INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH** and **SIND**

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538	Kanhaya Lal v. Baldeo Lall ...	*Patna High Court.
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ALLAHABAD HIGH COURT.

SECOND APPEAL No. 246 OF 1923.

January 21, 1925.

Present:—Mr. Justice Ryves and Mr. Justice Mukerji.

MAHADEO RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh JAN MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Landlord and tenant—Well sunk by tenant on land appurtenant to house—Landlord, whether can sue for demolition of well.

A tenant is entitled to improve his house in the *abadi.*

Balkishen v. *Muhammad Ismail Khan*, A. W. N. (1848) 44, followed.

The sinking of a *pucca* well in a part of the land which is appurtenant to a tenant's house does not entitle the *zemindar* to sue for the demolition of the well.

Mahabal Kurmi v. *Sarju*, 42 Ind. Cas. 51; 4 O. L. J. 454 and *Sheo Sahai Singh* v. *Rajashwar Bali*, 51 Ind. Cas. 1006; 6 O. L. J. 281, followed.

Second appeal from a decree of the District Judge, Ghazipur, dated the 10th November 1922.

Mr. *A. P. Pandeya*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by a *zemindar* against a tenant of his who had a house in the *abadi* for the demolition of a *pucca* well which that tenant had sunk in the *sahan* in front of and appurtenant to his house.

Both Courts below have dismissed the suit.

The plaintiff appeals. He claims that under what has been called the common law of these provinces, a *zemindar* is the owner of every inch of ground within the ambit of his *zemindari*, and that no tenant can, without his consent, make any permanent structure on any part of that *zemindari.*

It is further argued that the sinking of the well in the *sahan* of the defendant's house is a use of the land which is inconsistent with the purposes for which that land was given to the tenant, namely, for ingress and egress, and that that being so the tenant has no right whatever to sink the well.

There is no authority in this Court in support of the plaintiff's case and this is not surprising for it seems to us that the plaintiff is in no way damnified by the action of the defendants. It has been ruled many years ago that a tenant can improve his house in the *abadi*; *vide Balkishen* v. *Muhammad Ismail Khan* (1).

There are, however, two rulings of the Oudh Court which are directly in point. In *Mahabal Kurmi* v. *Sarju* (2) Mr. Lindsay then Judicial Commissioner and now a Judge of this Court, held under precisely similar circumstances that the sinking of a *pucca* well in a part of the land which was appurtenant to a tenant's house would not give a cause of action to the *zemindar.* The particular portion of land in that case on which the well was sunk was described as "*sahan-wa-rasta.*" That decision was followed by the same Court in *Sheo Sahai Singh* v. *Rajashwar Bali* (3).

In our opinion these decisions are right and we follow them.

We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) A. W. N. (1898) 44.
(2) 42 Ind. Cas. 51; 4 O. L. J. 454.
(3) 51 Ind. Cas. 1006; 6 O. L. J. 281.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

October 30, 1924.

Present:—Lord Atkinson, Lord Sumner and Sir John Edge.

Lala JAI NARAIN—APPELLANT

versus

Lala PRAG NARAIN AND ANOTHER—RESPONDENTS.

Hindu Law—Joint family—Separation from brothers, effect of—Brother, whether separated from his descendants—Public religious trust—Misappropriation by managing member—Other members, liability of.

Where a Hindu separates from his brothers, there is no presumption that he and his descendants cease to constitute among themselves a joint family. [p. 3, col. 1.]

Hari Bakhsh v. *Babu Lal*, 83 Ind. Cas. 418; 5 L. 92; 51 I. A. 163; 22 A. L. J. 254; 34 M. L. T. 70; 28 C. W. N. 953; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108; (1924) A. I. R. (P. C.) 126; 47 M. L. J. 938 (P. C.), followed.

Balabux Ladhuram v. *Rukhmabai*, 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.), explained.

A Hindu by his Will created a trust for public purposes of a charitable or religious nature. The managing member of the joint family misappropriated the monies belonging to the trust and applied them in family business:

Held, that the other members of the family were liable, jointly with the managing member as well as severally, to re-pay the amount with interest to the trust. [p. 8, col. 1.]

Consolidated appeals from a decree of the Allahabad High Court (Mr. Justice Rafique and Mr. Justice Piggott) and printed as 58 Ind. Cas. 566 in First Civil Appeal No. 140 of 1916, dated the 3rd April 1919, dismissing those of the District Judge, Mainpuri, dated the 2nd May 1916.

Mr. *J. M. Parikh*, for the Appellant.

Messrs. *DeGruyther, K.C.*, and *W. Wallach*, for the Respondent.

JUDGMENT.

Sir John Edge.—The suit in which these two consolidated appeals from a decree of the High Court at Allahabad have arisen was brought in the Court of the District Judge of Mainpuri in the United Provinces on the 20th May 1915. The reliefs claimed in the suit were the removal of the then trustees of an endowment for religious and charitable purposes on account of alleged misappropriation of the endowed property, and the appoinment of new trustees to whom the possession of the entire endowed property should be given; that accounts should be furnished of the property of the endowment and the misappropriations should be made good, that a scheme for the management of the endowment should be settled; that any other beneficial relief should be granted; and that costs should be decreed against any of the defendants who might be found liable. The suit was brought under s. 92 of the C. P. C., 1908. The plaintiffs had obtained the consent in writing of the Legal Remembrancer of the United Provinces to the institution by them of the suit, such Legal Remembrancer having been the officer appointed under s. 93 of the Act to exercise in those Provinces, the powers in that respect which are conferred on the Advocate-General by s. 92.

The parties to the suit are residents of Etawah in the United Provinces, and are Hindus of the Agarwal caste. The caste name is also written Aggarwall. The plaintiffs are through a common ancestor related more or less distantly, to the defendants, and are persons who were interested in the proper management of the trust properties of the endowment. The defendants are descendants of one Sital Prasad who founded the endowment by his Will of the 24th February 1904.

The Agarwal is a well-known caste and has caste sub-divisions. The members of the caste in the United Provinces and the Punjab are mainly *zemindars*, or agriculturists, or are engaged in other forms of trade. The Agarwals of the United Provinces and of the Punjab carry on their business, whatever it may be, either separately or as joint families. When the business is carried on as the business of a joint family it is as a rule carried on in the name of the managing member of the joint family or in a firm name.

The first of these appeals is by Lala Jai Narain, who was defendant No. 1. The other of these appeals is by Lala Prag Narain and Lala Brahma Narain who were respectively defendants Nos. 2 and 3.

As there are nine defendants in the suit against all of whom a common liability is not alleged, it is advisable to state at once, who the different defendants are. Sital Prasad, who founded the endowment in question, and his elder brother, Kunj Behari Lal with their father Lala Gopi Nath constituted a joint Hindu family, which was governed by the law of the Mitakshara. After the death of Lala Gopi Nath, the brothers, Kunj Behari Lal and Sital Prasad separated in 1900, and subsequently, Kunj Behari Lal died childless. Before the endowment in question was founded Kunj Behari Lal had, by his Will, left all his pro-

perty to his eldest nephew, Behari Lal. Sital Prasad had married and had sons Banke Behari Lal, above mentioned, Girwar dhari Lal, Benarsi Das and Sheo Narain, defendant No. 8. Banke Behari Lal married and had sons Lala Jai Narain, eldest sons, defendant No. 1, Rup Narain, who died before suit leaving a son, Shyam Behari Lal, defendant No. 4. Lala Prag Narain, defendant No. 2, and Lala Brahma Narain, defendant No. 3. Girwardhari Lal, second son of Sital Prasad, married and had sons Lala Gur Narain, defendant No. 9, and Lachmi Narain. Banarsi Das, third son of Sital Prasad, married and had sons Lala Suraj Narain, defendant No. 5, Brij Narain defendant No. 6, and Keshab Narain defendant No. 7.

Sital Prasad separated from his sons in or before 1903 and made his Will of the 24th February 1904 and died on the 5th March, 1904. There is evidence on which their Lordships find that Banke Behari Lal separated from his brothers. Banke Behari Lal and his sons constituted a joint Hindu family. Banke Behari Lal and his sons carried on business under a firm name of Banke Behari Lal-Jai Narain. It is not proved, nor indeed, has it been alleged, that Banke Behari Lal and his sons had ever separated, and as such a separation has not been proved, the presumption in law is that they continued joint. It has not been proved that the sons of Banke Behari Lal, after he died on the 5th March 1907 separated. Consequently it is to be assumed, unless the contrary has been proved and it has not been proved, that the business which was carried on under the firm name of Banke Behari Lal-Jai Narain, has continued to be the business of a joint family. At all material times Lala Jai Narain, defendant No. 1, was a member of that joint family, and appears to have acted as the managing member of the joint family, and he was also a member of a committee of trustees which was appointed by the Will of Sital Prasad to manage the property of the endowment created by that Will. When Shyam Behari Lal, defendant No. 4, was born, has not been proved, but it is stated in the plaint of the 20th May, 1915, that he was then about 8 years of age; it is thus uncertain whether he became a member of the joint family before or after the death of his grandfather, Banke Behari Lal, but the question is not material as it appears to their Lordships.

Owing to a misconception of the effect of a judgment of the Board which was delivered by Lord Davey in *Balabux Ladhuram* v. *Rukhmabai* (1) it was generally, but erroneously, assumed that the Board had decided that when a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers it was a presumption of law that he had separated from his sons and that he and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be joint Hindu family. It was pointed out, however, by the Board in a judgment which was delivered on the 22nd January, 1924, in *Hari Bakhsh* v. *Babu Lal* (2) that that was an erroneous conception of the effect of what Lord Davey had said, and that no authority had been brought to the attention of their Lordships for introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara. In the case of *Hari Bakhsh* v. *Babu Lal* (2) the parties were Hindus of the Bakkal Aggarwall caste of the Punjab. In the present case the learned Judges of the High Court in appeal decided that Shayam Behari Lal, defendant No. 4, was not liable in respect of the *waqf* trust fund, which was deposited by Banke Behari Lal with Banke Behari Lal-Jai Narain. Possibly, the explanation of that decision is that the learned Judges had, as others had done, misconceived the effect of the judgment which had been delivered by Lord Davey.

In their plaint the plaintiffs alleged that Sital Prasad, who died on the 5th March, 1904, had by his Will, dated the 24th February, 1904, made a *waqf* of his property for religious and charitable purposes; had appointed a committee of trustees, of which his eldest son Banke Behari Lal should be President; that after the death of Sital Prasad the whole of the *waqf* property was taken possession of, by Banke Behari Lal, that the defendants Nos. 1, 2, 3 and Shayam Behari Lal, defendant No. 4, were at the date of the suit in possession of the *waqf* property.

The defendants Nos. 1, 2, 3 and 4 jointly filed a written statement in which they did not deny or admit the statement in the

(1) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

(2) 83 Ind. Cas. 418; 5 L. 92; 51 I. A. 163; 22 A. L. J. 254; 34 M. L. T. 70; 28 C. W. N. 953; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108; (1924) A. I. R. (P. C.) 126; 47 M. L. J. 938 (P. C.).

plaint that the defendants Nos. 1 to 4 were, when the suit was brought, in possession of the *waqf* property; consequently it must be taken that that statement was not traversed and was not in issue. They alleged that the Will of Sital Prasad created a private endowment and that s. 92 of the C. P. C., 1908, did not apply. The meaning of that allegation is that Sital Prasad's Will did not create any trust for public purposes of a charitable or religious nature. They also alleged that they had been satisfactorily carrying on the management of the *waqf*, and they denied that there had been any misappropriation of the *waqf* fund and that there was any liability on them. It is not necessary to refer to the written statement of any other defendant.

Sital Prasad who was by occupation a money-lender and *zemindar*, made his Will on the 24th February, 1904. As translated it was, so far as is material, as follows :—

" I, Sital Prasad, son of Lala Gopi Nath, deceased, caste Agarwal Sahu resident of the City of Etawah, do declare as follows:—

Let it be known that under the decree of the Civil Court, dated the 16th April 1903, passed by the Subordinate Judge of the District of Mainpuri on the basis of the arbitration award, dated the 31st March 1903, the whole of my property is partitioned as against my sons and grandsons. I enjoy full proprietary rights of every sort in respect of the said property and have no co-sharer or co-parcener therein. I, therefore, give it in writing as regards the said property that I shall remain in proprietary possession of the property during my lifetime, that as regards the moveable and immoveable properties that might remain in my possession at the time of my death, I make a Will as follows :—A Committee should be formed to carry out the directions given below. The Committee would have all sorts of power regarding the management of the said properties. My eldest son, Banke Behari Lal, should be appointed as the President (of the Committee). Banarsi Das, my third son, should be the Secretary and Sheo Narayan, my fourth son, Jai Narain son of Banke Behari Lal aforesaid, Gur Narayan, son of Girdhari Lal and Gauri Shanker, son of Raghubhar Dayal, should be appointed as the members of the said Committee. The President's vote should be treated as three votes, the Secretary's vote as two and each member's vote as one. The resolutions should be always passed with reference to the majority of votes and the resolution passed should be considered to be the order of the Committee and all proceedings of every sort should invariably be taken in accordance therewith. The power to remove or to reappoint the President, Secretary and the members shall remain in the hands of the Committee, but let it be known that anyone who shall be admitted into the Committee as directed above shall be from amongst my sons, grandsons, and their descendants. No stranger can be admitted into the Committee, nor can he, under any circumstances, make any sort of interference :

I.—I consider it admissible to give some of the directions below :—

The Committee, so far as possible shall be bound to comply with them.

(*a*) Bisrent (*ghat*) of Sir Jamunaji should be built in Etawah at a cost of about Rs. 2,500

(*b*) A *dharamsala* containing two temples one of Sri Mahadeoji Maharaj and the other of Sri Thakurji Maharaj should be built in Etawah, at a cost of about Rs. 5,000.

(*c*) In the said '*dharamsala*' each of the four sons of mine should cause 4 small rooms to be built at his own cost under the management of the Committee, with reference to the plan of the *dharamsala*. The amount that might be given in charity on the occasions of the marriages of my sons, grandsons or their male childern should be given in this *waqf* fund to the extent of $\frac{1}{4}$. Should anyone fail to do so, he and his sons should be debarred from holding any of the aforesaid offices so long as they do not comply with the above directions.

(*d*) The principal amount of cash or the property should not be utilised in defraying any expenses other than those enumerated above. So far as possible about $\frac{3}{4}$ of the income yielded thereby, *i.e.*, interest or profits should be spent on the following object according to the discretion of the Committee or on any other act of charity.

1. Such quantity of unparched grain, flour or parched barley should be given for eating to, *sadhus*, *bairagis* (mendicants) and pilgrims as might be considered proper or in the winter season some clothes, etc., or medicine might be distributed to the sick.

Expenses in connection with the staff,

pay of employees, repairs of the *dharamsala*, temple and *bisrant*, etc., (should be defrayed out of the said fund).

3. Should any of my sons or their descendants lead a retired life and sit in contemplation and wish to be supplied with clothes and food, then the said person should get such assistance so long as he lives in the *dharamsala*.

II.—The President and the Secretary shall have power to realise every sort of money, grant receipts, acknowledge full payment, affix signature, purchase and sell property, verify at the time of registration, advance money on interest, carry on every sort of trade, take all sorts of Court proceedings either themselves or through their general attorney, in short they shall have power to take all the proceedings of every sort, but all the said proceedings relating to the *waqf* shall be taken in the name of me, Lala Sital Prasad. The President and the Secretary shall be competent to institute every sort of suit, set up defence and take Court proceedings in their own names. There shall be no necessity to include the names of other members.

III.—In addition to the cash, etc., due to or by me, under my account-books and *hundis*, a 5 *biswa zemindari* share in *Mouza* Kutubpur, *Pargana* Bhartna, District Etawah, which forms the subject-matter of a former gift and in respect of which my name is entered in the public papers, *i.e.*, the *khewat*, is also included in the subject-matter of this Will. As regards the said property it is also directed that it may be sold if it can be sold with profit, at a low rate of interest.

IV.—No one at any time under any circumstances shall have any sort of claim in respect of the aforesaid property. The income and expenditure, etc., of every sort shall be daily entered in the account-book.

V.—The President and the Secretary should according to the arbitration award, dated the 31st March 1903, take all proceedings in the cases relating to the shops at Cawnpore, the full particulars whereof are given in the said arbitration award and get their names entered in the Court (papers) in place of my name. They should incur expenses out of the amount standing to my credit in the papers. Moreover, the President and the Secretary should cause mutation proceedings to be taken in respect of such property of land as might belong to ny party under the said arbitration award but which might be entered in my name and in respect of which mutation proceedings, etc., might not be completed in my life-time.

I have, therefore, executed this Will so that it may serve as evidence."

It is obvious to their Lordships that Sital Prasad by his Will disposed of all his property.

When Sital Prasad died his property was represented by Rs. 48,000 in cash or securities, two houses at Etawah valued at Rs. 2,000, and *zemindari* property valued at Rs. 2,000. The Committee took over the houses and the *zemindari* property. His eldest son, Banke Behari Lal, got possession of the cash and securities and handed them over to a "shop" which he and his sons carried on as a joint family, trading under the firm name of "Banke Behari Lal-Jai Narain."

It has been held by the two Courts below, the District Judge and the High Court, that Sital Prasad by his Will created a trust for public purposes of a charitable or religious nature and that it was not void as being vague or uncertain as to the charities to which it applied. Their Lordships agree with that construction of the Will. Having regard to the fact that the bathing *ghat* might be washed away or damaged by floods in the Jumna and the expenses which might have to be incurred in replacing it or in repairing it, and having regard to the fact that the expenses of maintaining a *dharamsala* would much depend on the number of pilgrims using it, it was a prudent provision of the Will, as their Lordships understand it, that one-fourth of the income of the endowment should ordinarily be kept in reserve by the trustees, to meet such extraordinary expenses when they should occur. It is quite clear from clause IV of the Will that no one, except as provided by the Will, should have any claim to any part of the income of the *waqf* property.

From 1904 until 1907 the Committee appear practically to have done nothing to carry out Sital Prasad's directions: it is doubtful if during that period the Committee held any meetings. So far as has been proved the first meeting of the Committee was held on the 5th December, 1907. The Committee, however, on the 12th September, 1904, or one of them applied to the Municipality of Etawah for permission to construct a bathing *ghat* on the Jumna and to

erect a *dharamsala*. The application to construct the bathing *ghat* was refused because the Committee required the Municipality to divert a *pucca* drain from the land which the Committee required for the construction of the *ghat*. The application for permission to erect the *dharamsala* was refused because the Committee wanted the Government to grant to them *Nazul* lands gratis. It may be doubted whether either of those applications was made *bona fide*. Nothing further was done by the Committee for the construction of a bathing *ghat*, and until 1907 nothing further was done by the Committee with the object of erecting a *dharamsala* or of providing a building which could be used as a *dharamsala*.

Banke Behari Lal died on the 5th March, 1907, and was succeeded as President of the Committee of trustees by his second son, Rup Narain, and later Lala Jai Narain, defendant No. 1, was appointed Secretary. On the 14th March, 1907, Banarsi Das and Sheo Narain, two of the younger sons of Sital Prasad, brought a suit against Lala Jai Narain, defendant No. 1 of this suit, Girwardhari Lal their then eldest surviving brother and Gur Narain, the elder son of Girwardhari Lal, for cancellation of the Will of 24th February, 1904, of Sital Prasad and for possession of their share of the estate of Sital Prasad, or in the alternative, if that Will should be held to be genuine, an order that the directions contained in that Will should be carried out. It may be inferred that the directions given in that Will were not being carried out by the Committee.

It is now necessary to be considered whether there were any misappropriations of the *waqf* property by the trustees, and if there were, then it is to be considered whether the joint family trading as "Banke-Behari Lal-Jai Narain" can be made liable to repay any of the moneys misappropriated. The misappropriations which the District Judge and the High Court have concurred in finding, began in 1907 and ended in 1914, and in the aggregate amounted to Rs. 48,000. Their Lordships agree with the Courts below that these misappropriations for which the trustees are responsible were committed and amounted in the aggregate to Rs. 48,000. These misappropriations began after Banke Behari Lal died and they were committed with the knowledge and assent of Lala Jai Narain, defendant No. 1, and for those misappropriations of the trust fund, their Lordships agree with the Courts below that Lala Jai Narain, defendant No. 1, is responsible.

After the death of Banke Behari Lal in 1907, the joint family continued to carry on the business which had been carried on, in the firm name of "Banke Behari Lal-Jai Narain." Whether there was any change in the trading name of the joint family after the death of Banke Behari Lal their Lordships do not know; it is immaterial whether there was or was not a change in that trading name, and their Lordships will continue to refer to that trading name as the trading name of the joint family. It appears to their Lordships that after the death of Banke Behari Lal his eldest son Lala Jai Narain was the managing member of the joint family. After the death of Banke Behari Lal the joint family continued to hold on behalf of the trustees the moneys of the *waqf* fund which Banke Behari Lal had, on the death of Sital Prasad, deposited with "Banke Behari Lal-Jai Narain." Lala Jai Narain, defendant No. 1, on behalf of the joint family, was a party to the following transactions which affected the trust fund of the trustees in the possession of the joint family. In 1907 some people in Etawah trading in the name of "Durga Prasad and Sital Prasad" owed to "Banke Behari Lal-Jai Narain" Rs. 16,000. The debtors were in difficulties, and Lala Jai Narain, defendant No. 1, re-paid that debt to the joint family by transferring Rs. 16,000 from the credit account of the trustees to "Banke Behari Lal-Jai Narain" and took a mortgage for Rs. 16,000 in favour of the trustees, thus substituting the trustees for "Banke Behari Lal-Jai Narain" as the creditors of "Durga Prasad and Sital Prasad." Another instance is, the Bharat Bank owed to "Banke Behari Lal-Jai Narain" Rs. 10,000. The Bharat Bank got into difficulties and subsequently failed. Lala Jai Narain, defendant No. 1, on behalf of the joint family transferred that debt to the *waqf* account of the trustees with "Banke Behari Lal-Jai Narain." In 1914, after Lala Prag Narain, defendant No. 2, who was one of the joint family, had become a member of the Committee of trustees, a firm trading as "Ram Din and Sital Prasad" owed Rs. 15,000 to "Banke Behari Lal-Jai Narain." The debt was unsecured and the debtors were unable to pay it. Lala Jai Narain, defendant No. 1, in the interests of "Banke Behari Lal-Jai Narain" transferred

that debt of Rs. 15,000 to the *waqf* account of the trustees. The three instances to which their Lordships have referred represent in the aggregate Rs. 41,000 of the total sum of Rs. 48,000 which was misappropriated, and in their Lordships' opinion for that Rs. 41,000, Lala Prag Narain and Brahma Narain, defendants Nos. 2 and 3, as members of the joint family trading in the name of "Banke Behari Lal-Jai Narain" are equally responsible in this suit with Lala Jai Narain, defendant No. 1, but in their Lordships' opinion it has not been proved that the joint family is responsible for the balance of Rs. 7,000 of the Rs. 48,000 of misappropration of the *waqf* fund.

The learned District Judge decreed the suit in the manner following :—

"(1) The Committee will be reconstituted as follows subject to their acceptance: Lala Sheo Narayan, President ; Lala Prag Narain Lala Suraj Narain, defendants, Lala Guari Shankar, plaintiff and Babu Dharam Narain Pleader, Mainpuri, members.

(2) The entire property will be put in charge of the said trustees for management on the lines suggested.

(3) Lala Jai Narain will, within three months, furnish full accounts of the affairs of the trust; showing how the capital sum estimated at Rs. 52,000 has been utilised, and also how the interest thereon at a rate fixed by the Court at 4 per cent. per annum has been spent. Neither the transfers to Lala Jai Narain himself, in lieu of mortgages, *hundis* or other securities can be accepted by the Court, nor can the release to Lala Banarsi Das of Rs. 10,000, with interest thereon be allowed as a charge against the fund. The balance due to the fund on these accounts which are to be furnished will be handed over to the Committee in the form of cash or realiable securities.

(4) The Committee will have full power to carry out the testator's wishes as laid down in the Will. They will close the Gracey Hindu School, prepare a scheme of systematic charity and either build a *dharamsala* or some similar institution of a kind approved by this Court.

5. The plaintiffs' costs will be borne by Lala Jai Narain personally, who will bear his own costs and those of Lala Gur Narain.

The other defendants will bear their own costs with the proviso that those of the heirs of Lala Banarsi Das will be paid, out of the estate of Lala Banarsi Das. Interest at 6 per cent. per annum, will be allowed on the costs as usual.

And that the sum of Rs. 1,079-2-0 be paid by Jai Narain, defendant, to the plaintiff on account of costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to date of realisation.

It is further ordered that Jai Narain, defendant, do pay Rs. 76-8-0 to Gur Narain defendant, with interest at 6 per cent. per annum, from this date up to the date of realisation and Rs. 203-4-0 on account of costs of Suraj Narain and others, defendants, with interest be charged to the property of Lala Benarsi Das."

From that decree the plaintiffs appealed to the High Court as also did Lala Jai Narain defendant No. 1, and Lala Sheo Narain, defendant No. 8, who so far as his costs only were concerned, filed a cross-objection.

The High Court heard the two appeals together and dealt with them and the cross-objection in one judgment, as the Court was entitled to do. The High Court made the following decree.

"It is ordered and decreed that the decree of the Judge of Mainpuri be modified to this extent that the direction to Jai Narain to render accounts to the new Committee be deleted therefrom and instead thereof it is hereby directed that the first three defendants shall pay to the new Committee Rs. 48,000 with interest at 4 per cent. per annum from the 5th of March 1904, to the date of payment, less a sum of Rs. 1,308 and shall deliver the houses and the share in the village of Kutubpur, to the new Committee and that the rest of the said decree be maintained and this appeal and the cross-objection filed by Sheo Narain under O. XLI, r. 22, of the C. P. C. be and they hereby are dimissed.

And it is further ordered that the appellant aforesaid do pay to the respondents Nos. 1 to 3 aforesaid, the sum of Rs. (1,331-11-3) one thousand three hundred and thirty-one, annas eleven and pies three only, the amount of costs incurred by the latter in this Court.

And it is further ordered that the costs incurred in the lower Court be paid with interest thereon as awarded by the said Court."

Their Lordships, having considered the facts in the suit and the law which appears to them to be applicable to the facts, will humbly advise His Majesty that the appea

of Lala Jai Narain, defendant No. 1, should be dismissed, but the decree against Lala Prag Narain and Brahma Narain, defendants Nos. 2 and 3, should be varied, by making the principal sum, which they are jointly and severally with Lala Jai Narain liable to pay to the new Committee to be, Rs. 41,000 with interest at 4 per cent. per annum from the 5th March 1904, to the date of payment less the sum of Rs. 1,308 and that the rest of the decree of the High Court should stand. Lala Jai Narain must pay two-thirds of the costs of the respondents in these consolidated appeals, and Lala Prag Narain and Brahma Narain must pay one-third of the costs of the respondents in these consolidated appeals, as the variation of the decree of the High Court, which their Lordships advise should be made was not suggested by them or on their behalf, and they have made no payment into Court, and have resisted the claim of the plaintiffs from the first.

Before concluding, their Lordships must refer to a matter which has caused much trouble in the preparation of the advice which they will humbly offer to His Majesty. In the judgment delivered by the learned Judges of the High Court they correctly said :—"The two Appeals Nos. 140 and 241 of 1916 are connected and arise out of a suit brought under s. 92 of the C. P. C." In the case which was filed in this appeal on behalf of Lala Jai Narain, his Counsel stated :—"Against the said decree of the District Judge, Jai Narain and the plaintiffs both, appealed to the High Court." In the case which was filed in this appeal on behalf of Lala Prag Narain and Lala Brahma Narain their Counsel stated : "The 1st defendant, Jai Narain appealed from the said decree of the District Judge to the High Court of Judicature at Aallahabad, and the plaintiffs filed cross-objections in regard to costs." No copy of the appeal which presumably was filed by the plaintiffs appears in the record which is before their Lordships, and the cross-objections in regard to costs which were in fact filed were filed not by the plaintiffs, but by the defendant Lala Sheo Narain. In the case which was filed in this appeal on behalf of two of the plaintiffs by another Counsel it is stated: "Lala Jai Narain alone appealed to the High Court against the decree of the learned District Judge and impleaded as respondents the plaintiffs and the defendants who had not appealed." Such contradictory statements as to matters which were of record, very rarely occur in cases filed in appeals to His Majesty in Council; but in the present case the contradictory statements and the absence from the record, before their Lordships, of a copy of the memorandum of appeal to the High Court of the plaintiffs who did appeal to that Court must be the results of negligence for which persons in India are presumably responsible. Their Lordships must accept as correct the statement of the learned Judges of the High Court in their judgment that there were two appeals before them, but they observe that only one decree is included in the printed record, and that was in the Appeal No. 140 of 1916 to Lala Jai Narian.

K. S. D. *Appeal dismsssed.*

Solicitors for the Appellant:—Mr. *E. Dalgado.*

Solicitors for Respondent:—Mr. *D. Grant.*

PATNA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL.

June 4, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

Babu RAMNIRANJAN CHAUDHURY AND OTHERS—APPELLANTS —PETITIONERS

versus

Babu GOBARDHAN THAKUR AND OTHERS —RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Long consensus of opinion —Question, whether substantial question of law.

Where there is a long consensus of opinion on a question of law the matter cannot be treated as a substantial question of law within the meaning of s. 110 of the C. P. C. so as to justify an appeal to the Privy Council. [p. 9, col. 1.]

Application for leave to appeal to Privy Council under O. XLV, r. 2 of the C. P. C. and in the matter of First Appeal No. 199 of 1919.

Messrs. *S. C. Mitter* and *L. K. Jha*, for the Petitioners.

Messrs. *S. M. Mullick* and *Murari Prasad*, for the Opposite Party.

JUDGMENT.

Miller, C. J.—This is an application for leave to appeal to His Majesty in Council. The actual sum claimed together with interest up to the date of the decree is over

Rs. 10,000. It is pointed out, however, that that sum is made up on the assumption that the plaintiffs are the owners of a 7 annas 4 pies share in the property claimed, whereas the Court found that they were the owners of only 5 annas 4 pies share and there has been no appeal upon that part of the decision. Deducting the 2 annas the sum claimed would come to rather under Rs. 10,000. As, however, the question relates not merely to past claims but also to all future claims we think that the case comes within the provisions of s. 110 as it certainly raises a claim respecting property of over the value of Rs. 10,000.

There is a further point, however, that the decision sought to be appealed from is a decision of affirmance, and the question is whether there is a substantial question of law. The point is one of limitation. It has been found that under the law relating to limitation before the Act of 1877 came into force the claim in this suit that is to say the claim for *malikana* were entirely barred on the ground that it was a claim relating to an interest in land and the Act of 1877 could not revive the claim which had previously been barred. It is pointed out, however, that the Act of 1871 was also in terms similar to that of 1877 and that the claim had not become barred by the year 1871. It seems to us that the Act of 1859 applied to the case and that the claim did become barred before the Act of 1871 came into operation under the law then in force. The petitioners contend that there is a substantial question of law arising on this point. There have undoubtedly been a number of cases beginning in the year 1868 and going down to the year 1913 all to the same effect, namely, that the claim for *malikana* being claims in respect of an interest in land did become barred absolutely by limitation under the provisions of the Statute before that of 1871 and that the Statutes of 1871 and 1877 did not have the effect and could not have the effect of reviving the claim which had already become barred. The learned Vakil for the petitioners contends that the series of cases is all wrong and they wish to take the opinion of the Privy Council about it. We think, however, that having regard to this long consensus of opinion on the question we ought not to treat it as a substantial question of law remaining to be determined but should refuse the present application on the ground that there is no substantial question of law, and if the appellant wishes to have this question brought before their Lordships of the Privy Council he will have to make a special application to that effect.

We think that the application should be rejected. The respondents are entitled to their costs: hearing fee five gold *mohurs*.

Kulwant Sahay, J.—I agree.

Leave refused.

K. S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 15 OF 1923.

February 22, 1924.

Present:—Mr. Wazir Hasan, J. C.

AVANTIKA PRASAD SHUKEL—PLAINTIFF—APPELLANT

versus

GUR BUKSH—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 24—Oudh Rent Act (XXII of 1886), s. 127—Usufructuary mortgagee—Covenant for payment of creditors—Suit for ejectment of mortgagor—Equitable defence, whether available.

In a suit for possession by a usufructuary mortgagee, who has undertaken to pay off certain creditors of the mortgagor with a part of the mortgage-money left with him, it is open to the mortgagor to set up the equitable defence that the mortgagee has not paid the creditors and has not performed his part of the same contract. [p. 10, cols. 1 & 2.]

The mere fact that in such a case as the above, the mortgagee chooses to sue the mortgagor in ejectment under s. 127, Oudh Rent Act, instead of suing him for possession and damages in a Civil Court, is no reason for depriving the mortgagor of his equitable defence. Such defence is clearly supported by the second part of cl. (*b*) of s. 24 of the Specific Relief Act. [p. 10, col. 2.]

In order to obtain a decree under s. 127 of the Oudh Rent Act the plaintiff must show a title in ejectment as against the defendant. [p. 10, col. 1.]

Appeal against a decree of the District Judge, Rae Bareli, dated the 10th April 1923.

Mr. *S. N. Roy*, for the Appellant.

Mr. *Radha Kishan*, for the Respondent.

JUDGMENT.—The facts of this case are given in my order of the 27th August 1923. The original deed of mortgage referred to in that order has been produced by the plaintiff-appellant. The learned Pleader for the respondent accepts the genuineness of the deed. I have consequently ordered it to be admitted as evidence in the case. The deed is one of an ordinary usufructuary mortgage. The amount of money, in lieu of which the mortgage is made is Rs. 5,400; out of this

sum the amount of Rs. 2,815 is left with the mortgagee for payment to certain creditors of the mortgagor. These creditors are specified in the deed of mortgage and so are the amounts due to each of them from the mortgagor. The mortgagee undertook to pay off these creditors either himself, and in that event to obtain a receipt from them, or to allow the mortgagor to make the payment in the presence of the mortgagee, in which case the former would obtain the receipt for the payments made and deliver it to the mortgagee. Subsequently to the covenant relating to the payments mentioned above occurs the stipulation on the part of the mortgagor to put the mortgagee in possession of the mortgaged property from the date of the mortgage. The defence for the suit asking for the reliefs of the recovery of rent and of ejectment under s. 127 of the Oudh Rent Act was that the plaintiff failed to fulfil the conditions of the deed of mortgage inasmuch as he did not satisfy the previous creditors of the mortgagor as was agreed upon in the deed and consequently the plaintiff was not entitled to the reliefs for which he had prayed. This defence was considered to have no bearing on the plaintiff's claim by the Court of first instance. The Court of first appeal has dismissed the suit on grounds other than those which arise out of the defence just now mentioned.

The learned Pleader for the appellant has argued that the mortgage is the conveyance of the property and consequently it gives him a perfect title to possession of that property and the defendant's plea that the previous creditors have not been paid up is not a ground on which the suit of the plaintiff can be resisted.

It is not disputed that the mortgage is the conveyance of the lands mortgaged but this fact alone does no, in my opinion, entitle the plaintiff to the reliefs which he wants to obtain in the present suit. On my interpretation of s. 127 of the Oudh Rent Act the plaintiff must show a title in ejectment as against the defendant as I have already expressed myself in my previous order of the 27th August 1923. For the purposes of the decision of this appeal it has been assumed to be that the plea of fact set out in the defence already quoted, that the plaintiff mortgagee has not satisfied the obligation which rested on him under the mortgage-deed to pay off the previous creditors of the mortgagor is correct This being so, I am clearly of opinion that though the deed of mortgage is a conveyance yet, when the plaintiff seeks to enforce the covenant contained in it relating to possession of the mortgaged lands, it is open to the defendant to set up the equitable defence of the plaintiff not having performed his part of the same contract. It is not possible to hold that the defendant should be deprived of that defence for the reason that the plaintiff has chosen to sue him under s. 127 of the Oudh Rent Act instead of bringing a suit for possession and damages in a Civil Court. The equity of defence is clearly supported by the second part of clause (*b*) of s. 24 of the Specific Relief Act (I of 1877). Further under s. 37 of the Indian Contract Act (IX of 1872) the mortgagee is under a legal obligation either to perform or offer to perform his part of the contract. It is assumed that he has not performed it and there is no offer made in the present case to do it. On these grounds I am driven to the conclusion that the decree of the lower Appellate Court should be maintained.

The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 164 OF 1923.

August 6, 1924.

Present :—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Brown.

MA MARY—DEFENDANT—APPELLANT

versus

MA HLA WIN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 49—Permissive possession of moveables—Possessor's claim to ownership—Possession when becomes unlawful—Suit for recovery of possession—Terminus a quo.

Where the original possession of moveables is permissive the character of that possession is not changed by the fact that the person in possession sets up a claim to the property as his own. The possession does not become unlawful until a formal demand for its return is made and refused. [p. 11, col. 2.]

A suit for recovery of possession under such circumstances is governed by Art. 49 of the Limitation Act and is within time if brought within 3 years from the date of refusal. [*ibid.*]

Appeal against the judgment and decree of Mr. Justice Beasby in Original Jurisdiction in Civil Regular Suit No. 722 of 1921.

Mr. *Ghari*, for the Appellant.
Mr. *Dantra*, for the Respondent.

JUDGMENT.

Robinson, C. J.—The plaintiff-respondent in this case is a widow of one Ba Thein, who died in 1918 ; she has apparently always been in weak health. Ba Thein was a good husband and brother, and he appears to have given his sisters a home, in return for which they probably managed his house, relieving his sickly wife of her duty. He had several sisters, Ma Ma Gyi, Ma May May, Ma Aye Gywe and the appellant, Ma Mary, who was the youngest. They lived with him until they married and made a home of their own. It is alleged that he was generous to them, and that he provided jewelleries for his sisters to wear so long as they lived with him.

The present suit is one for the recovery of four items of jewellery or their value from the appellant who, shortly after Ba Thein's death, appears to have fallen out with his widow and left the house, taking the jewellery with her. She now says that she sold it at various times, although in her reply to the notice of action she professed to have the jewellery and to be entitled to it as her own property. Two out of the four items are of small value; but there are a pair of diamond ear-rings, valued at Rs. 2,000, and a diamond ring valued Rs. 1,750. The evidence as to these two will practically decide this case.

The appellant's defence is that this jewellery was given her absolutely by her brother many years ago and has all along been her own property in consequence.

The respondent, on the other hand, alleges that the jewellery still belongs to the estate of Ba Thein and was only lent to his sisters by him to wear so long as they lived with him.

Which version is correct is now to be decided; and there is a further point of limitation raised, which I will first dispose of.

It is argued that after Ba Thein's death, there was an attempt to refer certain disputes as to ancestral property to arbitration; and that the plaintiff wished to refer the question of ownership of this jewellery to the arbitrators also. The appellant was at that time ill; but her sisters refused to go to arbitration and then alleged that the jewellery did not form part of the estate. It is said that plaintiff then became aware of the appellant's claim ; and that the appellant's possession of the jewellery became from that time unlawful, so that limitation would begin to run under Art. 49 from then, and the suit was, therefore, barred. If this plea is correct, the suit would be barred.

A year later, the plaintiff made a formal demand for the return of the jewellery, which was refused. If limitation begins to run from that period, the suit is not barred.

Under Art. 49 limitation would begin to run from the date when the detainer's possession becomes unlawful. If the appellant's case is true no question of limitation can arise. If the plaintiff's case is true then the possession by the appellant of this jewellery was a permissive possession only and her possession would become unlawful, ordinarily speaking, only when a demand was made followed by a refusal. If the appellant's possession was permissive, the character of that possession would not be changed by the fact that she set up a claim to it as her own property. Her bare allegation is not sufficient to make her possession unlawful. It will be open to the planitiff to say that that was not true, and to leave the property with her until she chose to demand its return.

In my opinion in this case there was no unlawful possession until a formal demand for the return was made, and the appellant refused to return it. That being so, the suit is not barred by limitation.

Brown, J.—I concur.

K. S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 323 OF 1920.
February 5, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

GAJANAN VINAYAK—APPELLANT
versus
ASSISTANT COLLECTOR, SALSETTE AND ANOTHER—RESPONDENTS.

Land acquisition—Khoti *lands—Compensation, how assessed—Apportionment between occupant and* khot—Warkas *or* bhati *land.*

In awarding compensation for the acquisition of *khoti* lands, the value of the interest of the superior holder must be included in the award and not deducted from the value of the occupant's interest. [p. 13, col. 1.]

The method of apportioning compensation between the occupant and the *khot* in the proportion of two to

one can only be made applicable in the case of *warkas* or *bhati* lands which are not surveyed and which cannot be considered to be in the exact occupation of any particular tenant. [p. 13, col. 2.]

First appeal from the decision of the Joint Judge, Thana, in Reference No. 30 of 1919.

Mr. *R. W. Desai*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for Respondent No. 1.

Mr. *H. C. Coyajee*, (with him Mr. *W. B. Pradhan*), for Respondent No. 2.

JUDGMENT.—This is an appeal from an order made by the Joint Judge of Thana in a land acquisition reference. The land to be acquired was notified for acquisition on the 24th January 1919. At page 108 will be found a plan showing the property coloured pink which was acquired out of a much larger area which belonged to the claimant Gajanan Vinayak. The Collector awarded Rs. 2-8-0 a square yard for all interests in the land. The joint Judge increased that to Rs. 3, and divided the amount between Gajanan Vinayak, the occupant, and the *khot* of Kaneri, in the proportion of 2 to 1. The claimant Gajanan contends that the land was worth Rs. 4 a square yard in January 1919, but that contention is based on sales dating from May, June and July in 1919, several months after the land under reference was notified. It is a matter of common knowledge that as conditions began to improve after the Armistice had been signed, prices for land went up rapidly. But there is no evidence that they began to rise before May or June 1919. Therefore, the rates which were obtained in these months could not possibly bear any comparison with the rates which prevailed in January. It seems to us that the amount awarded by the Judge was ample, considering the evidence. The Judge, however, agreed with the Collector in awarding no compensation for 226 square yards on the northern boundary occupied by a rough road which was used by the public and by the tenants of the adjoining land, holding that as a small portion was allotted for the purposes of the road on the northern boundary of the claimant's land, there was no necessity to award compensation for the 226 square yards. We think that decision was wrong. The land acquired was 1627 square yards in all, and on acquisition the ownership would pass from the claimant to Government. Although there may have been a public right of way over the 226 square yards, it did not follow that the claimant was entitled to no compensation at all for his rights as a proprietor. At the same time, the fact that there was a road used by the public at one end of the claimant's land would depreciate that land, and we doubt very much whether we could possibly allow more than a few annas a square yard for these 226 square yards which were not reckoned in the Collector's award. We think the small amount that might be awarded can very well be set off against the very generous amount which has been awarded by the Joint Judge for the balance of the land so that there is no necessity to increase the total to be awarded for the whole 1627 yards.

Then the claimant asks us to assess damages for severance. That is a wrong word to use. Really this is a claim under s. 23 (1) (4). It has been contended that by reason of the Government acquiring a part of the frontage of the land belonging to the claimant, the land behind the plot acquired would, by reason of such acquisition, be injuriously affected. That may be the case. The Judge has taken that into consideration in the amount that he has awarded, by adding 5 per cent. and we do not think there is any thing unfair in that excess.

Then the claimant asks us to award him Rs. 2,000 by reason of his premises being injuriously affected by the proximity of the Police lines which were going to be built on the land acquired. It may be, as held in *Collector of Dinagepore* v. *Girja Nath Roy* (1), that the words in s. 23 (1) (4) "at the time of the Collector's taking possession of the land" cannot mean that the claimant can only prove that the property remaining with him is injuriously affected at the moment of the Collector's taking possession of the land. Such a construction would probably result in a claimant never getting anythiug under that clause. But it is very difficult to assess any possible damage which might be caused to the land still remaining with him, when the Government carry out the object which they have in view in acquiring his land; and it is difficult to say that because there will be some building occupied by the Police on that piece of land, a purchaser wishing to buy the rest of the claimant's land would consider that the Police lines was a draw-back,

(1) 25 C. 346; 13 Ind. Dec. (N. S.) 231.

which would reduce its value. We doubt, considering the situation of this land, whether as a matter of fact the value of the claimant's remaining land would then in any way be reduced by the mere fact that the plot nearest to it was occupied by the Police.

Then there is one error which the Collector and the lower Court have made. It is very likely that the mistake was not pointed out to either of them, but the land has been valued on instances of sales of what we may call the tenant's rights, and in order to value the freehold, that is to say the value of all interests in the land, something in addition would have to be awarded because the purchaser of the tenant's rights, to acquire the freehold, would have to redeem the rights of the *khot*. Instead of adding something on to the valuation of the tenant's rights as the value of the *khot's* interest, both the Collector and the Judge have deducted out of the tenant's interests the value of the *khot's* interest. In this case it is a very small amount. The rent paid to the *khot* is only 14 annas, and we may say that for a payment of Rs 25, the tenant could have redeemed all outstanding interests of the *khot* and so obtained the free-hold. The amount may seem trivial but an important principle is involved which to our knowledge has been consistently ignored in arriving at the market value of all interests in land to be acquired. The value of the interest of the superior holder must be included in the award and not deducted from the value of the occupant's interest. So we increase the award by Rs. 25.

Then we have got to consider whether the award by the Trial Judge of one-third of the compensation payable for the tenant's rights to the *khot* was correct. Undoubtedly in the case of *warkas* or *bhati* land in Salsette, it has been a recognised custom to divide the compensation between what we may call the occupant and the *khot* in the proportion of two to one. But that has been due to the fact that in the case of such lands it is extremely difficult to define and ascertain the value of the respective interests of the *khots* and the occupants, with the result that a rough and ready method of division has been adopted for want of a better. In many cases the claimants against the *khots* can hardly be called occupants. The claims are based on the fact that they are occupants of certain defined plots of land for the purpose of cultivating them, so that by reason of such rights as occupants, they are entitled to other rights over the adjacent lands either for the purposes of grazing or of gathering *rab* materials. It is not generally shown that in such cases the occupants of cultivated lands have any defined area of *warkas* or *bhati* lands allotted to them, and so in order to divide the compensation between the *khot* and the persons who have the right of user, owing to their position as cultivators, it has been found a convenient compromise to divide the compensation between them in that proportion. But it is entirely different when you find a tenant in occupation of a defined area of land, and paying assessment for it. Then undoubtedly he has a right to possession of all that area. Although this village has never been officially surveyed, it was surveyed in a rough sort of fashion in anticipation of an official survey, and we have it in evidence that in the *khot's* register there was a *khata* of Govind Bapuji which contained the names of various Survey Numbers (including the Survey Numbers in reference), the purpose for which the lands were used, and the assessment paid for them, that Govind Bapuji had sold a portion of the land appearing in his *khata* to the present claimant, and also that there had been proceedings with regard to this land with the result that the claimant was held entitled to possession. The result must be that the claimant was the occupant of the whole land acquired, and entitled to remain as occupant, provided he paid the assessment; while the only right which the *khot* had was to be paid the assessment. He could not possibly with any chance of success have filed a suit for possession as long as the assessment was paid. Therefore, this case has no resemblance whatever to those other cases in which the compensation money has been divided between the *khot* and the occupants in the proportion of two to one; and if it is suggested that in every case of *khoti* land in Salsette, that is the proper way of apportioning compensation, then we must very decidedly dissent from such a proposition. It certainly could only be made applicable in the case of *warkas* or *bhati* lands which are not surveyed, and which cannot be considered to be in the exact occupation of any particular tenant.

Therefore, the result of the decision is

that an extra amount of Rs. 25 plus 15 per cent. must be awarded and that will go to the claimant *khot*, while the entire compensation awarded by the Collector and the Joint Judge will be paid to the claimant Gajanan Vinayak.

The claimant Gajanan Vinayak must pay the costs of the appeal of Government respondent No. 1. Respondent No. 2 must pay whatever costs the appellant has incurred with regard to that part of the appeal on which he has succeeded against respondent No. 2.

K. S. D. *Award amended.*

CALCUTTA HIGH COURT.

APPLICATION IN CONNECTION WITH SUIT No. 1846 OF 1924.

July 7, 1924.

Present:—Mr. Justice C. C. Ghose.

KUMAR SHANKAR ROY CHOWDHURI AND ANOTHER—PLAINTIFFS

versus

THE HON'BLE MR. H. E. A. COTTON AND OTHERS—DEFENDANTS.

*Jurisdiction of High Court — Proceedings of Legislative Council, whether can be questioned—Suit against President, maintainability of—Appropriation of provincial revenues—Supplementary estimate—Rules and Standing Orders, rr. 15, 94—Decision of President, finality of—High Court jurisdiction, whether excluded —*Quia Timet *action, nature of—Discretion of Court—Application for injunction—Specific Relief Act (I of 1877), s. 45.*

The proceedings of a subordinate Legislature like the Provincial Legislative Council can be questioned in the High Court. [p. 16, col. 2.]

Hari v. *Secretary of State for India*, 27 B. 424 at p. 439; 5 Bom. L. R. 431, referred to.

The High Court is a Superior Court of Record and *prima facie* no matter is deemed to be beyond its jurisdiction unless it is expressly shown to be so. [*ibid.*]

By the word 'jurisdiction' is meant the authority which the Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. [*ibid.*]

The President of the Bengal Legislative Council is not immune from the jurisdiction of the High Court and a suit can lie against him for an injunction restraining him from putting a certain motion before the Council. [*ibid.*]

If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament or State authority, the legal justification can be enquired into in the High Court. [p. 16, col. 2; p. 17, col. 1.]

China Mutual Steam Navigation Co. v. *Maclay*, (1918) 1 K. B. 33; 87 L. J. K. B. 95; 117 L. T. 821; 14 Asp. M. C. 175; 34 T. L. R. 81, followed.

A proposal for appropriation of provincial revenues cannot be made at any time before the Legislative Council. [p. 21, col. 1.]

A figure in an estimate once passed by the Legislative Council cannot be altered, except as provided by the statutory rules. If, therefore, Government subsequently find that any item has been inadvertently omitted from the demands for grants, or that demands which could not be foreseen at the time of presenting the Budget have since arisen or that the provision made for any item is likely to prove insufficient, the same formality has to be gone through as in the case of the original demands and Government has to make a fresh demand known as a supplementary or additional demand and submit a fresh estimate to the Legislative Council. [*ibid.*]

Supplementary estimates are always looked upon with particular jealousy by a popular Legislature because they tend to diminish the control of the Legislature, and if for large sums, really amount to a breach of contract between the Government and the Legislature. [p. 21, col. 2.]

Save and except what is provided for in s. 72D of the Government of India Act and r. 94 of the Rules and Standing Orders, there cannot be made any demand for grant even if His Excellency the Governor makes a recommendation for appropriation of provincial revenues on occasions not provided for in the said section and the said rule. [*ibid.*]

Rule 15 of the Rules and Standing Orders simply means that when the President has given his decision on a point of order, his decision is final, so far as the Members of the Council are concerned, and that it cannot be questioned by anybody within the Council. [p. 22, col. 1.]

The presence of the word 'final' in r. 15 does not exclude the jurisdiction of the High Court, nor does it conclude the matter. [*ibid.*]

There are two necessary ingredients for a *Quia Timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable, *i.e.*, it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *Quia Timet* action. [p. 23, col. 1.]

Fletcher v. *Bealey*, (1885) 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745, referred to.

The power is entirely discretionary; it is a large power and the greater the power, the more cautious must be the exercise of it. [p. 23, cols. 1. & 2.]

The right to vote supplies is perhaps the greatest privilege accorded to a Legislative Body and any infraction of the Rules and Regulations guarding the provision as to the voting of supplies is an 'injury' which the members in a representative suit, are entitled to be protected from. [p. 23, col. 2.]

In disposing of an application for injunction the powers of the Court are not wholly circumscribed by the Rules laid down in s. 45 of the Specific Relief Act. [p. 24, col. 1.]

Messrs. *N. Sircar* and *S. C. Bose*, for the Plaintiffs.

Messrs. *S. R. Das* and *B. L. Mitter*, for Defendant No. 1.

Messrs. *S. R. Das* and *M. N. Bose*, for Defendant No. 2.

Messrs. *S. R. Das* and *S. M. Bose*, for Defendant No. 3.

JUDGMENT.—This is an application on behalf of the plaintiffs for an order that the first defendant the Hon'ble Mr. Cotton, who is the President of the Bengal Legislative Council, may be restrained from putting a certain Motion, being item No. 6 in the Printed List of Business, before the Bengal Legislative Council at its Session which commences to-day at 3 P. M., and for an order restraining the second and third defendants, the Hon'ble Mr. Fazl-ul-Huq and the Hon'ble Mr. Ghuznavi, who are the Ministers in charge of the Departments of Education and Agriculture of the Government of Bengal from discharging any duties as Ministers, or receiving any payment of salary and for such other or further order as to this Court may seem fit and proper.

This application has been brought on immediately after the delivery of my judgment this morning in the matter of the application under s. 45 of the Specific Relief Act on the part of Mr. J. M. Sen Gupta, praying for an order on Mr. Cotton directing him to disallow the said motion. For the reasons given by me I dismissed that application: *Jatindra Mohan Sen Gupta, In re* (1). But the questions raised on the present application are of such great importance, raising, as it does, difficult questions of constitutional law and procedure which might be carried to the highest tribunal, that it would have been more convenient if I were enabled to deliver a considered and written judgment. I felt that my decision might have the effect of creating a serious constitutional crisis and that in these circumstances there were two courses open to me: (1) that instead of making an interlocutory order of the description asked for, I should try out the suit in which the present application has been made within ten days from date, or (2) that this application should be dealt with by me on Wednesday next, it being understood that whichever course was adopted, the President of the Bengal Legislative Council should stay his hands meanwhile. The learned Advocate-General informed me, however, that arrangements had been made, whatever that might mean, so that the said item No. 6 might be put as the very first item of business before the Legislative Council this afternoon and that it was impossible to interfere with the order of business as it was one which was sanctioned by His Excellency the Governor of Bengal. I was not satisfied that the order of business could not be altered and I accordingly desired the learned Advocate-General to ascertain if it was not possible for His Excellency to give the necessary directions in this behalf, assuming that a matter like this was not within the competence of the President. It is now 2-15 P. M. and I have not been informed as yet of the result of the enquiry that I desired to be made. The matter is of very great urgency and I must, therefore, proceed to judgment.

The facts giving rise to the present application are more or less the same as were raised on the application of Mr. Sen Gupta for a Writ of Mandamus. Those facts will be found set out in the judgment which I delivered this morning and it will, therefore, not be necessary for me to repeat the same again in this judgment. I desire, therefore, that so far as the facts are concerned, my judgment in the case of Mr. Sen Gupta may be read as part of this judgment. This course is rendered all the more necessary because of the shortness of time at my disposal.

The substantial point that has been argued before me on the present application is whether, having regard to the provisions of s. 72D of the Government of India Act and of r. 94 of the Bengal Legislative Council Rules and Standing Orders, it is competent to the President of the Bengal Legislative Council to put the said item No. 6 before the Bengal Legislative Council at its meeting which takes place this afternoon for the consideration of the members of the Council. Another equally important point which has been the subject of debate before me is that whether on the facts of this case this Court has any jurisdiction to make an order of the description asked for on the President of the Legislative Council. The said item No. 6 runs as follows:—

Supplementary Demands for Grant.

22.—General-Administration (Transferred).

The Hon'ble Mr. J. Donald to move that a sum of Rs. 1,71,000 be granted for expenditure under the head 22.—General-Administration (Transferred) on account of salaries of the Ministers.

(1) 82 Ind. Cas. 374; 40 C. L. J. 44; 51 C. 874.

The first question that I have got to decide is whether this Court has any jurisdiction to interfere in this matter. Now, the clause of the Government of India providing for exemption from the jurisdiction of the High Courts runs as follows :—

"110—The Governor-General, each Governor, Lieutenant Governor and Chief Commissioner and each of the members of the Executive Council of the Governer-General or of a Governor or Lieutenant-Governor and a Minister appointed under this Act, shall not—

(*a*) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only ; nor

(*b*) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction ; nor

(*c*) be subject to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony."

There is no other provision in the Government of India Act or any Rules made thereunder excluding the jurisdiction of the High Courts. The learned Advocate-General has contended that Parliament in passing the Government of India Act and in constituting Legislative Councils thereunder, has kept in view the English constitutional principle, namely, that the Legislature is supreme and that neither the judiciary nor the executive should interfere in any way with the conduct of business in the Legislative Councils, and that having regard to the provisions of r. 15 of the Bengal Legislative Council Rules and Standing Orders, the decision of the President of the Legislative Council on a point of order (and it is argued that the point raised in the present application is a point of order) is final and that it is not open to question in a Court of Justice. I am perfectly aware of the fact that in England the Legislature is supreme, but what I have to consider on the present application is not whether the English Parliament is supreme, but whether the Bengal Legislative Council, which is a subordinate Legislature and a creation of Parliament, is supreme in the sense contended for by the learned Advocate-General and whether the jurisdiction of the High Court, so far as the President of the Legislative Council is concerned, is excluded by Statute or judge-made law or by implication. If I have no jurisdiction to entertain this suit, it would be obviously improper for me to express any opinion on the merits of the questions, discussed before me, though that discussion was necessary before I could determine the issue as to jurisdiction [*c. f. Pritchard* v. *Bangor Corporation* (2)]. In my view, the question now before me does not really relate to the powers of the local Legislature ; but if it did, I have no doubt that it would have been a legitimate subject of discussion in this Court and I am prepared to hold that the proceedings of a subordinate Legislature like the local Legislature can be questioned in this Court [see in this connection the observations of Jenkins, C. J., in *Hari* v. *Secretary of State for India* (3)]. But as I say the substantial question is whether the President of the Council is immune from the jurisdiction of this Court. This Court is a Superior Court of Record and *prima facie* no matter is deemed to be beyond the jurisdiction of this Court, unless it is expressly shown to be so. By the word 'jurisdiction' is meant the authority which the Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision.

Now, this is a suit of the civil nature and in the Civil Procedure Code it is provided that the Courts shall have jurisdiction to try all suits of a civil nature, but from this rule are excepted 'suits of which the cognizance is barred by any enactment.' As stated above, there is nothing in the Government of India Act to exclude the jurisdiction of this Court. The President of the Bengal Legislative Council is appointed under the provisions of s. 72C of tne Government of India Act, the present President being a person appointed by His Excellency the Governor. He is the holder of an office created by Statute and nothing has been shown to me during the course of the argument, which can remotely suggest that the President of the Bengal Legislative Council is immune from the jurisdiction of this Court. As was observed by Bailhache, J., adopting the statement of the law by the Attorney-General, Sir Richard Webster, if any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parlia-

(2) (1888) 13 A. C. 241; 57 L. J. Q. B. 313; 58 L. T. 502; 37 W. R. 103; 52 J. P. 564.

(3) 27 B. 424 at p. 439; 5 Bom. L. R. 431.

ment or State authority, the legal justification can be enquired into in this Court [see *China Mutual Steam Navigation Co., Ld.* v. *Maclay* (4)]. Therefore, in my opinion, a suit can lie against the President of the Bengal Legislative Council.

The learned Advocate-General referred to the impolicy of interfering with the discretion vested in the President of the Legislative Council. I have nothing whatsoever to do with questions of policy and as regards interfering with the discretion vested in the Legislative Council, the point raised really begs the whole question.

I now proceed to consider the substantial question raised before me on the construction of the provisions of the Government of India Act referred to above and of r. 94 of the Bengal Legislative Council Rules and Standing Orders, and I think it will be convenient if, at this stage, I set out the material sections of the Government of India Act. The first section to which I need refer is s. 52 of the Act, which runs as follows:—

"52.—The Governor of a Governor's Province may, by notification, appoint Ministers, not being members of His Executive Council or other officials, to administer 'transferred' subjects, and any Ministers so appointed shall hold office during his pleasure.

There may be paid to any Minister so appointed in any province the same salary as is payable to a member of the Executive Council in that province, unless a smaller salary is provided by vote of the Legislative Council of the province.

No Minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the local Legislature."

The next section of the Act to which reference may be made is s. 72C, which runs as follows:—

"72C.—There shall be a President of a Governor's Legislative Council, who shall, until the expiration of a period of a four years from the first meeting of the Council as constituted under this Act, be a person appointed by the Governor, and shall thereafter be a member of the Council elected by the Council and approved by the Governor.

Provided that, if at the expiration of such period of four years, the Council is in session, the President then in office shall continue in office until the end of the current session, and the first election of a President shall take place at the commencement of the next ensuing session."

Section 72D upon which the controversy has raged runs as follows:—

"72D.—(1). The provisions contained in this section shall have effect with respect to business and procedure in Governor's Legislative Councils.

(2) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the Council in each year, and the proposals of the Local Government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the Council in the form of demands for grants. The Council may assent, or refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed:

Provided that—

(*a*) the Local Government shall have power, in relation to any such demand, to act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, if the demand relates to a 'reserved' subject, and the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject; and

(*b*) the Governor shall have power in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquility of the province, or for the carrying on of any department; and

(*c*) no proposal for the appropriation of any such revenues or other moneys for any purpose shall be made except on the recommendation of the Governor, communicated to the Council."

Now these provisions relating to the business and procedure in Governors' Legislative Councils mark a great advance in the direction of parliamentary methods, particularly in conceding the right to vote 'supplies'. There is to be an annual statement of estimated expenditure and revenue and the proposals of the Local Governments

(4) (1918) 1 K. B. 33; 87 L J. K. B. 95; 117 L. T. 821; 14 Asp. M. C. 175; 34 T. L. R. 81.

for the appropriation of provincial revenues and other moneys in any year are to be submitted to the vote of the Council in the form of demands for grants. The Council may assent or refuse its assent to a demand or may reduce the amount demanded either by a reduction of the whole grant or by the omission or reduction of any of its items. A proposal for appropriation of revenue is not to be made except on the recommendation of the Governor, communicated to the Council. The voted 'grants' only cover the kind of expenditure which in England is made out of 'moneys provided by Parliament.' It is also provided in s. 72D that certain charges of a special or recurring character, which are set out in the section itself, are outside the range of voted 'grants.' This distinction will be recognized by every student of constitutional history as corresponding roughly to the English distinction between 'charges on the votes' and 'charges on the Consolidated Fund.' So far the procedure is based on English practice; but the Executive Government is given exceptional powers of authorising expenditure in case of need. If a demand relates to a Reserved subject and the Governor certifies that the expenditure is essential to the discharge of his responsibility for the subject, the Local Government has power in relation to any demand to act as if it has been assented to, notwithstanding the withholding of the assent or the reduction of the amount asked for. The Governor also has power in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquility of the province or for the carrying on of any department. The provisions of this very important section are left to be worked out in detail by statutory Rules and Standing Orders. The Standing Orders are to supplement the Rules and must not be inconsistent with them. They are to be made in the first instance by the Governor-in-Council, but may be altered by the Local Legislative Council with the assent of the Governor.

These being provisions of the Government of India Act, to which it is necessary for me to refer for the purposes of this judgment, I now turn to the Rules and Standing Orders made in virtue of the authority conferred by the Act. Elaborate provisions are made in the Rules and Standing Orders for the conduct of business in the Legislative Councils.

In r. 14 the limitations on debate are set out and in r. 15 it is provided that the President shall decide all points of order, which may arise and that his decision shall be final. It is also provided that any member may at any time submit a point of order for the decision of the President, but in doing so shall confine himself to stating the point.

Rule 21 provides that a list of business for the day shall be prepared by the Secretary and shall be circulated to all members and that no business not included in the list of business for the day shall be transacted at any meeting without the leave of the President.

Rule 37 indicates the procedure to be followed by which motions can be brought forward before the Legislative Council.

Rule 38, which has been so often referred to before me, run as follows:—

"Except as otherwise provided in the rules, the President shall decide on the admissibility of a motion. The President may disallow any motion when, in his opinion, it does not comply with the Rules or Standing Orders."

Rule 39, which is also equally important, runs as follows:—

"A motion must not raise a question substantially identical with one on which the Council has given a decision in the same session."

Rule 70 relates to the moving of resolutions and power is given by r. 71 to His Excellency the Governor to disallow any resolution or any part of a resolution.

Rule 85 runs as follows:—

"A statement of estimated annual expenditure and revenue of the province (hereinafter referred to as the Budget) shall be presented to the Council on such day as the Governor may appoint."

Rule 87 runs as follows:—

"(1) A separate demand shall ordinarily be made in respect of the grant proposed for each Department of the Government, provided that the Finance Member may, in his discretion, include in one demand grants proposed for two or more Departments, or make a demand in respect of expenditure, such as Famine Relief and Insurance and Interest, which cannot readily be classified under particular Departments. Demands affecting reserved and transferred

subjects shall, so far as may be possible, be kept distinct.

(2) Each demand shall contain, first, a statement of the total grant proposed, and then a statement of the detailed estimate under each grant, divided into items.

(3) Subject to these rules, the Budget shall be presented in such a form as the Finance Member may consider best fitted for its consideration by the Council."

The next Rule to which I need refer is r. 88, which is in these terms:—

"The Budget shall be dealt with by the Council in two stages, namely:—

(1) a general discussion; and

(2) the voting of demands for grants."

Rule 89 is in these terms:—

"(1) On a day to be appointed by the Governor subsequent to the day on which the Budget is presented and for such time as the Governor may allot for this purpose, the Council shall be at liberty to discuss the Budget as a whole or any question of principle involved therein, but no motion shall be moved at this stage, nor shall the Budget be submitted to the vote of the Council.

(2) The Finance Member shall have a general right of reply at the end of the discussion.

(3) The President may, if he thinks fit, prescribe a time-limit for speeches."

Rule 90 runs in these terms:—

" Not more than twelve days shall be allotted by the Government for the discussion of the demands of the Local Government for grants.

(2) Of the days so allotted, not more than two days shall be allotted by the Governor to the discussion of any one demand. As soon as the maximum limit of time for discussion is reached, the President shall forthwith put every question necessary to dispose of the demand under discussion.

(3) On the last day of the allotted days at 5 o'clock the President shall forthwith put every question necessary to dispose of all the outstanding matters in connection with the demands for grants."

The next Rule which I need refer to is r. 91 which runs follows:—

"No motion for appropriation can be made except on the recommendation of the Governor communicated to the Council.

(2) Motions may be moved at this stage to omit or reduce any grant or any item in a grant, but not to increase or alter the destination of a grant.

(3) When several motions relating to the same demand are offered, they shall be discussed in the order in which the heads to which they relate appear in the Budget.

(4) No motions shall be made for the reduction of a grant as a whole until all motions for the omission or reduction of definite items within that grant have been discussed."

Rule 92 runs as follows:—

"If the Local Government or the Governor exercises the power conferred by s. 72D (2), provisos (*a*) and (*b*), of the Government of India Act in regard to demands refused or reduced by the Council, the Finance Member shall, as soon as may be thereafter, lay on the table of the Council a statement showing the action under s. 72D (2), proviso (*a*), with a copy of the certificate granted by the Governor, but no motion may be made in regard to that action."

Rule 93 runs as follows:—

"When money has been spent on any service for which the vote of Council is necessary during any financial year in excess of the amount granted for that service and for that year, a demand for the excess shall be presented to the Council by the Finance Member, and shall be dealt with in the same way by the Council as if it were a demand for a grant."

Rule 94 is in these terms:—

"(1) An estimate shall be presented to the Council for a supplementary or additional grant when.....

(*i*) the amount voted in the Budget of a grant is found to be insufficient for the purposes of the current year; or

(*ii*) a need arises during the current year for expenditure for which the vote of Council is necessary upon some new service not contemplated in the Budget for that year.

(2) Supplementary or additional estimates shall be dealt with in the same way by the Council as if they were demands for grants."

The real controversy has raged round the provisions of r. 94, which I have just set out, taken along with the provisions of s. 72D of the Government of India Act. It is contended, having regard to the facts which are set out in my judgment in the matter of the application of Mr. Sen Gupta, that it is not competent to Mr. Cotton to include in the agenda the motion which stands in the name of the Hon'ble Mr. Donald. The

argument is put in this way: It is contended that before the financial year commences, a statement of the estimated annual expenditure and revenue of the province has got to be placed before the Legislative Council, that is to say one statement of the estimated annual revenue and expenditure, commonly called the 'Budget' has got to be placed before the Legislative Council. The provisions in the Budget relating to the appropriation of revenues and other moneys must be submitted to the vote of the Council in the form of demands for grant. A particular demand for the grant of salaries of the Ministers having been once rejected, by the Legislative Council at its meeting held on the 24th March, 1924, it is argued that it is not now competent to the Government to put forward a fresh demand for the grant of salaries to Ministers, unless that damand can be brought within the four corners of r. 94 of the Bengal Legislative Council Rules and Standing Orders. It is also pointed out that having regard to the plain and unequivocal language of r. 94, the supplementary demand for grant of salaries to Ministers, in respect of which Mr. Cotton has admitted Mr. Donald's motion, can never be included within the category of demands referred to in r. 94 and that this Court, therefore, has undoubted jurisdiction to prevent the President of the Bengal Legislative Council from allowing such a demand to be put before the Council.

I have already indicated that in addition to Mr. Cotton there are two other defendants in this suit, namely, the two Ministers. As regards the Ministers, I desire to say at once that I am not satisfied on the grounds which have been urged before me that so far as this application is concerned there is any reason for asking for any order against the Ministers at this stage. I must, therefore, dismiss the present application, so far as the Ministers are concerned.

On behalf of the Hon'ble Mr. Cotton, I have heard an elaborate address by the learned Advocate-General and he has submitted the following propositions for my consideration:—

(*a*) That in disposing of the present application against Mr. Cotton I should follow the same principles as were followed by me in the application for the Writ of Mandamus.

(*b*) That the present plaintiffs have not been able to satisfy the Court that they have made any demand whatsoever on Mr. Cotton and that Mr. Cotton has distinctly determined to refuse the demand of the plaintiffs.

(*c*) That the plaintiffs have failed to satisfy the Court that they have any interest whatsoever in this matter which is likely to be injured by Mr. Cotton putting Mr. Donald's motion before the Bengal Legislative Council this afternoon.

(*d*) That the President of the Bengal Legislative Council has under the Rules complete discretion in the matter and that having regard to the provisions made in the Rules and Standing Orders for points of order being raised by members of the Council and having regard to the express provisions of r. 15, this Court will not interfere with the President in the discharge of his duties.

(*e*) That there is nothing whatsoever in the Government of India Act or in the Legislative Council Rules and Standing Orders to prevent a motion for appropriation of provincial revenues for a particular object being made at any time before the Legislative Council, provided it is in compliance with the provisions of r. 39.

The learned Advocate-General in concluding his observations pointedly drew my attention to s. 52 of the Government of India Act and contended that having regard to the events that had happened, namely, the total refusal of the salaries of the Ministers at the meeting of the Bengal Legislative Council, held on the 24th March, it was competent to His Excellency the Governor to direct that there should be paid to the Ministers whose salaries had been refused by the Legislative Council, the same salaries as were payable to the members of His Excellency's Executive Council and that it was not really necessary to bring forward again any demand for grant of salaries to the Ministers and that if His Excellency has given directions for a motion for appropriation of revenues to be brought forward in the manner indicated in item No. 6 in the agenda, it was because His Excellency desired to do every courtesy to the members of the Bengal Legislative Council and because as constitutional ruler he was anxious to give the members of the Legislative Council a further opportunity to consider the matter.

With reference to these last observations of the learned Advocate-General, I desire

to say at once that the question he has indicated is not before the Court at the persent moment and I refuse to pronounce any opinion on the legality or otherwise of the action which may be taken to pay the Ministers whose salaries had been refused by the Legislative Council the same salaries as are payable to the members of His Excellency's Executive Council. It is not my province, nor is it my remotest desire, sitting here in this Court, to refer to any action that has been taken or that may be taken by His Excellency to Governor of Bengal. I am not concerned with any discussion about His Excellency's acts and I must enter my protest against any reference being made in my Court to the same.

I now proceed to consider Mr. Advocate-General's arguments, and in considering them I shall first take up for discussion his argument under head (*e*). I am wholly unable to accede to the learned Advocate-General's argument that a proposal for appropriation of provincial revenues can be made at any time before the Legislative Council. The principle underlying s. 72D of the Government of India Act is, as I understand, as follows :—

A figure in an estimate once passed by the Legislative Council cannot be altered, except as provided by the statutory rules. If, therefore, Government subsequently find that any item has been inadvertently omitted from the demands for grants, or that demands which could not be foreseen at the time of presenting the Budget have since arisen or that the provision made for any item is likely to prove insufficient, the same formality has to be gone through as in the case of the original demands and Government has to make a fresh demand known as a supplementary or additional demand and submit a fresh estimate to the Legislative Council. That such should be the case is only natural, considering the fact that the original estimates are framed from 6 to 8 months in advance of the actual occurrence of the facts and the nature of the charges for which provision has to be made is so vast and varied. As Col. Durell points out in his book on Parliamentary Grants, Ch. I, p. 49, "It is a sound principle, that *one, and only one*, estimate of national expenditure should be laid before Parliament during each session ; for to render Parliamentary control effectual, it is necessary that the House of Commons should have the money transactions of the year presented to it *in one mass and in one account.*" Supplementary estimates are always looked upon with particular jealousy by popular Legislature because they tend to diminish the control of the Legislature, and if for large sums, really amount to a breach of contract between the Government and the Legislature. (If authority is needed for this statement as a matter of constitutional practice, reference may be made to the speech made by Mr. Austin Chamberlain in the House of Commons in August, 1921, where he described supplementary estimates as the weak joint, in the armour of any Government.)

The Advocate-General lays very great stress upon the provisions of r. 39. Now this r. 39 is taken from the Rules and Standing Orders of the House of Commons and if Mr. Advocate-General's contention was correct, then there would be nothing to prevent a coach and four being driven, to use the words of Lord Justice Bowen, through this Act of Parliament. And, in my opinion, it is because the framers of the Rules and Standing Orders under the Government of India Act desired to follow with scrupulous care the English Parliamentary practice as regards the Budget Heads of Expenditure and Revenue and the demands for grants or supplies that they did not omit to insert in the said Rules and Orders a provision for Supplementary or Additional grants. This provision is to be found in r. 94, and, therefore, the conclusion is irresistible that save and except what is provided for in s. 72D of the Government of India Act and r. 94 of the Rules and Standing Orders, there cannot be made any demand for grant even if His Excellency the Governor makes a recommendation for appropriation of provincial revenues on occasions not provided for in the said section and the said Rule. The learned Advocate-General drew my attention to the Report of the Joint Committee of the House of Parliament on Mr. Montagu's Bill. My duty sitting here to-day is to construe the provisions of the Act ; but since the matter has been raised, I desire to observe that I am very familiar with the whole of the literature on the subject of the Government of India Act including the report of the Joint Committee and I say that there is no warrant to be found anywhere for the proposition which has been strenuously maintained by the learned Advocate-General. The authorities on this question of constitutional prac-

tice, such as Sir Courtenay Ilbert, Sir Erskine May and Lord Courtnay, are all aganist the view contended for by Mr. Advocate-General, and I do not, therefore, propose to pursue the matter any further.

I now take up for consideration Mr. Advocate-General's contention under head (*d*). If I am correct in the view which I have taken, namely, that Mr. Donald's motion for a supplementary grant is in the circumstances of the present case entirely opposed to the provisions of the Statute (see the provisions of r. 94 of the Rules and Standing Orders) then it follows that the President of the Council, who is required to conduct the business of the Council in accordance with the provisions of the law in that behalf, is not competent to allow any facilities to Mr. Donald to bring forward such a motion. In other words, Mr. Cotton has no jurisdiction to admit Mr. Donald's motion under the provisions of the Government of India Act and under the provisions of the Rules and Standing Orders. Mr. Advocate-General has strongly relied upon the provisions of r. 15. Rule 15, in my opinion, does not exclude the jurisdiction of this Court. It is a Rule by which the Members of the Bengal Legislative Council are bound, and as I read the Rule, it means nothing more or less than this that when the President has given his decision on a point of order, his decision is final, so far as the Members of the Council are concerned, and that it cannot be questioned by anybody within the Council. If anybody within the Council questions the President's decision on a point of Order, the President's powers are ample and he knows how to enforce his decision. The presence of the word "Final" in r. 15 does not, as I have said above, exclude the jurisdiction of this Court, nor does it conclude the matter. It is a word which is to be found in numerous Statutes; sometimes it has been held with reference to the context in which it appears that the word 'Final' means *final* for all purposes, and excludes the jurisdiction of the Courts; sometimes it has been held that notwithstanding the existence of the word 'Final' the jurisdiction of the Courts is not excluded. There are numerous decisions on this point, and if time permitted, I could give illustrations from a long catena of cases decided in this Court. Mr. Advocate-General refers to the affidavit which has been put in by Mr. Cotton, and asks me not to interfere with the President in the discharge of his duties. By instinct and training I am opposed to any interference with the President of a Legislative Body in the discharge of his duties but it seems to me in this case that Mr. Cotton has had abundant opportunities of deciding on the legality or otherwise of Mr. Donald's motion, and he has not chosen to tell me through the mouth of his Counsel what his decision is. If the matter rested purely on the discretion of the President, it is clear that the Court would hesitate to interfere although in England it has been held that if there is an outrageous exercise of discretion by a public officer, the Court will not hesitate to interfere. In my opinion, however, no question of discretion arises in this case; the law is clear; and Mr. Advocate-General has been forced to admit that Mr. Donald's motion is wholly inadmissible under r. 94 of the Rules and Orders. But Mr. Advocate-General tries to get out of the difficulty by suggesting that r. 94 requires an 'estimate' and that inasmuch as no 'estimate,' within the meaning of r. 94, has been presented before the Bengal Legislative Council, Mr. Donald's motion is, therefore, not hit by r. 94 of the Rules and Orders. In parenthesis I may observe that Mr. Advocate-General stated that no estimate has been presented under r. 94, because the 'estimate' had been presented on a previous occasion, namely, at the Meeting of the Legislative Council, held in March last. There is really no substance in this. The 'estimate,' such as it was, was presented at a different session of the Council ; the section which is about to commence to-day is a new session, and this in itself is a sufficient answer. But I do not propose to pause here. Mr. Donald's motion is headed by the framer with an eye to its inclusion under r. 94, and I cannot allow the consideration of this very important question to be obscured by a reference to the want or otherwise of an 'estimate.' To do so would really amount to juggle with the Act, if I may be allowed to use the expression. I now proceed to discuss Mr. Advocate-General's points under heads (*b*) and (*c*). This is a representative suit instituted by the present plaintiffs. Leave under O. I, r. 8, C. P. C., has been given to the plaintiffs to sue on behalf of themselves and all others who pay Government revenue or pay taxes. The 'interest' which Mr. Sen Gupta in his application failed to show, is in the present plaintiffs and it is sufficient

to sustain them to maintain this suit [see in this connection the judgment of Tayabji and Parsons, JJ., in the case of *Vaman* v. *Municipality of Sholapur* (5)]. The present plaintiffs have, in my opinion, made a sufficient demand on Mr. Cotton; Mr. Cotton would not be here through his Counsel before me if a demand had not been made, and I am satisfied on the contentions raised on behalf of Mr. Cotton that he has refused to comply with the demand. As I have already said in the other judgment, it is not necessary to use the word 'refuse' or any equivalent to it; refusal may be inferred from conduct, and on the facts of this case, I think the plaintiffs are not wrong when they say that there has been a refusal on the part of Mr. Cotton. That being so, it is necessary to consider whether the plaintiffs would be injured by Mr. Cotton, putting the motion, being item No. 6 in the agenda, before the Bengal Legislative Council, at its meeting this afternoon; and secondly, what is the extent of the imminence of danger which will induce the Court to make an order in favour of the present plaintiffs. The present action is what in England would be described as in the nature of a *Quia Timet Bill*. It is a very old head of Equity Jurisdiction and according to Story, it has been traced back to so early a period as the reign of Edward IV. These *Quia Timet Bills* are in the nature of Writs of Prevention, to accomplish the ends of precautionary justice and are ordinarily applied to prevent wrongs or anticipated mischiefs and not merely to redress them when done. There are two necessary ingredients for a *Quia Timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable, *i.e.*, it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *Quia Timet* action [see in this connection *Fletcher* v. *Bealey* (6)]. The power is entirely discretionary: it is a large power and I have ever present in my mind Lord Mansfield's caution that the greater the power, the more cautious must be the exercise of it. Time is pressing and I am unable to develop all the points which are passing through my mind, because Mr. Advocate-General has desired an immediate decision. I must say, however, this that on both heads, the plaintiffs have been able to satisfy me that this is a fit and proper case for the exercise of my discretion. There can be no doubt of the imminence of danger having regard to the conclusions at which I have already arrived. That there will be substantial damage and irreparable, within the meaning of the Rule laid down above, it is impossible to doubt. No doubt there is the possibility of the motion being not accepted, but there is also the possibility of the motion being accepted by the Council. In these circumstances, when the various considerations are so balanced and when the motion itself is in complete violation of the spirit and letter of the Government of India Act and of the Rules made thereunder, it is my obvious duty to protect the plaintiffs by a temporary order till the suit is heard. In these matters the Court, in the exercise of its discretion, is under an obligation to take large and liberal views, so that the rights of the subject may be preserved and the constitution as laid down by the Government of India Act safeguarded by such means as are in the power of the Court. The right to vote supplies is perhaps the greatest privilege accorded to a Legislative Body and any infraction of the Rules and Regulations guarding the provision as to the voting of supplies is an 'injury' which the plaintiffs in a representative suit, are entitled to be protected from. The Advocate-General has reminded me that it is open to the Legislative Council to flout my order. This is a region of controversy into which I will not enter; the occasion has not arisen for me to consider this question; it may never arise, and speaking for myself, it will never arise. Therefore, so far as Mr. Advocate-General's points under heads (*b*) and (*c*) are concerned, I am against him, and I am in favour of the plaintiffs.

There now remains for me to consider Mr. Advocate-General's point under head (*a*), namely, that in disposing of the present application I should follow the same principles as were followed by me in the application for the Writ of Mandamus. I have read and re-read, during the last two days, the case to which Mr. Advocate-General has drawn my attention, namely, the case

(5) 22 B. 646; 11 Ind. Dec. (N. S.) 1013.
(6) (1885) 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745.

of the *Bank of Bombay* v. *Suleman Somji* (7). To a certain extent the contention is correct so far as it goes; but I am by no means prepared to say that in disposing of an application for an injunction, my powers sitting here on this side of the Court are wholly circumscribed by the rules laid down in s. 45 of Specific Relief Act. I have given to this matter my very best and most anxious consideration within the time at my disposal, and I have come to the conclusion that the plaintiffs having made out a *prima facie* case, I really have no other alternative but to make an order restraining Mr. Cotton, the President of the Bengal Legislative Council, within which expression are included the persons mentioned in page 238 of the Bengal Legislative Council Rules and Standing Orders, from putting the said item No. 6 before the Council for its consideration until the final determination of this suit. The costs of this application, so far as Mr. Cotton is concerned will be costs in the cause. So far as the Ministers are concerned, the application will stand dismissed with costs.

I have now dicharged my duties as Judge; but perhaps in view of the public importance of this case, I may venture on one observation: I do not disguise from myself that it is a serious thing to have to interfere with the President in the discharge of his duties. But the law, as I conceive it to be, requires my interference. In my opinion, the Rules and Standing Orders require revision in the light of the events which have happened. I express no opinion on the political situation brought about in March last, but only desire to express the hope that the constitution will be placed on a firm and enduring foundation.

K. S. D. *Application granted.*

(7) 12 C. W. N. 825; 8 C. L. J. 103; 32 B. 466; 10 Bom. L. R. 636; 18 M. L. J. 865; 4 M. L. T. 16; 5 A. L. J. 463; 35 I. A. 130 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1818 OF 1919.

May 26, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

CHANDA SINGH—PLAINTIFF—APPELLANT

versus

JAI KISHEN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act(IX of 1908), Sch. I, Arts. 29, 36, applicability of—Suit to recover compensation for loss sustained by irregular execution sale—Terminus a quo.

A suit to recover compensation for loss sustained on account of the irregular sale of certain property in execution of a decree is governed by Art. 36 of Sch. I to the Limitation Act, and must be brought within two years from the date of the sale. [p. 25, col. 2.]

Article 29 of Sch. I to the Limitation Act must be interpreted to apply only to the seizure of property and not to govern any suits arising out of what happens later at the time of sale. [*ibid.*]

First appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the 2nd June 1919.

Mr. *N. C. Mehra*, for the Appellant.

Lalas *Kashi Ram* and *Durga Das*, for the Respondents.

JUDGMENT.—Plaintiff in this case sued to recover Rs. 6,000 on account of compensation for loss sustained by him on account of the irregular sale of certain property in execution of a decree, alleging that in consequence of the irregularities a sum far below the market value of the property had been realized. He also claimed the refund of a sum which he said had not been credited. The suit was dismissed as barred by limitation, and the only question to be decided is whether this order of dismissal is correct.

In *Narasimha Rao* v. *Gangaraju* (1), it was held that the limitation for a suit of this nature is governed by Art. 29, inasmuch as the sale follows from the seizure and the cause of action must be taken to be the irregular seizure. It is contended on appeal, though this is not by any means clear from the plaint, that the plaintiff merely seeks compensation for the irregular sale though he does distinctly state in his plaint that the seizure or attachment was also irregular. It is obviously possible that there should be a case where the attachment was in every respect correct, but the formalities prescribed before sale had not been observed, and it would, in our opinion, not be correct to hold under these circumstances that the cause

(1) 31 M. 431 (F. B.).

of action was one for damages for wrongful seizure and that the cause of action arose on the date of attachment. It is also clear, that the sale might take place more than a year after the attachment, and apparently on the view taken in that ruling the plaintiff would be debarred from seeking any remedy for the loss caused to him by any irregularities in the sale as distinguished from the seizure, and the cause of action would be still born. We are of opinion that the sale, though following naturally on the attachment and being the object which the decree-holder had in view at the time of making his original application, can be distinguished from that attachment. It is only after the attachment has been completed that the proclamation issues under r. 66 and the sale subsequently takes place. Article 29 must, in our opinion, be interpreted to apply only to the seizure and not to govern any suits arising out of what happens later at the time of sale.

It is contended by the appellant that Art. 62 or Art. 48 or 49 applies. In his own replication at page 17 of the paper-book he uses the following words :—

"The plaintiff's right to ralief arises in respect of facts or series of facts constituting the same transaction and giving rise to a common question of law regarding the liability to the plaintiff under the general Law of Torts."

Suits based on tort are governed by Art. 36, unless specifically provided for by some other Article in just the same way as suits based on an unregistered contract, are governed by Art. 115 unless some other Article definitely applies.

There can be no question that the act complained of in bringing the property to sale is a tort, whether it be described as nonfeasance or malfeasance. Holding that neither Art. 48 nor Art. 49 nor any of the other Articles governing torts applies in express terms to the suit, we find that it is governed by Art. 36 and having been brought admittedly more than two years after the sale it is barred by time.

In addition to the compensation claimed on account of the moveable property sold, the plaintiff claims the return of a sum of Rs. 400 which he says has not been credited by the defendant to his account. This sum was paid in on the 24th of June 1916 and the suit was instituted on the 20th of January 1919. It is urged that Art. 62 applies more especially to this sum of money, but, in our opinion, the words as used do not cover this portion of the claim. Money was not received by the defendant for the plaintiff's use and was not payable by the defendant to the plaintiff. This portion of the claim also, in our opinion, is based on an alleged tort and the same Art. 36 applies.

The suit, therefore, fails throughout and the appeal is dismissed with costs.

K. S. D. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 388 OF 1923.
April 25, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Kulwant Sahay.

LILO SONAR—APPELLANT
versus
JHAGRU SAHU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, scope of—Death of party—One of several legal representatives already on record—Suit, whether abates—Belated knowledge of death of deceased—Abatement, when can be set aside.

The fact that one of the legal representatives of a deceased respondent is already on the record, but not as such, does not relieve the appellant from the duty of applying for the substitution of the legal representatives of the deceased. [p. 26, col. 2.]

Bhikaji Ramchandra v. *Purshotam*, 10 B. 220; 5 Ind. Dec. (N. S.) 533, *Adusupalli Venkata Row* v. *Marikruthan Ammal*, 13 Ind. Cas. 313 and *Sughar Kunwar* v. *Sitapat Ram*, 39 Ind. Cas. 135; 4 O. L. J. 92; 20 O. C. 67, distinguished.

Rule 4 of O. XXII, C.P.C., does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement. [*ibid.*]

The Court will set aside an abatement where it appears that the appellant lives at a distance from the residence of the deceased respondent and the application is made within time from the date of the knowledge of the death of the deceased. [p. 26, col. 2; p. 27, col. 1.]

Mr. *Sambhu Saran*, for the Appellant.

Messrs. *Guru Saran Prasad* and *Anand Prasad*, for the Respondent.

JUDGMENT.—On the 1st of February 1924, the petitioner applied for substitution in place of the deceased respondent No. 1, Jhagru Sahu. This application was made more than ninety days after the death of Jhagru Sahu. The proposed legal repre-

sentatives of Jhagru Sahu have entered appearance and oppose the application for substitution. Their case is that the appeal has already abated, no application for substitution having been made within time. The learned Vakil on behalf of the appellant-petitioner submits that no substitution was necessary and the abatement did not take place, inasmuch as one of the legal representatives, Doman, was already on the record as respondent No. 2, and the family being a joint *Mitakshara* family he was competent to represent all the other heirs of Jhagru Sahu. It is said that so long as Doman is on the record the appeal could not abate, notwithstanding that all the heirs of Jhagru Sahu were not on the record. This contention is based upon the legal notion of a joint *Mitakshara* family, but "legal representative" as defined in cl. (11) of s. 2 of the C. P. C. includes the person on whom the estate devolves on the death of the party suing or sued in a representative character. Therefore, even if Jhagru Sahu and Doman were numbers of a joint *Mitakshara* family, their legal representatives will be the heirs on whom the estate would devolve upon their death by survivorship. In the present case upon the death of Jhagru Sahu, his legal representatives would be the surviving members of the family, the opposite party. Order XXII requires legal representatives of parties to be brought on the record in the case of the death of any one of them irrespective of whether the deceased was joint or separate from the other members of the family. Assuming for the sake of argument that the said heirs, who are now proposed to be substituted, are the legal representatives of Jhagru Sahu, they must be brought on the record in accordance with law and the procedure set forth in O. XXII. The procedure, in a case of this kind, is prescribed by r. 4 of the said Order which requires that, upon the death of a defendant, and when the right to sue does not survive against the surviving defendant, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party. By r. 11 of the said Order the word "defendant" includes "respondent." Therefore, the respondent in the present case being dead, the substitution could only be made upon an application made in that behalf by the appellant or by the legal representatives of the deceased. The fact that Doman, one of the legal representatives of the deceased, is already on the record does not relieve the appellant or the other heirs of Jhagru Sahu from making an application for substitution as legal representatives of Jhagru Sahu in terms of r. 4 of O. XXII, Doman was respondent in his own capacity. Now, if the appellant wants him to be placed on the record as legal representative of Jhagru Sahu, a proper application should be made. Therefore, the appeal did abate before the application for substitution was filed.

Reliance has been placed upon a number of cases [*Bhikaji Ramchandra* v. *Purshotam* (1), *Adusupalli Venkata Row* v. *Marikruthan Ammal* (2) and *Sughar Kunwar* v. *Sitapat Ram* (3)] in support of the contention that the presence of Doman on the record as legal representative would prevent the appeal from abating. These cases do not go so far. They only lay down that where there are several representatives, if an application is made within time for bringing any one of them on the record, the appeal does not abate, and that the other legal representatives may be made parties to the case even after the expiry of the time fixed for substitution. It is notable that in all those cases an application was made as required by r. 4 of O. XXII as regards one of the legal representatives within time. The rule does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement. The aforesaid cases are not on all fours with the present one.

The learned Vakil on behalf of the appellants then urges that upon the grounds stated in the petition the abatement should be set aside. On this score he seems to stand on a firmer footing. It appears that Jhagru Sahu died in September last, and the appellants came to know of his death in December, and that, after certain correspondence with the learned Vakil who appears for them in the present case, the application was made within time from the date of knowledge of the death of the deceased. The allegations made in the application are not at all controverted by any counter-affidavit, and regard being

(1) 10 B. 220; 5 Ind. Dec. (N. S.) 533.
(2) 13 Ind. Cas. 313.
(3) 39 Ind. Cas. 135; 4 O. L. J. 92; 20 O. C. 67

had to the fact that the appellant lives at a distance from the residence of the deceased Jhagru Sahu, it is possible that, as alleged by him, he did not come to know of the death of the deceased until December. We, therefore, accept the reasons given in the petition for not making the application for substitution in time, and accordingly we set aside the abatement and direct that the substitution as prayed for be made. The opposite party has entered appearance and in this case he is entitled to costs.

K. S. D. *Substitution ordered.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 155 OF 1923.
July 21, 1924.
Present:—Mr. Justice Mukerji and Mr. Justice Dalal.
RAM ADHIN—APPLICANT
versus
RAM BHAROSE AND ANOTHER—OPPOSITE PARTIES.

Civil Procedure Code(Act V of 1908), O. XVII, r. 2—"Make such other order as it thinks fit," scope of—Party taking time to produce evidence—Failure to appear—Court, duty of—Decree—Application for re-hearing—Revision.

Where a party has taken time to produce evidence and, on the date fixed for hearing of that evidence, he is absent, the Court is bound to proceed under O. XVII, r. 2 of the C. P. C. and cannot proceed under r. 3. [p. 28, col. 1.]

Phul Koer v. *Hashmat Ullah Khan*, 29 Ind. Cas. 553; 37 A. 460; 13 A. L. J. 679, *Lal Jangpal Singh* v. *Kushalpal Singh*, 70 Ind. Cas. 942; 20 A. L. J 97; (1923) A. I. R. (A.) 153 and *Rukam* v. *Tara Chand*, 65 Ind. Cas. 775; 20 A. L. J. 123; (1922) A. I. R. (A.) 68, followed.

Goura Bibi v. *Ghasitiya*, 12 Ind. Cas. 603; 8 A. L. J. 1265; 34 A. 123, dissented from.

Lalta Prasad v. *Nand Kishore*, 22 A. 66; A. W. N. (1899) 176; 9 Ind. Dec. (N. S.) 1075 (F. B.), distinguished.

The words "make such other order as it thinks fit" in r. 2 of O. XVII, C. P. C., do not authorise a Court to pass a judgment on the merits. [*ibid.*]

Ram Charan Lal v. *Raghubir Singh*, 75 Ind. Cas. 387; 21 A. L. J. 495; (1923) A. I. R. (A.) 51; 45 A. 618, followed.

A Court must be presumed to have passed such an order as it could pass according to law, whatever section it may have mentioned in its order. [p. 29, col. 1.]

Rukam v. *Tara Chand*, 65 Ind. Cas. 775; 20 A. L. J. 123; (1922) A. I. R. (A.) 68, referred to.

On the failure of the defendant to produce his evidence on the date fixed for the purpose, the Court decreed the plaintiff's suit for redemption. The defendant treating the order as one passed *ex parte* applied for re-hearing. This application was dismissed, the Court holding that the application did not lie and the defendant ought really to appea from the decree. On appeal to the District Judge, that Court came to the same conclusion and dismissed the appeal. The defendant applied in revision to the High Court:

Held, that the decree passed was an *ex parte* decree, and inasmuch as the District Judge refused to exercise the jurisdiction vested in him of hearing an appeal from the refusal of the Trial Court to grant an application for re-hearing, the High Court could interfere in revision. [p. 28, col. 1.]

Civil revision from an order of the District Judge, Allahabad, dated the 12th of January 1923.

Mr. *Janaki Prasad*, for the Applicant.

Mr. *Gulzari Lal*, for the Opposite Parties.

JUDGMENT.

Dalal, J.—We shall consider in this judgment the facts of Suit No. 86 of 1920. There is a connected revision relating to a decree passed in Suit No. 124 of 1920. To avoid confusion, we shall deal with the decree in the former suit as from the point of view of the respondents to this application, the decree in Suit No. 86 of 1920 is more in their favour.

This Suit No. 86 of 1920 after various postponements was adjourned on the 23rd June 1921 on the application of the defendant Ramadhin for the production of defence evidence. Third August 1921 was the date fixed for hearing and on that date the defendant did not appear in person, nor did any Pleader of his appear. He did not put forward any evidence for the defence. The Court thereupon wrote a judgment decreeing the plaintiff's suit for redemption.

It is argued here on behalf of the respondents that the decree purports to be one passed under O. XVII, r. 3. No order or rule is mentioned in the judgment, but in the order-sheet it is mentioned that the decree is passed under O. XVII, r. 3. Subsequently, the defendant, treating this decree as one passed *ex parte* under O. XVII, r. 2 applied for re-hearing under O. IX, r. 13. The Trial Court of the Subordinate Judge decided that the application did not lie and that the defendant ought really to appeal from the decree passed on the merits under O. XVII, r. 3. On appeal to the District Judge, that Court came to the same conclusion and dismissed the appeal. This is a revision from the order of the District Judge.

It was first argued by the respondents' learned Counsel that no application in revision lay, because the lower Appellate Court

had decided rightly or wrongly that the original decree was passed under O. XVII, r. 3 and that, therefore, no application for re-hearing lay to the Trial Court. In our opinion, the provisions of s. 115 will apply if we hold that the application was one for re-hearing and the District Judge refused to exercise the jurisdiction vested in him of hearing an appeal from the refusal of the Trial Court to grant an application for re-hearing. It will depend upon our subsequent decision whether the lower Appellate Court has exercised its jurisdiction or failed to do so.

Coming to the question whether the decree ought to have been passed in the redemption suit under r. 2 or r. 3 of O. XVII, our opinion is that the decree in such a case should be passed under r. 2 even where a party has taken time to produce evidence and on the date fixed for hearing of that evidence he is absent. Rule 2 comes first in the order of procedure. It lays down that "Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX or make such other order as it thinks fit." When a party is not present the Court is bound to proceed under this rule and cannot proceed under the later rule r. 3.

The next question is whether the words "make such other order as it thinks fit" include an order under r. 3. It has been held by a Bench of this Court in *Ram Charan Lal* v. *Raghubir Singh* (1), that on the proper interpretation of O. XVII, r. 2 a Court cannot pass a judgment on the merits under cover of the words "make such other order as it thinks fit." The other order referred to could only mean an order for further adjournment. Mr. Justice Lindsay who delivered the judgment of the Court relied on the Bench ruling of *Phul Koer* v. *Hashmat Ullah* (2). There has been a certain amount of conflict of authority on this point. In *Goura Bibi* v. *Ghasitiya* (3), where a suit was dismissed on an adjourned date of hearing on the ground that the claim was not proved, the Court held that an application for restoration did not lie under O. IX, r. 4, the plaintiff's remedy being by way of appeal against the Court's decree. This ruling of the Bench was followed by a Single Judge of this Court Mr. Justice Tudball in *Ganga Ram* v. *Chiddu Singh* (4). From observations made by the learned Judge on page 766* of the report, it appears that he was not in agreement with the opinion expressed in the Bench ruling. Next in order is a Bench ruling of *Phul Koer* v. *Hashmat Ullah Khan* (2) already referred to, by the learned Chief Justice and Mr. Justice Banerji, who observed in the course of their judgment: "We are of opinion that in a case like the present the Court ought not to have decided the suit on the merits but ought, if it did not intend to give the plaintiff or his Pleader any other opportunity of appearing, to dimiss the suit for default of appearance."

As already pointed out, this case was followed in *Ram Charan Lal* v. *Raghubir Singh* (1). At the end of 1920 and in 1921 there were two other cases. In *Lal Jangpal Singh* v. *Raja Kushalpal Singh* (5), the judgment of Mr. Justice Piggott is printed on page 103†. The learned Judge in a case like the present was of opinion that the proper order would be one of an *ex parte* decree under O. XVII, r. 2. In the same volume is reported the case of *Rukam* v. *Tara Chand* (6). The learned Judge Mr. Justice Benerji was of opinion that when one of the parties was absent the proper order would be one under O. XVII, r. 2 and the order must be construed to be one passed under that rule, although it purports to be an order of dismissal or decree on the merits.

We agree with the observations of the learned Judge that the Court must be taken to have done that which it could only do under the provisions of the law. It is clear, therefore, that according to the trend of recent rulings of this Court, excepting the ruling reported as *Gaura Bibi* v. *Ghasitiya* (3), the proper decree as a suit under the circumstances of the present case would be one of an *ex parte* decree.

The respondents' learned Counsel argued that once the Court passing the decree purported to act under O. XVII, r. 3, this Court

(1) 75 Ind. Cas. 387; 21 A. L. J. 495; (1923) A. I. R. (A.) 551; 45 A. 618.
(2) 29 Ind. 553; 37 A. 460; 13 A. L. J. 679.
(3) 12 Ind. Cas. 603; 8 A. L. J. 1285; 34 A. 123.
(4) 14 Ind. Cas. 119; 9 A. L. J. 763.
(5) 70 Ind. Cas. 942; 20 A. L. J. 97; (1923) A. I. R. (A.) 153.
(6) 65 Ind. Cas. 775; 20 A. L. J. 123; (1922) A. I. R. (A.) 68.

*Page of 9 A. L. J.—[*Ed.*]
†Page of 20 A. L. J.—[*Ed.*]

was bound by such action and must accept that the decree was passed under that rule. In support of this contention a Full Bench ruling in the case of *Lalta Parsad* v. *Nand Kishore* (7) was quoted. In that case the point did not really arise. The question was whether an order purporting to have been passed under s. 102 of the Code of 1882 dismissing a suit in default should be construed as one under that section or one under s. 158.

We were referred to certain observations of the learned Chief Justice that though the naming of a section is not conclusive it may be a useful piece of evidence in construing the order which must be read and construed as a whole. This opinion does not imply that when a Court has acted under a wrong section or quoted a wrong section the party complaining against that order cannot take action as if the correct procedure had been adopted. It would be interesting to note that Mr. Justice Benerji was a party to the Full Bench ruling and was also the Judge who delivered the judgment which we have already referred to and which is reported as *Rukam* v. *Tara Chand* (6). We have quoted from that judgment to indicate that the learned Judge's opinion that a Court must be presumed to have passed such an order as it could pass according to law, whatever section it may have mentioned in its order.

We are of opinion that the decree was passed *ex parte* and the defendant was entitled to apply for a re-hearing. Both the subordinate Courts have failed to exercise a jurisdiction vested in them.

Mukerji, J.—I entirely agree. But having regard to the fact that there has been some conflict of opinion on the point raised in these applications for revision I wish to make one observation.

It has been said that where in spite of the fact that one of the parties to a suit is absent, the Court proceeds to decide the case on the merits and not according to the actual circumstance of the case, namely, one of the parties is absent, the remedy of the absent party by an application either for re-hearing or for restoration is barred, and his only remedy is by way of an appeal.

It is, therefore, admitted that there is a remedy. The question is which is the proper remedy. I will take an extreme case. Say a defendant obtained time to produce his witnesses. On the date fixed for hearing he did all he could do to arrive at the Court in time, but there happened to be a Railway accident and he and his witnesses were delayed. Where is he to prove the facts? It must be conceded that the defendant was prevented by a sufficient cause from appearing and he must have a redress. But if the remedy is by way of appeal, will he be expected or will he be allowed to produce evidence in the Appellate Court to prove that he had a sufficient reason for his non-appearance? Will the Appellate Court entertain fresh evidence or will it dispose of the appeal on merits as recorded on the file of the Trial Court? Clearly then the remedy, if one is not denied to the absent party, would be by an application to the Court of first instance and not by way of an appeal. The act of the Court, namely, its attempt to decide the case on the merits, cannot prevent a party from seeking his proper remedy.

By the Court.—The orders of the Courts below are set aside and the Court of first instance is hereby directed to hear the application under O. IX, r. 13 of the C. P. C. Costs here and heretofore to abide the result.

K. S. D. *Application allowed.*

(7) 22 A. 66; A. W. N. (1899) 176; 9 Ind. Dec. (N. S.) 1075 (F. B.).

PATNA HIGH COURT.

CIVIL REVISION No. 183 OF 1920.
May 10, 1921.
Present:—Mr. Justice Das and Mr. Justice Adami.

LACHMI NARAIN SINGH AND OTHERS —PETITIONERS
versus
RUP NARAIN AND OTHERS—OPPOSITE-PARTIES.

Civil Procedure Code (Act V of 1908), O. XIV, r. 2, O. XV, r. 3—Issue of law, whether can be tried first—Court, power of.

Both O. XIV, r. 2 and O. XV, r. 3 of the C. P. C. give ample power to the Court to try issues of law first. The power under O. XIV, r. 2, can be exercised at the issue stage, but O. XV, r. 3, empowers the Court to proceed to determine issues of law at a stage subsequent to the issue stage and it is for the Court to decide at its discretion as to which course to adopt. [p. 30, col. 2.]

Civil revision against an order of the Subordinate Judge, Deoghar.

Messrs. *S. M. Mullick* and *S.S. Bose*, for the Petitioners.

Messrs. *C. C. Das*, *S. N. Bose* and *P. Banerji*, for the Opposite-Parties.

JUDGMENT.

Das, J.—This application is directed against an order of the Subordinate Judge of Deoghar directing the parties to address him on Issues Nos. 1, 2, 3 and 4 only. It is quite unnecessary to go into the antecedent history of the case; it is sufficient to say that fourteen issues were settled by the learned Subordinate Judge, and before the examination of the witnesses had commenced the defendant moved the Court for trial of Issues Nos. 1 to 4. The learned Subordinate Judge at first rejected the application but ultimately reviewed his own order and allowed the application. Mr. Sushil Madhab Mullick on behalf of the petitioners urges before us that there is serious prejudice to him in the course adopted by the learned Subordinate Judge.

Order XIV, r. 2 of the Code provides that: "Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined." Order XV, r. 3, provides that: "Where the parties are at issues on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument of evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit: Provided that where the summons has been issued for the settlement of issues only, the parties or their Pleaders are present and none of them objects."

The whole question which we have to determine is whether the C. P. C. has vested the Subordinate Judge with power to determine whether issues of law should be tried first. The Code has vested the Subordinate Judge with the power to determine the question, or in other words if such power exists, then, in my view the Subordinate Judges must decide for themselves whether circumstances exist in each particular case calling for the exercise of that power. In my opinion both O. XIV, r. 2 and O. XV, r. 3 give ample power to the Subordinate Judge to try issues of law first. It is quite true that the power under O. XIV, r. 2 can be exercised at the stage which may be conveniently described as the issue stage but O. XV, r. 3 gives power to the Subordinate Judges to proceed to determine the issues of law at a stage subsequent to the issue stage. Speaking entirely for myself I think it is far better that the Subordinate Courts should not try any case piecemeal, but that is a matter which is for the Subordinate Judges to decide.

Reliance was placed on a decision of this Bench but that case is clearly distinguishable. There the learned Subordinate Judge decided to try certain issues first after evidence had been gone into and the trial had already proceeded. Following a decision of the Calcutta High Court we held that the Subordinate Judge ought not to have exercised the power either under O. XIV, r. 2 or under O. XV, r. 3 at that stage. But here the hearing of the suit has not commenced and in my view it was open to the learned Subordinate Judge to determine for himself whether circumstances did exist calling for the exercise of power vested in the Subordinate Judge under the provisions of the Code to which I have referred. I am unable to say that the learned Subordinate Judge has either declined to exercise the jurisdiction which he had under the law or assumed a jurisdiction which he had not under the law or that in exercising the jurisdiction which he had he acted with illegality or material irregularity. The question is one of discretion and discretion only.

I must refuse this application with costs. Hearing-fee two gold *mohurs*.

Adami, J.— I agree.

K.S.D.

Application rejected.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 132 OF 1923.

July 25, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Mukerji.

GAJADHAR PANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JADUBIR PANDE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage decree against father—Sale in execution—Sons, whether can set aside sale.

When property has been sold in auction in execution of a decree against the father, it is not open to his sons or grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree has been obtained was without any legal necessity or not in lieu of any antecedent debt.

Ram Chandra v. *Muhammad Nur*, 73 Ind. Cas. 656; 21 A. L. J. 485; 45 A. 545; (1923) A. I. R. (A.) 591, followed.

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 51 I. A. 129; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.), referred to.

Appeal, under s. 10 of the Letters Patent, from a judgment of Mr. Justice Kanhaiya Lal, dated the 6th July 1923, reported as 75 Ind. Cas. 785.

Mr. *Harnandan Prasad*, for the Appellants.

Mr. *Kumuda Prasad*, for the Respondents.

JUDGMENT.

Sulaiman, J.—The facts of the case are that a portion of plot No. 44 belonged to a joint Hindu family consisting of Salik Pande and his sons Ram Jag and Gajadhar. The father was the manager and Gajadhar was a minor. On the 2nd of July 1890 the father and his son Ram Jag made a simple mortgage of the property in favour of Jagannath. Subsequently on the 31st of January 1900 the father and some other co-sharers mortgaged the entire plot with possession to one Mangru. In 1903 Jagannath filed a suit for sale on the basis of his mortgage-deed, and obtained a decree for sale against the mortgagors alone. To that suit Gajadhar was not made a party. The property was sold in execution of the decree and was purchased by the decree-holder himself. The decree-holder, subsequently, sold the share purchased by him to Jadubir Pande, who got mutation of names effected in his favour.

It is, however, a fact that inasmuch as the plot in question was in the possession of the subsequent mortgagee, Jadubir Pande could not have obtained actual and effective possession over the property. Gajadhar and other minor members of his family brought this suit for a declaration that the execution sale, the auction purchase and the transfer to Jadubir were not binding on them inasmuch as the mortgage of 1890 had been executed without any legal necessity. There was no allegation that the debt had been tainted with any illegality or immorality. The Court below decreed the claim. On appeal a learned Judge of this Court has dismissed the suit. He came to the conclusion that when the property had been sold in auction in execution of a decree against the father, then it was not open to his sons and grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree had been obtained had been without any legal necessity or not in lieu of any antecedent debt. It was further necessary for the plaintiffs to establish that that debt had been tainted with illegalily or immorality. This was the view expressed by one of us in the case reported as *Ram Chandra* v. *Muhammad Nur* (1) and is quite in conformity with the latest pronouncement of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2). In that case their Lordships entirely agreed with the view of the learned Chief Justice in the Full Bench Madras case of *Arumugham Chetty* v. *Muthu Koundan* (3), where it had been held by him that an independent debt, neither immoral nor illegal, contracted by a father on the security of the joint family estate, antecedent to a mortgage sued on, could be treated as an antecedent debt so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage. That finding drew no distinction between a secured debt and a simple money debt. On the other hand that was a case expressly of a mortgage-debt. Their Lordships of the Privy Council at page 139 in 51 Indian Appeals

(1) 73 Ind. Cas. 656; 21 A. L. J. 485; 45 A. 545; (1923) A. I. R. (A.) 591.

(2) 77 Ind. Cas. 689; 51 I. A. 129; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 16 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.).

(3) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 (F. B.).

[*Brij Narain Rai* v. *Mangla Prasad Rai* (2)] laid down certain propositions as the result of the authorities referred to by them. The second proposition stands as follows:—

"If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

It is obvious that if the word 'debt' in this proposition includes both a mortgage debt and a simple money debt, the appellants' contention cannot prevail, because the father, having incurred the mortgage debt in question which was not for an immoral purpose, did lay the estate open to be taken in execution of the mortgage-decree passed for the payment of that debt. The learned Vakil for the appellants, however, contends before us that the word 'debt' there only means a simple money debt and not a mortgage debt, and relies on the wording of the proposition No. 5 where it is stated that there is no rule that the result is affected by the question whether the father, who *contracted the debt or burdens the estate*, is alive or dead. In our opinion this argument cannot be accepted. Their Lordships in the proposition No. 5 were clearly referring to all the previous contingencies and had, therefore, to use both the expressions.

It is not necessary for us to consider what logical results would follow from this interpretation of the second proposition. The propositions have been laid down recently in order to settle further disputes, and we are bound to accept them as they stand. I am, therefore, clearly of opinion that it is not open to the present plaintiffs to have the decree, the auction-sale and the subsequent transfer set aside specially when rights of a third party have come in without establishing that the secured debt had been tainted with illegality or immorality. The mere fact that they were no parties to the litigation or that the debt was not incurred for legal necessity or in lieu of an antecedent debt, is no ground for setting aside the decree and the subsequent sale.

Mukerji, J.—I entirely agree. I wish to say just a few words having regard to the importance of the question involved. The two propositions, *viz.*, a father cannot borrow money on the security of the joint family property without establishing the case of legal necessity and he can allow the very property, to be sold in satisfaction of a debt of his own, not incurred for family necessity, if the debt be not secured on any family property, would appear to be contradictory on principle. Yet there can be no doubt that such is the Anglo-Hindu Law established beyond all possible controversy. The pure Hindu Law did not regard a loan secured on a mortgage, as different from a loan without such security. It prohibited a sale or gift of family property only without justification. Under Anglo-Indian law a mortgage became to be regarded as an alienation and hence the rule of Hindu Law against an alienation by the father was applied. This will probably explain the contradictory nature of the two rules. It would follow from these two propositions, which are, undoubtedly, correct, that where a debt is incurred on the security of the family property and to realise the debt the property is sold, the result is the same as if the family property had been sold in execution of a simple money decree obtained against the father for a debt purely personal to himself. Such being the case we can easily see why their Lordships of the Privy Council did not make any mention of a case where property is sold out of the family in execution of a mortgage decree obtained against the father alone. If they were not of opinion that the word 'debts' in proposition No. 2 at page 139* [*Brij Narain Rai* v. *Mangla Prasad Rai* (2)] did not include both a simple debt and a secured debt, they would certainly have said something, whatever it might be, as regards a debt secured by mortgage, where a decree had been passed on foot of it and the decree had been executed effectually by sale. I entirely agree that the propositions of law have been clearly laid down for the purpose of guidance of the Courts in India by their Lordships of the Privy Council, and we ought loyally to administer them as good law till the propositions are re-considered (if ever) and a contrary opinion is expressed.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

K. S. D. *Appeal dismissed.*

*Page of 51 I. A.—[*Ed.*]

LAHORE HIGH COURT.

CRIMINAL REVISION No. 851 OF 1924.
September 23, 1924.
Present:—Mr. Justice Campbell.
BUDHA SINGH AND ANOTHER—CONVICTS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Railways Act (IX of 1890), s. 120 (b)—*Using abusive language—Actual words—Prosecution, duty of.*

When an accused person is put on his trial for an offence under s. 120 (*b*) of the Railways Act, it is necessary to put the actual words used by the accused before the Court in order to enable it to determine whether the accused used abusive language within the meaning of the section. The evidence for the prosecution should also make it clear that the place of occurrence came within the definition of a Railway or part of a Railway.

Petition, under s. 439 of the Cr. P. C., for revision of an order of the Additional District Magistrate, Amritsar, dated the 28th April 1924, affirming that of the Honorary Magistrate, Second Class, Amritsar, dated the 23rd March 1924.

Dr. *Nand Lal*, for the Petitioners.

JUDGMENT.—The two petitioners have been convicted of an offence under s. 120 (*b*) of the Railways Act and the conviction has been sustained on appeal by the Additional District Magistrate, Amritsar, the finding of both the Courts being that the appellants used abusive language while on the Railway premises.

The record of evidence does not make it clear that the incident in respect of which the petitioners have been convicted took place within boundary marks indicating the limits of land appertaining to a Railway. According to the witnesses there was a struggle or even perhaps an affray between the petitioners on the one side and other persons on the other at the carriage stand outside Amritsar Railway Station. One witness states that he pointed out to the contestants that the place was the Railway compound, but the evidence has not made it clear, as it should have done, that the place of occurrence came within the definition of a Railway or part of a Railway. This point was not raised in the memorandum of appeal to the Additional District Magistrate and by itself it might be of secondary importance.

The offence, however, as defined in s. 120 (*b*) is using obscene or abusive language. None of the witnesses has repeated in Court any particular expression which either of the petitioners is alleged to have used. All that they have said is that the petitioners uttered abuses (*galian*). It is possible that words which the witnesses considered to amount to abuse would not be considered abuse by the Court, and it was necessary for the actual words to be put before the Magistrate before the latter could say that the petitioners had used abusive language. The evidence shows that the petitioners chiefly rendered themselves conspicuous by fighting with other persons over possible customers who were coming out of the Railway Station, and any definite words used by either of them do not appear to have stuck in the memories of any of the witnesses.

It appears that the petitioners behaved in a reprehensible manner but the record of evidence does not support their conviction for using obscene or abusive language upon any part of the Railway. The petition is, therefore, accepted and the petitioners are acquitted. Their fines if paid will be refunded.

K. S. D. *Revision accepted.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 461-B OF 1924.
July 30, 1924.
Present:—Mr. Jurtice Lentaigne.
PARSODAN—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Burma Habitual Offenders' Restriction Act (II of 1919), ss. 4 proviso (a), *7, 13—Criminal Procedure Code (Act V of 1898), ss. 110, 112, 117, 118—Order of restriction—Procedure—Preliminary order, contents of—Period of restriction not specified, effect of—Order under Code, conversion of, to one under Act—Reasons—District Magistrate, duty of.*

Section 117 of the Cr. P. C. lays down the procedure to be followed at the hearing of a case under Chap. VIII of the Code after the preliminary order has been recorded and after the accused has been brought before the Court. The same procedure, with necessary modifications and additions must be followed where it is intended to take preventive action under s. 7 of the Burma Habitual Offenders' Restriction Act, 1919. [p. 34, col. 2.]

Proviso (*a*) to s. 4 of the Burma Habitual Offenders' Restriction Act, makes it essential that the preliminary order required under s. 112 of the Cr. P. C. shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the term

during which a proposed restriction is intended to be in force is not specified in such preliminary order no order under s. 7 of the Act can be passed. [p. 34, col. 1.]

The District Magistrate is the only Magistrate empowered under s. 13 of the Burma Habitual Offenders' Restriction Act to convert an order under s. 118 of the Cr. P. C. to one under s. 7 of the Act, but he has no power to intervene where there has been no proper preliminary order under s. 112 of the Code, and where the original order has not been made under s. 118 of the Code. [p. 34, col. 4.]

Even in the case of an order properly made under s. 118 of the Code, it is the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offenders' Restriction Act. Rule 12 of the Rules framed under that Act indicates the class of reason which would justify such a change. [p. 34, col. 2; p. 35, col. 1.]

Criminal revision from an order of the Sub-Divisional Magistrate, Thayetmyo, in Criminal Miscellaneous Trial No. 37 of 1924.

Messrs. *Keith* and *Young*, for the Petitioner.

JUDGMENT.—The Sub-Divisional Magistrate of Thayetmyo has passed an order directing that the applicant, Parsodan, be restricted to the Town of Allanmyo for one year under s. 7 of the Burma Habitual Offenders' Restriction Act, 1919, and that he do report once in every three days at 9 A. M. to the Police Station at Allanmyo. The applicant, who is the nephew of a wealthy mill-owner, appealed against that order to the District Magistrate, but his appeal was dismissed, and he now applies that such order be revised by this Court.

On a perusal of the Sub-Divisional Magistrate's record, it is obvious that the orders must be set aside, in any case, on the technical ground that the Magistrate has failed to comply with the procedure specifically prescribed for such a proceeding, because the preliminary order, dated the 27th March 1924, did not comply with the provisions of proviso (*a*) to s. 4 of the Burma Habitual Offenders' Restriction Act, 1919. That proviso makes it essential that the preliminary order required under s. 112, of the Cr. P. C. shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the additional requirement, as to the term during which a proposed restriction is intended to be in force, is not specified in such preliminary order, no order under s. 7 of the Act should be passed. A persual of the proceedings show that the defence was materially misled by this omission, because no attempt was made to produce evidence on the question of restriction; whilst several witnesses expressed their willingness to become sureties for the good behaviour of Parsodan.

It is quite true that the record now commences with a formal order which, if read with the preliminary evidence would purport to be a compliance with the provision of the proviso in question; but such order is dated the 3rd April 1924, and is, therefore, subsequent in date to the recording of all the defence evidence on the 1st and 2nd April. Likewise, all the prosecution evidence had been previously recorded on the 29th March.

The order, as passed on the 27th March, which was really the order on which the proceedings were initiated, appears on the reverse of page 10 of the record, and from its wording, it suggests that it is an order under s. 110, cl. (*f*) of the Cr. P. C.; but it is not even a proper order for that purpose in so far as it does not state the amount of the bond to be executed, or the term for which the bond is to be in force, as required under the provisions of s. 112 of the Cr. P. C.

Section 117 of the Cr. P. C. shows clearly the procedure that is contemplated at the hearing of the case after the preliminary information has been recorded, and after the accused has been brought before the Court; and the same procedure, with necessary modifications and additions, must be followed, where it is intended to take preventive action under s. 7 of the Burma Habitual Offenders' Restriction Act, 1919. As the proper preliminary procedure has not been adopted prior to the recording of the evidence for the prosecution and for the defence, the entire proceeding must be treated as irregular.

Section 13 of the Burma Habitual Offenders' Restriction Act, 1919, cannot be relied on as justifying the special procedure of this case, because the District Magistrate is the only Magistrate empowered under that section, and even the District Magistrate could not have intervened in the present case unless there had been a proper preliminary order and unless the Sub-Divisional Magistrate had also previously passed his order under s. 118 of the Code. In such a csse, it would be the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offenders' Restriction Act, 1919;

and r. 12 of the Rules framed under that Act indicates the class of reason which would justify such a change.

I may add, however, that, even if the proper preliminary order had been passed in this case, and even if the various allegations made against Parsodan are true, it is open to question whether this is the class of cases to which the Burma Habitual Offenders' Restriction Act, 1919, is intended to apply. It is not suggested that Parsodan goes out of the local area in which he lives for the purpose of committing breaches of the peace in other local areas, but merely that he worries certain people in the local area in which he lives, because he is said to be a bully. It is, therefore, difficult to see any possible object in the order except to deport him from Ledaingzin, because he has made himself objectionable to certain residents of that place. Likewise, it is difficult to see what useful public purpose would be served by an order expressly prohibiting him from moving into other areas where, he would not be likely to do any harm, or by such operation of such an order in presumably curtailing his means of livelihood as a broker to his uncle's cotton mill. Moreover, the suggestion, that the order restricting him to the Town of Allanmyo will permit him to act as a cotton broker to his uncle's cotton mill at Ledaingzin on the Thayetmyo side of the river, appears to overlook the difficulty of a broker taking orders from his master, or bringing samples to his master, or his supervising deliveries of cotton to his master's mill, if he is not permitted to go to his master's mill. I notice, however, a later passage in which the Magistrate states that :—"I decided that accused ought to be restricted in Allanmyo for one year. He is not so very far from his home and can still carry on his business *there*." I am not sure whether the word "there" is intended to refer to "home" or to "Allanmyo." If the latter is the intended meaning the above points require consideration, but, if the former is the intended meaning, it is not clear who is to give Parsodan his daily passes over to Ledaingzin in order to enable him to carry on his business *there* or how this modification of the scheme of the Act is to be worked.

The case has other peculiar features because the action under the preventive sections was initiated on the formal complaint of a private individual; no Police Officer has been examined, and there are alleged to be cross cases in the Courts, and some suggestions of stone throwing by both sides. It appears to be assumed that there is only one bully, and that there is only one side to some incidents which may be only the prosecution version of incidents connected with a series of squabbles, the details of which have not been disclosed to the Court. It is, however, unnecessary to discuss the merits of this evidence at this stage, because the order must be set aside on technical grounds.

For the above reasons I must set aside the order of restriction passed against Parsodan without the proper procedure having been complied with.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 7 OF 1923.
January 26, 1923.
Present :—Mr. Justice Ross.
KABIR SHAH—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 562—Receiving stolen property, offence of—Section, whether applies.

Section 562 of the Cr. P. C. cannot be applied in a case under s. 411, Penal Code. [p. 36, col. 2.]

Criminal revision from a decision of the Sub-Divisional Officer, Monghyr, dated the 19th of December 1922, confirming that of the Sub-Deputy Magistrate, Jamui, dated 24th November 1922.

Mr. *G. C. Pal*, for the Petitioner.

The Government Pleader, for the Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application on behalf of one Kabir Shah who has been sentenced to three months' rigorous imprisonment on conviction on a charge under s. 411 of the Indian Penal Code. The case for the prosecution is that the accused was found selling a bullock belonging to the complainant for a sum of Rs. 55. The defence was that the bullock had grazed the petitioner's field and that he was taking the animal to the pound when the complainant's party met him on the way and asked him to release the bullock and on his refusal to do so they took him to the Police Station. The grounds for the application are that the judgments of the Courts below are not in accordance with law ; that the

defence evidence is reliable and that in any case in view of the age of the accused the Magistrate ought to have proceeded under s. 562. It is stated in the application that the appeal was transferred to the file of the Sadar Sub-Divisional Magistrate of Monghyr and that the petitioner was not aware of the transfer and on the date fixed the Sadar Sub-Divisional Magistrate called out the case and dismissed the appeal and on the petitioner's Pleader coming to know of it he asked the Sub-Divisional Magistrate to hear him in support of the appeal but that was refused. There is no answer to this statement in the Magistrate's explanation. But I do not see that the Magistrate could have done anything in the matter. His judgment is to the effect that "the appellant was absent and unrepresented; that he had been through the judgment and the whole record and the petition of appeal and could see no substance in any of the grounds of appeal. The case was perfectly a clear one under s. 411 of the Indian Penal Code and was proved by a mass of reliable evidence." If this judgment was signed by the Magistrate before the Pleader appeared I do not see that the Magistrate could have done anything in the matter. The learned Vakil for the petitioner, however, requested me to go through the evidence myself and consider the case on its merits. I have done so and can see no reason to doubt the correctness of the conviction. It is not denied that the bullock was the property of the complainant and this has been amply proved. The evidence of Nilkant Sahu, Dalip Sahu and Punit Sahu proves that the petitioner was trying to sell the complainant's bullock. Somar Sahu proves that the accused gave conflicting accounts of his residence. Dwarka Singh, the *Daffadar*, proves that he attempted to escape when the bullock was identified as belonging to Iswar Singh. Two witnesses were examined by the defence to prove that the field of the accused was grazed. These are both boundary witnesses but one of them has enmity with the owner of the bullock and the evidence does not seem to me to be of weight. But even if it was true, the fact that the field of the accused was grazed is no justification for his attempting to sell the bullock. The two witnesses who say that the accused was taking the bullock to the pound are men of no substance and the evidence of the Police Officer who investigated the case shows sufficiently that this part of the defence is untrue. I hold, therefore, that the conviction of the accused is right.

The question remains as to the sentence. It is strongly urged that in view of the youth of the accused he should be dealt with under s. 562. The Magistrate has recorded his age as 19 years. It is true that this is his first offence and that the petitioner is a young man. But s. 562 cannot be applied in a case under s. 411. The sentence of three months' rigorous imprisonment is not excessive and I must dismiss this application. The petitioner will surrender to his bail to undergo the rest of his sentence.

K. S. D. *Petition dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 480 OF 1924.
May 16, 1924.
Present:—Mr. Justice Campbell.
GOKAL—PETITIONER
versus
PHUMAN SINGH AND OTHERS—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 363, 366—Kidnapping, charge of—Girl found to be over sixteen—Magistrate, duty of.

Where in a case under s. 363, Penal Code, the Magistrate finds that there is *prima facie* sufficient evidence to show that the girl was enticed away as alleged, he should not discharge the accused merely because the girl is not under age, but should examine and decide the question whether the accused can be charged with an offence under s. 366 or some other cognate offence against a female of over sixteen.

Criminal revision against an order of the District Magistrate, Jullundhur, dated 27th February, 1924.

Dr. *Nand Lal*, for the Petitioner.

Mr. *Khazan Singh*, for the Respondents.

JUDGMENT.—Phuman Singh and four others were sent up for trial by the Police for an offence under s. 363 of the Indian Penal Code against the person of *Musammat* Parbhi who was alleged to be under 16 years of age. The Magistrate in a detailed order discharged the accused on the ground that the girl was not proved to be under 16, and the learned District Magistrate refused to order further inquiry. Gokal, the father of the girl, has come to this Court on revision.

The Magistrate began by saying that there was *prima facie* sufficient evidence perhaps to show that the girl was enticed away as alleged. Having said this much he should not have been content merely with finding that the girl was not under-age but he should have examined and decided the question whether the accused could have been charged with an offence under s. 366 or some other cognate offence against a female of over 16. The District Magistrate also appears to have lost sight of this point. I have, however, examined the evidence and have heard Counsel on both sides at some length, and in the particular circumstances I am not prepared to interfere on revision.

The petition is dismissed.

K. S. D. *Petition dismissed.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 158 OF 1924.

August 1, 1924.

Present:—Mr. Justice Venkatasubba Rao.

In re SAMI GOUNDAN—ACCUSED—PETITIONER

Criminal Procedure Code (Act V of 1898), s. 439—Magistrate consulting Appellate Magistrate—Irregularity—Proceedings, whether can be quashed—High Court, power of.

It is extremely irregular for a Magistrate to consult and take the advice of an appellate Magistrate in regard to proceedings pending before himself. [p. 38, col. 2.]

The High Court will not, however, quash the proceedings on revision on that ground alone during the pendency of the trial before the Magistrate, although it has power to do so at any stage on a proper case being made out. [*ibid.*]

Petition, under section 107 of the Government of India Act and ss. 435 and 439 of the Cr. P. C., 1898, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records in C. C. No. 70 of 1924, on the file of the Court of the Stationary Sub-Magistrate, Udumalpet and to quash the proceedings therein.

Mr. *K. S. Jayarama Iyer*, for the Petitioner

Mr. *K. S. Vasudevan*, for the Public Prosecutor, for the Crown.

ORDER.—I am asked to quash the proceedings now pending before the Stationary Sub-Magistrate of Udumalpet. They have taken a course which to me appears very curious; and I think it may be useful to state the facts which have given rise to this application which is made on behalf of the accused. He attended a cattle show at Tiruppur and came back to his village on or about the 11th June 1923. He then presented a complaint to the Village Munsif of Thenkumarapalagam stating that at Tiruppur he lost a revolver, and, owing to the fact that there was a huge crowd in the place, he was unable to give the information to the Police at Tiruppur. The Village Munsif forwarded the complaint to the Sub-Inspector of Police, Udumalpet, who in his turn transmitted it to the Sub-Inspector, Tiruppur. The latter officer investigated the case and arrived at the conclusion that no theft had been committed and that the information given was false. Under s. 173, Cr. P. C. he sent a report of the investigation to the Magistrate of Palladam who also arrived at the conclusion that the case was false. Thereupon the Police Sub-Inspector of Udumalpet filed a charge sheet before the Sub-Magistrate of Udumalpet charging the accused with giving false information to a public servant under s. 182, Indian Penal Code. The Sub-Magistrate addressed a communication dated 8th November, 1923 to the Sub-Divisional Magistrate of Pollachi wherein the facts as stated above and the contention of the accused's Pleader were set forth. The communication contains the following paragraph :—

"Further the language of s. 182, Indian Penal Code, clearly points to the fact that I have no jurisdiction to try the case. For the Sub-Inspector at Udumalpet could not investigate the case even if he had a mind to do. Therefore, he is not the public servant concerned contemplated in the section

* * * *

If you agree with me, I request that the case may be transferred to the Stationary Sub-Magistrate, Palladam for disposal. The records are herewith submitted as noted in the margin".

The Sub-Divisional Officer made an endorsement dated 18th November 1923 which concludes thus :—

"Under the circumstances the only thing that can be done is, I think, for you to return the charge sheet to the Police with an endorsement to the effect that you can take cognizance of the case only on the complaint of the public servant concerned. It will be then for the Police to arrange to have a com-

plaint laid by the public servant concerned before a Court having jurisdiction."

On receipt of this answer the Sub-Magistrate of Udumalpet passed the following order :—

"Returned to the Inspector of Police of Udumalpet. The offence will be taken cognizance of only on the complaint of the public servant concerned".

Notwithstanding the fact that the complaint had thus been returned, the Sub-Inspector of Udumalpet approached the Sub-Divisional Officer directly with a complaint similar to the one that was disposed of by the order to which I have made reference. The Sub-Divisional Magistrate thereupon made the following endorsement on the complaint :—

"Taken on file under s. 182, Indian Penal Code, and transferred to the Sub-Magistrate, Udumalpet, for disposal according to law."

This endorsement bears the date 11th January 1924. Thus we find that the complaint which was once directed to be returned by the Stationary Sub-Magistrate of Udumalpet has come back to him through his superior officer, the Sub-Divisional Magistrate. The Stationary Sub-Magistrate was evidently perplexed as regards how he should act in this matter. On the previous occasion he made a certain order. The complainant is the self same Sub-Inspector of Udumalpet who, the Sub-Magistrate had already decided was not entitled to prefer the complaint. At this stage he seems to have had an interview with the Sub-Divisional Magistrate, and then we find the following communication passing from the Sub-Magistrate to the Sub-Divisional Magistrate dated 6th February 1924 :—

"As per your oral orders with regards to the prosecution of Sami Goundan under s. 182, Indian Penal Code, I beg to submit herewith the records in C. C. No. 70 of 1924 on the file of my Court".

"The Pleader for the accused applied for an adjournment for a month with a view to get orders on some law points involved in the case. I have adjourned the case to 10th March 1924". The Sub-Divisional Magistrate takes upon himself the responsibility of advising the Trial Magistrate, and his direction is embodied in the following order :—

"Returned to the Stationary Sub-Magistrate. The *Queen* v. *Periannan* (1) deals with the point. It says that s. 182 does not apply, where the public servant is only competent to pass on the information. If you can get the text of the ruling you can look it up."

It is at this juncture that Mr. K. S. Jayarama Iyer, on behalf of the accused, has asked me to intervene and stop further proceedings. I do not think a case has been made out for my interference.

The course adopted by the Trial Magistrate as well as the Sub-Divisional Magistrate is no doubt thoroughly unjustifiable. From a conviction by the Sub-Magistrate an appeal lies to the Sub-Divisional Magistrate. It is extraordinary that the Trial Magistrate should have chosen to consult the Appellate Magistrate, and it is equally extraordinary that the latter should have given advice on the matter. These acts are extremely irregular, and, in the interests of the administration of justice, it is hoped that there is no precedent for the very strange course these proceedings have taken. All this is perfectly true. But why should I assume that the Magistrate is now going to decide wrongly ? And if he holds that he has jurisdiction and the order turns out to be wrong, then the accused has his usual remedy. I am not at present concerned with the very grave irregularities these proceedings have disclosed. The only question that now arises is :—Has a case been made out for the intervention of the High Court at this stage ? The Trial Magistrate is bound to give a decision on the points raised before him and I do not see why, I should usurp his function and take upon myself the duty of deciding the question which ought to be decided by the Magistrate. I have not the least doubt that the High Court can quash proceedings at any stage on a proper case being made out. I have reviewed the subject at some length in a judgment I recently pronounced and I do not think any useful purpose will be served by my covering the same ground again. In the present case, I am not satisfied that it is necessary to interfere at this stage in revision. I, therefore, dismiss this petition.

V. N. V. *Petition dismissed.*

(1) 4 M. 241; 1 Weir. 117; 2 Weir 456; 1 Ind. ec. (N. S.) 1004

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 4 OF 1923.
February 27, 1923.
Present :—Pandit Kanhaiya Lal, J. C.
AHMAD HUSAIN—COMPLAINANT—APPLICANT
versus
Musammat RAHIMAN—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 37, 195, 407 (2)—Bench of Honorary Magistrates with Second Class powers—Order granting sanction—Appeal when lies.

An appeal against an order granting sanction to prosecute passed by a Bench of Honorary Magistrates exercising the powers of a Magistrate of Second Class lies to the District Magistrate to whom the Bench of Honorary Magistrates is subordinate.

Sadhu Lal v. *Ram Churn Pasi*, 30 C. 394; 7 C. W. N. 114 and *Eroma Variar* v. *Emperor*, 26 M. 656; 2 Weir 202, followed.

Reference made by the Sessions Judge, Lucknow.

Mr. *Muhammad Yusuf Ali*, for the Complainant.

Messrs. *C. C. Chatterji* and *Iqbal Narain*, for the Accused.

JUDGMENT.—This is a Reference by the Sessions Judge of Lucknow in a case in which the sanction granted by a Bench of Honorary Magistrates exercising the powers of a Magistrate of the Second Class was revoked by the City Magistrate of Lucknow. By Notification No. 4848-VI-353 of the 3rd December 1921, Munshi Muhammad Shafi Khan has been invested with the power to hear appeals from orders and convictions by Magistrates of the Second and Third Classes under s. 407 (2) read with s. 37 of the Cr. P. C. The conferment of that power does not exclude the jurisdiction of the District Magistrate to entertain and hear those appeals, though by a special order the District Magistrate has directed Munshi Muhammad Shafi Khan the City Magistrate, to receive and hear the same.

The question for consideration here is whether for the purposes of s. 195, cl. (7) of the Code an appeal from the decision of a Bench of Honorary Magistrates, exercising Second or Third Class powers, was to be deemed "*ordinarily*" to lie to the District Magistrate, or to Munshi Muhammad Shafi Khan, who was empowered to receive and hear them. The power of the latter officer is obviously an extraordinary power, which he has derived from a particular notification and order. The ordinary power is vested in the District Magistrate; and as held in *Sadhu Lall* v *Ram Churn Pasi* (1) and *Eroma Variar* v. *Emperor* (2) an appeal from an order under s. 195 of the Cr. P. C. should, therefore, be heard by the District Magistrate to whom the Bench of Honorary Mogistrates is subordinate. Sections 405 and 486 of the Code similarly lay down that in certain cases a person aggrieved by an order of the kind therein referred to may appeal to the Court, to which appeals ordinarily lie from the orders of the Court, which passed the order in question. There would be no object in limiting the jurisdiction to the Court to which the appeals would "*ordinarily*" lie, if such cases could be heard even by a Court or officer in which or in whom such jurisdiction is by special order temporarily or otherwise vested. The power conferred on a Subordinate Judge to hear an appeal from the decision of a Munsif under s. 18, cl. (3), of the Oudh Civil Courts Act (XIII of 1879) or s. 21, cl. (4), of the Bengal and Assam Civil Courts Act (XII of 1887) bears no analogy to the present case, because where such a power is conferred on a Subordinate Judge the power is exclusive and the appeals can be preferred only in the Court of the Subordinate Judge and not elsewhere. Section 407, cl. (2), of the old Cr.P.C. similarly directed that where such powers were conferred on a Magistrate of the Second or Third Class, an appeal from an order or sentence passed by him *shall* be preferred to such Magistrate. But by the present Cr. P. C. the word "*shall*" has been replaced by the word "*may*"; and the jurisdiction of the District Magistrate to hear such appeals has been maintained intact. The appeal in question ought, therefore, to have been preferred to the District Magistrate, to whom appeals "*ordinarily*" lie from the decision of the Magistrates of the Second and Third Class, as distinguished from the extraordinary jurisdiction conferred on a particular Magistrate by the notification aforesaid.

The order of the learned City Magistrate is, therefore, set aside and the appeal transferred for disposal to the District Magistrate, Lucknow, where it ought to have been filed in the manner provided by law.

K. S. D. *Order set aside.*

(1) 30 C. 394; 7 C. W. N. 114.
(2) 26 M. 656; 2 Weir. 202.

PATNA HIGH COURT.

CRIMINAL REVISION No. 157 OF 1923.
May 2, 1923.
Present:—Justice Sir John Bucknill, Kt.
GAJADHAR MULL MARWARI AND OTHERS—PETITIONERS
versus
THAKUR SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Numerous claimants for possession—Joint trial, legality of.

There is nothing to prevent a Magistrate from joining together numerous claims for possession in proceedings under s. 145 of the Cr. P. C. and dealing with the matter at one hearing. [p. 40, col. 2.]

The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding. [*ibid.*]

Criminal revision from an order of the Deputy Magistrate, Purnea, dated the 29th January 1923.

Mr. *K. B. Dutt*, for the Petitioners.

The Hon'ble Mr. *Hasan Imam*, for the Opposite Party.

JUDGMENT.—This is an application in criminal revisional jurisdiction asking that an order, made by the Deputy Magistrate of Purnea on the 29th January last, should be set aside. Proceedings were initiated as the result of a Police report between two sets of persons both of whom claimed a large area of somewhat over 300 *bighas* in extent of land which is apparently situated in the domain of the Maharaja of Darbhanga. The first party who are the respondents here claim to be in possession as tenants of the *Raj* from long past, the second party who are the applicants here, claim to have recently been settled on the land by the *Raj*, and to be in possession thereof. Subsequently the Manager of the Darbhanga Raj was added as the third party; and, in this application, he adopted the arguments which have been so ably placed before me by the learned Counsel who appears on behalf of the applicants. Now, the position was, as is often the case in these matters, a somewhat complicated one, for not only were the lands not co-terminus, but they were divided into some 23 different plots. They were not apparently claimed jointly or as a whole by all of the eight parties of the first party; but each party appears, so far as I can gather from their written statements, to have laid claim to be in possession of certain of these plots. One plot, in deed No. 7, it is common ground, was not claimed at all. Now, the matter might, of course, quite well have been dealt with in several different proceedings, that is to say, in proceedings in which one person claiming possession of a specific piece of property might have been joined as the first party and another person also claiming possession of that piece of property might have been joined as the second party. But the Magistrate did not adopt such a course although, as was pointed out by an officer who was deputed to make a report upon the possession of the land, it probably would have been more convenient had he done so. There is, however, it is quite clear, nothing to prevent a Magistrate from joining numerous claims of this description together and in dealing with the matter at one hearing. The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding. Now in this case, the Magistrate went into the matter very carefully and he came to the conclusion, a conclusion which I may say is not and could not well be challenged here, that the second party was not in possession at all of any of the lands in dispute and that the first party was. The objection which is put forward to the order by the second party (the applicants here) is that the Magistrate does not, in his judgment, state which of the first party is actually, according to his finding, in possession of which part of the property in dispute. It is suggested by the learned Counsel who appears on behalf of the respondents (the first party here) that it may be said that those details may be inferred as being included in the Magistrate's decision by reference to the written statements which have been filed. But what I think is a more cogent argument than that is that, so far as the second party is concerned, the allocation to the individuals of the first party of the different pieces of land does not appear to me to be a matter of any concern or moment. So far as the applicants are concerned the result of the Magistrate's decision is simply that he has found that they are in possession. So far as the first party are concerned as between the parties thereto, the question of which piece of the property in dispute is in the possession of which of them is a matter which concerns themselves and not one which immediately in these proceedings in any way concerns now the second party. Under those circumstances although

I must admit that I think it would have been more workmanlike in his judgment to have given clearly the limits of the pieces of the property and the persons in whose possession the Magistrate actually found those pieces of property to lie, I do not think that I can say that the order as it stands is without jurisdiction and I must, therefore, decline to interfere.

With regard to plot No. 7 it is agreed by both parties that this plot was not claimed by either party and ought not to have been included in the proceedings. So far, therefore, as this plot is concerned, the order will be modified by excluding it therefrom.

K. S. D. *Order modified.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 392 OF 1923.
July 24, 1923.
Present:—Mr. Justice Walsh.
NIHAL MUHAMMAD—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

U. P Municipalities Act (II of 1916), s. 178—Alteration in building, scope of—Raising wall above prescribed height—Penalties, when should be inflicted.

The expression "an alteration in a building" in s. 178, U. P. Municipalities Act, includes a part of such building. [p. 41, col. 2.]

To raise a wall above the prescribed height of the building is clearly within the mischief aimed at by s. 178, U. P Municipalities Act. [*ibid.*]

Penalties must be provided and penalty sections must be used for bad cases where the individual has been contumacious and has palpably acted *mala fide*. But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. [p. 41, col. 2; p. 42, col. 1.]

Reference made by the Sessions Judge, Saharanpur.

JUDGMENT.—In dealing with this Reference I am even more handicapped than was the learned Judge. It is really a question of fact. To some extent it is a question for experts. These questions of whether buildings correspond with sanctioned plans, many of which are not too precise or accurate in detail, are sometimes very difficult and require expert evidence and explanation, and I am practically without any material at all. It is impossible to decide between the respective merits and opinions of the Sessions Judge and the Magistrate respectively in this case, in a discussion of plans and erections neither of which I have seen. On three points of principle I can express my opinion. A Municipality taking proceedings for a penalty under this Act, ought to make its sanction and orders or conditions for new buildings or erections so conspicuously clear as to leave no room for controversy. If in a particular case before me as a Magistrate they failed to do so, I should dismiss the complaint. Secondly, the learned Judge is quite right, and the Magistrate should never have allowed the case to proceed before him without the production of the Municipal file. On the other hand I agree with the Magistrate that to erect a wall, which for this purpose must be part of a building and, therefore, a building within the meaning of the section quoted by the learned Judge, is, in my opinion, a material alteration. I think that the expression "an alteration in a building" in s. 178, sub-s. (3) must include a part of such building. The definition in s. 214 of a part of a building lays down what is to be read into this expression when it is used. But it is not inconsistent with a wall supplementary to or accessary to a verandah or balcony or house or other larger building, being in itself a building within the meaning of s. 178. To raise a wall above the prescribed height of the building as provided by the section, would clearly be within the mischief aimed at by the section, and to say that it was only part of the building, when it was the only thing the raising of which mattered to anybody, and therefore, could not be dealt with under the section, would reduce these provisions, which are made for the public interest, to an absurdity. Using the best judgment I can on the materials before me, it seems that the person in question, Nihal Muhammad, either rightly or wrongly did attempt technical breaches. On the other hand I agree with the Sessions Judge that the extent of his breach is very indistinctly made out. In questions of building plans, breaches of sanction and conduct in excess of rights conferred by or permitted by a public authority, the object is to enable the public authority to control streets and buildings under the best expert opinion, and it is not so important to inflict a fine upon the person who has committed a breach as it is to compel him to put his building back in accordance with the plan as sanctioned. Penalties must be provided and penalty sections must be used for bad cases where

the individual has been contumacious and has palpably acted *mala fide*. But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. It seems to me, therefore, that the justice of the case will be met in this way. I reduce the penalty from Rs. 100 to Rs. 5, and I return the case to the Magistrate through the Sessions Judge with the intimation that this order has been passed without prejudice to the right of the Municipality, if so advised, to take such steps as are open to it under the Act to compel Nihal Muhammad to put his building into conformity with the plan originally sanctioned. I regret that I am unable on this latter point to express a more definite opinion. I have had no legal assistance and I do not know whether the Act enables the Municipality to pull down the building or alter anything which has been erected in breach of the sanction. Such a power certainly exists under the Public Health Act and Metropolis Act in England, and I suspect that it must have been provided somewhere in India.

K. S. D. *Sentence reduced; Case remanded.*

MADRAS HIGH COURT.

(CRIMINAL REVISION PETITION No. 389 OF 1924).

CRIMINAL REVISION CASE No. 472 OF 1924.

July 24, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice.

In re CHANLET—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 94—Statements of witnesses at inquest inquiry—Accused's right to copies.

An accused person may be given copies of statements made by witnesses at the inquest inquiry. If the record of the inquest proceedings is in the custody of the Court, the Magistrate may allow certified copies to be given on the application of the accused's Vakil. If the inquest report is not in Court, the Magistrate has power under s. 94, Cr. P. C., to call for it to be produced by the Police.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the order, dated the 2nd July 1924, of the Court of the Chief Presidency Magistrate, Egmore, Madras, refusing copies of the statements of witnesses at the inquest made in Calender No. 7981 of 1924.

Messrs. *K. U. Shama Rao* and *A. S. Natarajan*, for the Petitioner.

The Crown Prosecutor, for the Crown.

ORDER.—There is no objection whatever to the accused being granted a copy of the statements made by witnesses at the inquest inquiry; and if the record of the inquest proceedings was in the custody of the Court, the Magistrate should have allowed certified copies to be given upon the application of the accused's Vakil. If the inquest report was not in the Court; the Magistrate had power under s. 94 of the Cr. P. C. to call for it to be produced by the Police.

The Chief Presidency Magistrate will take back the application and pass the necessary orders.

V. N. V. *Petition granted.*
N. H.

PATNA HIGH COURT.

CRIMINAL REVISION No. 194 OF 1924.

April 30, 1924.

Present:—Mr. Justice Adami and Mr. Justice Sir John Bucknill, KT.

CHHEDI SINGH—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code Act (V of 1898 as amended by Act XVIII of 1923), s. 106—Security for keeping peace—Order, when can be passed.

No order can be passed under s. 106 of the Cr. P. C., 1898, as amended in 1923, where the only section under which the accused are convicted is a section of the Penal Code which is read with s. 149 of the Code. [p. 43, col. 1.]

Criminal revision from an order of the District Magistrate, Shahabad, dated the 21st February, 1924, affirming that of the Sub-Deputy Magistrate, Bhabhua, Second Class, dated the 24th January, 1924.

Mr. *Gour Chandra Pal*, for the Applicants.

Mr. *Muhammad Yusuf*, for the Opposite Party.

JUDGMENT.

Adami, J.—The five petitioners have been sentenced under section 325 read with section 149, Penal Code, to six weeks' rigorous imprisonment each and to a fine of Rs. 50; they have also been bound down under s. 106, Cr. P. C., to keep the peace for a year.

The case proved against these petitioners and found by the lower Courts is that they

were cutting the crop of one Raghunandan Singh and when he went to protest they beat him and Deonandan and caused many injuries on the bodies of these two persons.

The petitioners have been found guilty on the facts by both the Courts below. The only questions that arise before us now are with regard to the order passed under s. 106, Cr. P. C., and with regard to the punishment imposed on the petitioners.

With regard to the order under s. 106 it is quite clear that it cannot be upheld. The amendment to s. 106 by Act XVIII of 1923 has made an order under s. 106 impossible where the only section under which the accused are convicted is a section of the Penal Code which is read with s. 149. The amendment is not very happily worded for it speaks of an offence punishable under s. 149. Now no offence is punishable under s. 149 alone: there must be some substantive offence charged to be read with s. 149.

In the present case the petitioners were convicted under s. 325 read with s. 149, and under s. 106, as it now stands, an order cannot be passed against them under that section.

With regard to the sentence, considering the number of injuries and their severity, caused by the unlawful assembly on the persons of Raghunandan and Deonandan, the sentence of six weeks' rigorous imprisonment and a fine of Rs. 50 each is not too severe even though most of the petitioners are members of one family.

The result is that the order passed under the provisions of s. 106, Cr. P. C., must be set aside but the conviction and sentences passed under s. 325 read with s. 149, Penal Code, must be upheld.

Bucknill, J.—I agree.

K. S. D. *Order modified*

RANGOON HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 15 OF 1924.

July 18, 1924.

Present:—Mr. Justice Duckworth.

H. M. BOUDVILLE—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), s. 497, scope of—Bail in non-bailable cases—Magistrate, powers of—High Court, discretion of.

Section 497 of the Cr. P. C., 1898, as amended in 1923, tends to limit rather than enlarge the powers of Magistrates in granting bail in non-bailable cases. [p. 43, col. 2.]

G. W. Henderson v. *Emperor*, 19 Ind. Cas. 171; 6 L. B. R. 172; 6 Bur. L. T. 73; 14 Cr. L. J. 171, referred to.

The High Court, however, is not limited within the bounds of s. 497, Cr. P. C., and has absolute discretion in the matter, but it is bound to follow the general law as a rule, and not to depart from it, except under very special circumstances, especially so in the initial stages of a case. [p. 43, col. 2; p. 44, col. 1.]

Application for bail.

Mr. *Aiyangar*, for the Applicant.

Mr. *Lutter*, for the Crown.

JUDGMENT.—This is an application for bail, pending his trial before the Sessions Court, Mandalay, on three charges under s. 409, Indian Penal Code, by the applicant, H. M. Boudville.

He is an Anglo-Indian, aged 53.

He alleges that he is sickly, as he suffers from Asthma, but there is not even an affidavit to this effect, and the fact is not admitted by the Crown.

There is evidence, which, if believed, would warrant his conviction. This is clear from the committal proceedings.

It would be improper for this Court to express any further opinion upon the merits.

The offences, with which Boudville is charged are punishable with transportation for life, and s. 497, Cr. P. C. must be read, as amended in 1923.

The case of *G. W. Henderson* v. *Emperor* (1) must be referred to. It is true that that decision was based on the unamended ss. 497 and 498, Cr. P. C., but, the principles there laid down by Sir Charles Fox, C. J., still appear to me to hold good. In fact, the amended s. 497 seems to me, in the case of offences punishable with transportation for life and death, to limit, rather than enlarge, the powers of Magistrates in granting bail in non-bailable cases. The principle enunciated by Sir Charles Fox is that in deciding questions of granting bail to persons accused of non-bailable offences, *Magistrates* must follow the provisions of s. 497, Cr. P. C., 1898. But a *High Court* is not limited within the bounds of that section. It has absolute discretion in the matter. As however, the Legislature has placed the initial stage of dealing with crimes with Magistrates, and having, in effect, enacted that persons accused of non-

(1) 19 Ind. Cas. 171; 6 L. B. R. 172; 6 Bur. L. 73; 14 Cr. L. J. 171.

bailable offences shall be detained in custody, except when there are, in the opinion of the Magistrate dealing with the case, no reasonable grounds for believing that the accused has committed the offence charged against him, a High Court is bound to follow the general law as a rule, and not to depart from it, except under very special circumstances, especially so in the initial stages of a case. Here the Committing Magistrate, in committing Boudville to stand his trial, has strongly expressed his opinion that there are reasonable grounds for believing in his guilt. The learned Sessions Judge has also, for reasons given in his order, dated July 6th, 1924, rejected an application for bail. There are quarters in the Mandalay Central Jail set apart for European prisoners. There is no proof that applicant's health will suffer from custody. The case does not appear to be one in which his Pleader will require careful instructions about accounts. I see no special reasons for granting bail.

The application is, therefore, dismissed.

K. S. D. *Application dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 291 OF 1922.

June 29, 1922.

Present:—Justice Mr. Lindsay.

RAM SINGH—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 224, 323—Assaulting Police Constable—Accused not in lawful custody—Private defence, right of.

Where a person assaulted a constable who had wrongfully arrested him, in order to effect his escape, and it did not appear that the constable was acting in good faith under colour of his office:

Held, that the constable was guilty of wrongful confinement and as against him the accused was entitled to the right of private defence.

Criminal revision from an order of the Sessions Judge, Moradabad, dated the 3rd May 1922.

Mr. *Nihal Chand*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—It appears that the applicant Ram Singh was convicted in the Court of a Magistrate of an offence under s. 224 of the Indian Penal Code, that is to say, the offence of escaping from lawful custody.

The finding of the learned Sessions Judge in appeal is that Ram Singh was not in lawful custody. He has, therefore, acquitted him of the offence under s. 224 of the Indian Penal Code, but has convicted him under s. 323 of the Indian Penal Code of the offence of assaulting the constable who arrested him.

The story which was told regarding this arrest was that the constable had been deputed by the Station Officer to arrest Ram Singh in connection with a charge of dacoity. The learned Sessions Judge's finding is that it is not proved that the Station Officer did depute this constable for this purpose. He did not believe the statement of the Station Officer in this respect.

It is argued, therefore, that the learned Judge ought not to have convicted Ram Singh under s. 323 but ought to have given him the full benefit of the order of acquittal.

It seems to me that the learned Sessions Judge's finding that Ram Singh was not in lawful custody is correct. It follows, therefore, that the constable was guilty of the offence of wrongful confinement and obviously as against him Ram Singh would be entitled to right of private defence. On the other hand the learned Assistant Government Advocate referred me to s. 99 of the Code, but here I think the findings of the Judge prevent my coming to the conclusion that the constable was acting in good faith under colour of his office. I allow the application, therefore, and set aside the conviction and sentence under s. 323. The accused Ram Singh is acquitted and released.

K. S. D. *Application allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 510 OF 1923.

(CRIMINAL REVISION PETITION NO. 402 OF 1923.)

January 15, 1924.

Present:—Mr. Justice Odgers.

SANKAMMA—COMPLAINANT—PETITIONER

versus

GOVINDA CHETTY—ACCUSED—RESPONDENT.

Penal Code (XLV of 1860), s. 500, Exception 9—Defamation—Lawyer's reply notice—Allegations of immorality—Common interest—Privilege.

The complainant served a lawyer's notice on the accused, her deceased husband's nephew, charging him with theft and criminal breach of trust with regard to properties left by her deceased husband and threatening him with civil and criminal proceedings. The accused in reply to the notice sent a letter, also through his lawyer, alleging that the complainant was living an adulterous life, that her daughter was not born to her husband, that she had been discarded by him during his lifetime and that she had lost all right to his property. He also set up a Will by the deceased in his favour in which the testator had stated that there was none to protect him. On a charge of defamation :

Held, (1) that there was a matter of common interest between the complainant and the accused relating to the title to property left by the deceased giving rise to qualified privilege ; [p. 46, col. 1.]

(2) that there was no malice or want of *bona fides* or presence of improper motive in the accused when he gave instructions to his Vakil to write the letter ; [*ibid.*]

(3) that the matter fell within Exception 9 to s. 499, Penal Code, and was not defamatory. [*ibid.*]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Third Presidency Magistrate, George Town, dated 9th July 1923 in C. C. No. 3019 of 1923.

Mr. *A. Venkatrayaliah*, for the Petitioner.

Mr. *O. Thavikachalam Chettiar*, for the Respondent.

ORDER.—This is a revision against the acquittal of one Govinda Chetty against whom one Sankamma made a complaint under s. 500, Indian Penal Code. She complained that Govinda Chetty had defamed her by certain allegations made in a letter written by Mr. T. S. Rajagopala Iyer, High Court Vakil, on his instructions on the 30th November, 1922. It is not necessary to set out the letter at length, but the allegations of defamation shortly are, (1) that she was living an adulterous life, (2) that she was discarded by her deceased husband owing to her conduct, (3) that her daughter was not the daughter of her husband, (4) that she had never lived with the deceased for about 25 years. The learned Magistrate came to the conclusion on hearing the evidence that the matter fell within Exception 9 to s. 499, Indian Penal Code and discharged the accused.

I have heard the criminal revision case and it has been strongly urged before me that the Exception does not apply, in that the expressions contained in the letter which I have referred to are altogether too strong for the occasion ; that is to say, that if there is any qualified privilege attached to the letter at all, that privilege has, as the law says, been exceeded by express malice on the part of the accused, and the question I have got to decide is whether that is so or not ? The accused began, to justifiy his letter by trying to prove that his allegations were true, but for one reason or another he abandoned that course and sought refuge no doubt on good advice in Exception 9 which is sometimes referred to in the English books as matters affecting the common interest of both the complainant and the accused and hence giving rise to a qualified privilege. There are serveral points to notice about the present petition. The first is that the alleged defamatory letter was written in reply to a letter of Mr. V. Visvanatha Sastri, High Court Vakil, on behalf of the widow Sunkamma. There is no doubt that at the date of the deceased Sankaralingam Chetty's death, she was not living with him, and I am disposed to think that she had not been living with him for a very considerable time. It is pointed out that in a deposition given by her husband in 1906 he said that she had obtained maintenance against him and had put him in jail because he failed to carry out the order of the Court. But he also deposed that that took place 8 or 10 years before 1906 and that after that they had lived happily. Of course 1906 is a long time ago, and it is perfectly certain that not only was the widow not living with her husband at the time of his death but she did not attend the *karumantharam* ceremony to which the learned Magistrate refers as being highly significant of the terms on which the deceased and his wife were. There is evidence that the neighbours of the deceased thought or had reason to believe that she had left him sometime ago. In 1917 by Ex. I the deceased executed what he calls a deed of settlement in favour of the accused who is his brother's son. The deceased therein recites that he is 70 years old, that he had neither female issue nor male issue, and none to protect him. The letter in question containing the defamatory statement was written in reply as stated to another letter which undoubtedly was strong in its language. It charges the brother's sons among whom is the accused with being guilty of theft and criminal breach of trust with regard to the properties left by the deceased. The letter concludes by saying that the widow will be under the painful necessity of filing civil and criminal proceedings against him in respect of the articles, bonds and

cash without any further notice whatsoever. That provoked the defamatory letter referred to, and the question is whether the expressions in that letter are in fact under the circumstances of the case, justified or not. It will be noticed that the deceased having died without any issue, his widow would be his heir unless the right to succession could be displaced, for instance, by establishing want of chastity, etc. This was very important from the point of view of the brother's son who was propounding the Will, Ex. I, left by the deceased, in his favour by the deceased by which he was consituted his heir ; so that as pointed out by Mr. Thanikachellam Chetty for the accused he had a direct interest in putting forward these allegations against the widow when she directly raised the allegation in the letter of her Vakil that she was entitled to all the properties of the deceased as being his widow. I must not for a moment be thought to be approving of the letters passing between the lawyers couched in this kind of langauge. I very strongly deprecate it. Mr. Venkatarayaliah with great frankness and most properly admitted that the learned Vakil who wrote the letter under discussion could in no way be held personally responsible, so that the case does not fall under the class of cases which you get in the the English Law where a Solicitor writes a letter in terms not necessary to protect the client's interest and has sometimes been held personally responsible for the defamatory words used in it. In this case it is assumed for all purposes that the actual expressions used were all authorised by the clients. Assuming, as I think one must, that this was a matter of common interest between the complainant and the accused relating to the title to property left by the deceased, the question is, can one under the circumstances of this case impute what we call malice or want of *bona fides* or the presence of any improper motive to the accused when he gave instructions to write the letter under discussion ? It is admitted that there is no previous ill-feeling between the people. I am not persuaded on the evidence that the accused knew that his allegations were untrue. In fact as far as I can judge from the evidence putting oneself in the position of a man writing at that time, I am inclined to think that he really believed that what he caused to be written was true in all material particulars. I, therefore, cannot say that in the language of the cases the terms employed by the accused were much too violent for the occasion and circumstances are uttery disproportionate to the facts nor can I say that improper motive were unnecessarily imputed or anything of that sort to the widow. I think that it was to the accused's interests to get his case on paper at the earliest posisible opportunity in order that when the litigation as to the Will came along, it should not be said that he set up these allegations against the character of the widow at the last minute. I think, therefore, that he was within his rights in causing this letter to be written. I should have added where I was discussing the devolution to the widow of the property of the deceased man that of course if the daughter was illegitimate she would also be debarred from the inheritance. For these reasons I think that on the whole the learned Magistrate was right, and the criminal revision case must be dismissed.

V. N. V. *Revision dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 554 OF 1923.

October 9, 1923.

Present:—Mr. Justice Sulaiman.

UTTAM CHAND SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 112, 117, 123--Security proceedings—Strict compliance with law essential—Procedure—Rigorous imprisonment in default of security, legality of.

The provisions of s. 112 of the Cr. P. C. ought to be complied with strictly. [p. 47, col. 1.]

A case under s. 107 of the Cr. P. C. should not be treated as a warrant case. [*ibid.*]

An order directing that in default of furnishing the required security the accused should undergo rigorous imprisonment is altogether illegal. [*ibid.*]

Criminal Reference made by the District Magistrate, Ballia.

JUDGMENT.—In this case Uttam Chand Singh has been ordered to furnish under s. 107 of the Cr. P. C. a bond and two sureties to keep the peace for one year or in default to undergo rigorous imprisonment for that period.

The proceedings in this case appear to have been very irregular from the very start.

Originally a complaint under s. 107 of the Cr. P. C. was filed against Uttam Chand Singh but it was dismissed. Without any fresh complaint, or, any report by the Police, a case under that section was started on the 12th of May 1923 under a *robkar* purporting to have been based on, some Police report. No such Police report is on the file, nor is there any order in writing setting forth the substance of the information received and other particulars as required by s. 112 of the Cr. P. C. The provisions of that section ought to have been complied with strictly.

Another irregularity was that although under s. 117 (2) of the Code, the enquiry should as nearly as practicable have been in the manner prescribed for conducting a charge and recording evidence in summons cases, the case was treated as a warrant case.

The final order directing that in default of furnishing the required security the accused should undergo rigorous imprisonment for one year was also altogether illegal. Section 123 (5) most clearly provides that imprisonment for failure to give security for keeping the peace shall be simple. This provision was fully ignored, it may have been under an oversight.

In view of all these circumstances I set aside the order under s. 107 passed against Uttam Chand Singh and direct that securities, if furnished, should be cancelled, and the accused, if in jail, should be released.

K. S. D. *Order set aside.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

October 23, 1924.

Present :—Lord Atkinson, Lord Sumner and Sir John Edge.

BARENDRA KUMAR GHOSE—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 114, scope of—Act done in furtherance of common intention—All present, whether liable—Abetment—Presence of abettor at commission of crime—Criminal trial—Appeal to Privy Council—Special leave—Letters Patent (Cal.), cl. 41.

Section 34 of the Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. [p. 52, col. 1.]

Section 114 of the Penal Code is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition. The section is evidentiary not punitory. [p. 52, col. 2.]

Abhi Missir v. *Lachmi Narain*, 27 C. 566; 4 C. W. N. 546; 14 Ind. Dec. (N. S.) 372.

Points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave to the Privy Council. [p. 49, col. 2.]

Appeals in criminal matters under cl. 41 of the Letters Patent (Calcutta) should not be encouraged where no point of law has been raised by the Trial Judge nor will an application for special leave to appeal as an alternative be granted as a matter of course. [p. 56, col. 1.]

Obiter.—Cl. 41 of the Letters Patent (Calcutta) is not applicable to a case where any point or points of law have been reserved for the opinion of the High Court, by an authority outside the High Court; *viz.*, by the Advocate-General of Bengal.

Appeal from the judgment of the Calcutta High Court, dated the 26th September 1923, reported as 81 Ind. Cas. 353.

Messrs. *L. De Gruyther K. C.* and *W. Wallach*, for the Appellant.

Messrs. *A. M. Dunne K. C.* and *K. Brown*, for the Crown.

JUDGMENT.

Lord Sumner.—This was an appeal from the High Court of Calcutta brought in a criminal matter under Art. 41 of the Letters Patent. The Trial Judge reserved no question of law and the case came to the High Court on the certificate of the Advocate-General of Bengal under Art. 26. Objection was taken at their Lordships' bar to the competence of this appeal on the ground that Art. 41 does not give an appeal to their Lordships from the determination of the High Court, unless the case came before that Court at the instance of the Trial Judge. Thereupon the appellant applied in the alternative for special leave to appeal. The materials being the same in both proceedidgs though the questions arising are not identical, their Lordships were able to decide the appeal and the application together and, in view of the gravity and urgency of the case, they dispensed with a formal petition for special leave to appeal. After hearing the arguments, they announced last July the substance of the advice, which they would humbly tender to His Majesty, namely, that the appeal should be dismissed. At the same time their Lordships intimated

that they were unable to advise that the application for special leave to appeal should be granted. Their reasons are as follows:

On August 3rd, 1923, the Sub-Postmaster at Sankaritolla Post Office was counting money at his table in the back room, when several men appeared at the door which leads into the room from a courtyard, and when just inside the door, called on him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places, in one hand and near the armpit, and died almost at once. Without taking any money the assailants fled, separating as they ran. One man, though he fired his pistols several times, was pursued by a post office assistant and others with commendable tenacity and courage, and eventually was secured just after he had thrown it away. This man was the appellant; the others escaped. The pistol was at once picked up and was produced at the trial.

There was evidence for the prosecution, such as the Jury was entitled to act upon, that three men fired at the Postmaster, of whom the appellant was one; that he wore distinctive clothes by which he could be and was identified; and that while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the door-step in the courtyard. This man was armed but did not fire.

Except for a doubt as to the total number of the men concerned in the attack, most of the witnesses concurring in the above statement, while ultimately the prisoner said they were only three in number, the evidence of the eye witnesses was consistent and uniform. The pistol thrown away by the prisoner was a German automatic self-ejecting pistol. An ejected shell was found just inside the room near the door, and it fitted this pistol. The bullet which killed the Postmaster was cut out of his back and was produced, and it also fitted the ejected shell and the pistol carried by the prisoner. This bullet was distinctly of German make. It was not, however, conclusively proved that no other assailant had a similar pistol to that which the prisoner had, or used a similar bullet to that found in the deceased.

The appellant was defended by five counsel. A few of the witnesses were cross-examined by them but very sparingly, and only to test their adherence to their evidence given in examination in chief. Most of them were not cross-examined at all. No affirmative defence was indicated in any part of this cross-examination and no witnesses were called on the part of the prisoner, but after the case for the prosecution was closed, the prisoner made an oral statement, which, of course, was not on oath and was not cross-examined too. Here for the first time some foundation was laid, though vaguely, for what eventually became the case raised on this appeal.

According to the prisoner, he was the man outside the room. He said that he stood in the courtyard and was very much frightened. The prosecution had left his purpose to be inferred from his position and his action. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the Crown. What was singular was the prisoner's own reticence on these matters. He dealt with none of them. Why he was there at all and why he did not take himself off again he did not say, nor did he even indicate his precise position in the yard. Accordingly the evidence called by the prosecution, that the man outside was close to the men inside and, being visible by those within, would also see what went on within, was never challenged at all. The appellant's account was: "I took my stand on the portico"—this ran round two sides of the courtyard and according to the plan is consistent with a position on the steps of the doorway:—

"After a minute I heard two sounds, *dum dum*: when I heard the sounds I was confused. I perspired heavily and could not remember anything. Afterwards I heard *chor chor*; not finding the others there, I ran away."

Finally he said (and it was to this that the only affirmative part of his Counsel's cross-examination was directed).—

"I have never assaulted anyone in my life. This is my first offence. I throw myself on the mercy of the Court. I was married hardly three months ago."

The charges preferred were murder under s. 302 of the Indian Penal Code, and voluntarily causing hurt under s. 394, while jointly concerned in an attempted robbery. To the first charge he pleaded not guilty. To the second he pleaded guilty of robbery. Their Lordships do not pause to remark on

the inconsistency of this latter plea with the argument subsequently advanced in the High Court. There were further charges of attempted murder and attempt to commit culpable homicide, which were abandoned by the prosecution at the outset.

The learned Trial Judge, Page, J., directed the Jury carefully, upon the footing, that the prisoner was one of the men inside the room, that he was one of those who fired, and might be the man who fired the fatal shot, and that in any event, if they were satisfied in terms of s. 34 of the Code, that the Postmaster was killed in furtherance of the common intent of all, then the prisoner was guilty of murder, whether he fired the fatal shot or no. He did not deal with the prisoner's statement until the prosecuting Counsel reminded him of it, when he told the Jury that its weight was for them, but it formed part of the evidence which they had to consider. He gave no express direction on the subject either of attempted murder or of abetting murder. It appears to their Lordships that, as the whole summing up was rested, in sentences more than once repeated, upon the prisoner being one of those inside the room and on his firing at the Postmaster, the direction to the Jury to take his statement into account might well be understood as impliedly instructing them to acquit, if they believed his whole statement as to his action and his connection with the murder to be true, since in that case the conditions would not be fulfilled on which throughout the summing-up it was stated that the guilt of the accused must rest. This view, however, was not put forward in the Court below, and their Lordships are quite satisfied to deal with the matter as it was presented to the High Court upon the question of misdirection.

The note of the defence submitted, which was taken by the Trial Judge is as follows:—"No evidence of murder, because no evidence that prisoner killed him." This he overruled, saying quite rightly "there is evidence that accused fired the fatal shot." If the defence subsequently raised before the High Court had been put before him intelligibly, it should have been a submission that the Jury ought to acquit if they thought that the accused either fired and missed or did not fire at all, and that they must not find that he fired the fatal shot without weighing the fact that the prosecution had not actually proved that neither of the other men fired from a German automatic pistol like the prisoner's though there was evidence making it improbable that they were armed as he was. As to the subsequent defence resting on abetment it does not appear to have been thought of at all. It would be a circumstance proper to be considered on the application for special leave, that, neither in cross-examination nor in argument before the verdict was found, was any point about abetment taken, nor was even any point as to an attempt clearly urged. It was not too late to have amended the charge and to have given further directions to the Jury (Cr. P. C., s. 227) and points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave. In the present case, however, their Lordships think it unnecessary to dwell further on this matter.

In the period of over sixty years which have elapsed since the Indian Penal Code came into force, a very large number of cases have, of course, been reported, in which joint commission of crime, attempts to commit crime, and abetments of crime, in many and very various forms, have been the subject of judicial rulings. With insignificant exceptions the Code has been interpreted in all the Indian Courts down to a few years ago in conformity with the English law existing in 1860.

The learned Judges in the High Court examined the authorities so fully and exhaustively that it would serve no good purpose if their Lordships were to discuss them again *seriatim*. The chief authority for the appellant is a decision of Stephen, J., in 1914, in *Emperor* v. *Nirmal Kanta Roy* (1), a case in which two men, obviously acting in concert, having both fired at a policeman, one hitting and killing him and the other failing to hit him at all, that learned Judge directed the acquittal of the latter, who was charged under ss. 302/34 with murder. He held that, applying s. 34 to the case, the criminal act was the killing of the policeman, that only one man killed him, not both, that all the prisoner did was to try to kill him, and that the criminal act charged was not done by several persons at all, that is to say, *was not under the circumstances a joint act*, and he added "the only act he can be liable for under the section is

(1) 24 Ind. Cas. 340; 41 C. 1072; 18 C. W. N. 1023; 15 Cr. L. J. 460.

one done by several persons of whom he was one, that is by the man who escaped and himself. .....In order to make the accused liable for murder under s. 34 it would be necessary to say that an offence and an attempt to commit it are the same 'act,' which seems to me not to be the case." This view of the meaning of s. 34 was adopted in *Emperor* v. *Profulla Kumar Mazumdar* (2), the High Court observing that "s. 34 does not create an offence, the provisions thereof merely lay down a rule of law". Reference may also be made to *Chandan Singh* v. *Emperor* (3), *Harnam Singh* v. *Emperor* (4) and *Bakal Singh* v. *Emperor* (5).

Before 1914 there seems to have been no case in Bengal in which the view of s. 34 formulated by Stephen, J. in *Nirmal's case* (1) was adopted by any Judge, while the cases to the contrary are numerous. It is evident that till then the view now contended for had a very small place in the voluminous body of criminal decisions, and it has since been as often criticised as followed and more often than not has been disregarded altogether. This is so in all the Courts in India. The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in cirminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact but the rule is one that has never left the Indian Courts in much doubt. As illustrations of the course of decision, reference may be made to the cases of *Queen-Empress* v. *Jan Mahamed* (6), *Queen-Empress* v. *Mahabir Tiwari* (7), *Keshwar Lal Shaha* v. *Girishchundar Dutt* (8), *Gouridas Namasudra* v. *Emperor* (9), *Kanhai* v. *Emperor* (10) and *Manindra Chandra Ghose* v. *Emperor* (11).

The appellant's argument is, in brief, that in s. 34 "a criminal act," in so far as murder is concerned, means an act which takes life criminally within s. 302 because the section concludes by saying "is liable for that act in the same manner as if the act were done by himself alone" and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim. Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for if a man has done something criminal in itself he must be punishable for it, and none-the-less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act which one could do by himself. Criminal action which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment. By way of illustration it may be noted that, in effect, this means, that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but if one bullet only grazes his ear, one of them is not a murderer and each being entitled to the benefit of the doubt all must be acquitted of murder unless the evidence

(2) 74 Ind. Cas. 267; 50 C. 41; 24 Cr. L. J. 763; (1923) A. I. R. (C.) 453.

(3) 43 Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150.

(4) 52 Ind. Cas. 395; 21 P. R. 1919 Cr.; 20 Cr. L. J. 635.

(5) 52 Ind. Cas. 791; 24 P. R. 1919 Cr.; 20 Cr. L. J. 711.

(6) 1 W. R. Cr. 49.

(7) 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876.

(8) 29 C. 496.

(9) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186.

(10) 21 Ind. Cas. 657; 35 A. 329; 11 A. L. J. 752; 14 Cr. L. J. 609.

(11) 23 Ind. Cas. 1002; 41 C. 754; 18 C. W. N. 580; 15 Cr. L. J. 402.

inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough: there must be proved an act, which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that if this construction is adopted it defeats itself for several persons cannot do the same act as one of them does. They may do acts identically similar but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another or the same as that other's act. The result is that s. 34, construed thus, has no content and is useless. Before the High Court the appellant's Counsel put an illustration of their own, which may be taken now because, the whole range of feasible illustrations being extraordinarily small this one is equally exact in theory and paradoxical in practice. Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under s. 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, is done by himself alone is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer, death separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does: it merely makes the act for which he would be liable if done by himself alone, an attempt to murder and not an act of murder and accordingly the case is not an illustration of s. 34. To this the reply was made before the High Court that in a case where death results from the cumulative effect of different acts, each actor must be deemed guilty of murder, though whether because it cannot be shown that it was not his act alone which took the victim's life or because the absurdity of the argument had to be disclaimed somehow, it is not easy to determine. Yet absurd it is, and absurd it must remain. "Where two men have done a man to death," said the learned Counsel (Record 127) "your Lordships will not inquire into the individual effect of each blow but the point I am insisting on is that the doing to death must have been the joint acts of both." This concession, rational enough in itself, is another way of saying that the section really means "when a joint criminal act has been done by the acts of two persons in furtherance of a common intention each is liable for that joint criminal act as if he had done it all by himself." On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself each can say that the prosecution has not discharged the onus for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different Juries, either Jury or both taking the view that the violence used by the man before them killed the man whom they knew to be dead, might return unimpeachable verdicts of murder, and then both men would be justly hanged.

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of s. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By s. 33 a criminal act in s. 34 includes a series of acts and further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By s. 37 when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door it is to be remembered that in crimes as in other things "they also serve who only stand and wait." By s. 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that

act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate facts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all) makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

The other part of the appellant's argument rests on ss. 114 and 149, and it is said that, if s. 34 bears the meaning adopted by the High Court, these sections are otiose. Section 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, *viz.*, one of those named in s. 141 [*Queen* v. *Sabid Ali* (12)] and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of s. 34, is replaced in s. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but s. 149 cannot at any rate relegate s. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

(12) 11 B. L. R. F. B. 347 at p. 359; 20 W. R. Cr. 5.

As to s. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; *Abhi Misser* v. *Lachmi Narain* (13). Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by s. 114 brings the case within the ambit of s. 34.

The prosecution gave no evidence of any prior connection of the accused with the crime, but began the case at the time when the assailants appeared at the Post Office. The discovery of sundry pistols and daggers among the appellant's effects, some hours after the crime, was proved but not that they were those used in the commission of the murder. There was nothing in the prosecution's case to show that he had instigated or aided the commission of the crime before the actual commission began. The evidence on this matter was wholly supplied by the prisoner himself. His statement was that earlier in the day, when he was reclining on his couch after a meal, "one, whom he knew to be a God-fearing man and a man of learning," came and took him to a house, where he found two young men. Here he was solicited to go with them in order to commit a dacoity, and when he reluctantly consented and was shown how to use the pistol with which, like the others, he was then supplied, he stipulated that he was not to be a party to any dacoity or murder and was told there was to be no murder and he was to be there merely for show. It is plain from his statement that these persons had some hold over him, for when by way of excusing himself, he had

(13) 27 C. 566; 4 C. W. N. 546; 14 Ind. Dec. (N. S.) 372.

said "My brother is in Government service and draws large pay. The money I earn is enough for me," he states that the other man "looked at me for a time. I could not speak"; and when he had been told that he was to be there only for show, he adds, "I was not in a position to speak. I went with them." Thus his statement goes at most to abetting a dacoity, the crime to the actual commission of which he pleaded guilty, but, as he had stipulated with success that there was to be no murder, it is not itself a statement showing an abetment of murder. Strictly, therefore, there was no evidence of any such abetment as has to be proved before s. 114 comes into operation. As to the appellant's presence at the Post Office, it has been already pointed out that he gave no explanation of it at all, but his story was much more consistent with participation in the actual commission of the crime than with mere bodily presence after previous abetment. Indeed, he says that, when he ran away, the others had already disappeared; thus it would seem that he covered their retreat. At any rate, his statement supports presence by way of actual participation in the criminal act or series of acts by which the Postmaster was killed rather than such conduct as adds to previous abetment bodily presence at the commission of the crime abetted and nothing more, and s. 114 was never really made applicable for want of proof of abetment of the very crime, at the commission of which the appellant was actually present.

For these reasons their Lordships think that only the most unsubstantial foundation was laid for any discussion of s. 114 at all but, as it was fully considered by the High Court, they state thir own concurrence in the conclusion of the learned Judges below. Even if it be the case that the accused could have been convicted as an abettor, present at the commission of the offence, this is not to say that, if to presence there is added proof of participation, he could not also be convicted under ss. 34 and 302. Participation must depend on the facts, but it is not negatived merely because actual presence and prior abetment are proved.

Their Lordships do not think it useful to go at length into the history of the preparation and enactment of the provisions of the Indian Penal Code, which played no inconsiderable part, in the discussion of this subject in India. That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code; that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects; and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though common-places, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as principal in the first or the second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed. One object which those who framed the Code had in view, was to simplify the law; and to get rid of the terms "principal in the first degree" and "principal in the second degree" and others was no doubt a step in that direction, but to introduce a general section, s. 34, which has little, if any, content, and to attach a wholly new importance to abetments and attempts, was to complicate not to simplify the administration of the law, for participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts. If s. 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether. If the appellant's argument were to be adopted, the Code, during its early years, before the words "in furtherance of the common intention of all" were added to s. 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words expressed all that the appellant contends that the amended section expresses.

One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. This got rid of questions about principals in the first or the second degree by ignoring them, and the object of the framers of the Code was attained. In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition, under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section. Really the amendment is an amendment in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, "a criminal act" means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is in a criminal offence.

Their Lordships are accordingly of opinion that the Full Bench of the High Court rightly construed s. 34 of the Indian Penal Code, and that the view taken of it in *Emperor* v. *Nirmal Kanta Roy* (1) is not correct. This disposes of the main question raised in the appeal and in the application for special leave. Assuming that Page, J., in taking the view of s. 34 which he did take, directed the Jury correctly on the subject, there is admittedly little left in the general objections to his summing-up. It was very fully examined by the Full Bench of the High Court, and the learned Judges were unanimously of opinion that it did not call for any review. Their Lordships do not think it necessary to re-examine it sentence by sentence, or to reiterate the reasons which the learned Judges gave for their conclusion. It is enough to say that, having fully considered the summing-up themselves, they entirely concur in the conclusion of the Full Bench. The learned Judge's direction was not erroneous in point of law, and it sufficiently dealt with the material facts. It, therefore, contained no misdirection: still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits, which have long been laid down by their Lordships' Board when special leave to appeal is asked for in criminal matters.

The argument against the competence of the appeal was substantially as follows:—Subject to the satisfaction of the conditions which Art. 41 contains, the appeal is a limited appeal as of right, and must, therefore, be strictly construed. It is given in two cases only and beyond those cases any appeal is incompetent. The two cases are these: first, that the High Court, in the exercise of its original criminal jurisdiction, has passed a judgment, order or sentence; and, second, that there has been a criminal case where the Court, exercising original jurisdiction in that case, has itself reserved a point or points of law for the opinion of the High Court. The present case does not fall within the words "from any judgment, order or sentence of the said High Court of Judicature...made in the exercise of original criminal jurisdiction" but it must be brought within the second alternative. Now, the Advocate-General of Bengal, under Art. 26 of the Letters Patent, granted his certificate that in his judgment "whether the alleged direction or the alleged omission to direct the Jury do not in law amount to a misdirection should be further considered by the said High Court." After full consideration of the question so raised, the Full Bench of the High Court made its order in the following terms: "The order of the Court is that the application made by the prisoner under cl. 26 of the Letters Patent do stand dismissed"; and this is the order by which the appellant is really aggrieved. It is true that in his petition to the High Court for a declaration of the fitness of his case for further review, he says "that being aggrieved by the said dismissal of his application and by the judgment and sentence passed and pronounced upon him by the Hon'ble Mr. Justice Page, your petitioner prays for leave to appeal therefrom to the King's Most Excellent Majesty in Council;" but

this statement is doubly inexact. The High Court does not and does not purport to grant leave to appeal: it grants or withholds a declaration of its opinion on the fitness of the case for appeal. Further, the appeal is from the order of the High Court itself refusing to exercise its power to interfere with the trial and sentence. If it had discharged the sentence and directed an acquittal to be entered, the appellant would not have been aggrieved by the judgment and sentence of Page, J., at all. If it had altered the sentence, his grievance would have been that the alteration did not go far enough. Accordingly his application is made in a case which does not fall within the words "in any criminal case where any points of law have been reserved for the opinion of the High Court in manner herein before provided by any Court which has exercised original jurisdiction"; for the points of law were reserved by the Court which exercised original jurisdiction, nor did the Court exercise its discretion in the matter in terms of Art. 25. That Article provides that, but for the case therein excepted, "there shall be no appeal to the High Court from any sentence passed in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the High Court" and although Art. 26, which states what is to be done with these points reserved, introduces a new reserving authority, determination of the High Court on the question reserved is final, except only for the express provision of Art. 41. It says:—

"And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that in his judgment .....a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case and finally determine such point or points of law."

Now, Art. 41 names, as part of the defining limits of the right to appeal to His Majesty in Council, a reservation of points of law by a Court exercising original jurisdiction, which is not the reservation made in this case, and the fact that a reservation by the Advocate-General is mentioned and provided for in s. 26, and is omitted from s. 41, makes the intention clear. When an authority outside the High Court is empowered to bring about a right of first appeal by a certificate of his own, that appeal is to the High Court and is finally concluded by its determination. There is no second appeal. When the reservation originates within the High Court itself, then, subject to the approval of the High Court to the fitness of the case in that regard, a second appeal is competent. With Art. 41 the Advocate-General has nothing to do. The proceedings of the two Tribunals, the High Court exercising original criminal jurisdiction and the High Court determining by its judgment points reserved for its consideration are strictly two proceedings, and, when the Trial Judge is *functus officio* and the whole matter has passed to the Court in review, the conditions under which the further decision in review can be brought before His Majesty in Council under Art. 41 are strictly limited to those which that section prescibes for that very case. Such was the submission on behalf of the respondent, and there can be no doubt that it was a weighty one.

Having arrived at the above stated conclusion on the construction of the Code, which goes to the root both of the appeal and the application for special leave, their Lordships do not, however, think it necessary to proceed with the question whether in this case an appeal under Art. 41 of the Letters Patent is competent. In 1901 an appeal [*Subrahmania Ayyar* v. *King-Emperor* (14)], was heard and determined by their Lordships' Board, in which the decision under review was that of the High Court at Madras in a criminal matter, brought before it on the certificate of the Advocate-General under Art. 26. The terms of the Letters Patent of the High Courts of Calcutta and Madras are for the present purpose identical. No objection was taken by Counsel that under these circumstances an appeal to their Lordships' Board under Art. 41 was incompetent, nor is any question raised on this point in the judgment of the Board, and the explanation of this circumstance probably lies in the fact that in addition to the appeal under Art. 41, special leave to appeal had been applied for and had been granted by Her Majesty in Council on 29th June 1900. The decision in that case does not, therefore, conclude this matter, but

(14) 25 M. 61; 11 M. L. J. 232; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160.

their Lordships think it inexpedient to deal with the objection now, since on the other grounds above stated the appeal itself in their opinion must fail. They desire, however, to say that they must not be understood as giving any encouragement to appeals in criminal matter under Art. 41, where no point of law has been raised by the Trial Judge, nor are appellants, who have chosen this mode of bringing their case before the Board, to assume that an application for special leave to appeal as an alternative will be granted or even entertained by their Lordships.

For similar reasons they do not deal with other considerations relating to the grant of special leave to appeal to His Majesty such as the following. Although in general hardly anything could more conspicuously violate natural justice than to convict and sentence a man for an offence of which he was not guilty, it may be that irregularity alone is the proper term to use, when, the facts being the same, the evidence the same the guilt the same, and the punishment the same, error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, especially when this error could have been corrected in time, if the accused had put his Counsel in a position to raise his defence clearly and in due form at the trial. Upon this point also their Lordships express no opinion at present.

K. S. D. *Order accordingly.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Crown:—Solicitor, India Office.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 259 OF 1924.

May 24, 1924.

Present :—Mr. Pullan, A. J. C.

PEARAY LAL—ACCUSED—APPLICANT

versus

PUTTAN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Pleader appearing in Court of his father.

There is no rule against a Pleader appearing in the Court of his father, and the mere fact that the son of a Magistrate appears as a Pleader in a case before him, cannot be a ground for transfer of the case from his Court.

Miscellaneous application for transfer of case under s. 526, Cr. P. C.

Mr. *Mohammad Ayub*, for the Applicant.

JUDGMENT.—This is an application for transfer of a criminal case under s. 526, Cr. P. C., from the Court of Pandit Lajja Ram, Honorary Magistrate, Shahabad to Hardoi. The first ground given is that the complainant in the case is a tenant of Pandit Lajja Ram but this has not been supported by the affidavit. The second ground is that Pandit Lajja Ram's son is a Pleader and that he has been engaged by the other side. If such a ground were accepted for the transfer of a case no Pleader would be able to practice in the Court of his father. As there is no rule against a Pleader appearing in the Court of his father I cannot accept this ground for transfer. The third ground is that the appellant cannot get a Pleader in Shahabad and the fourth is that he cannot take a Vakil from Hardoi to Shahabad. But in view of the fact that the complainant has already engaged a Pleader in Hardoi to press his case for transfer in the Court of the Deputy Commissioner and has engaged a Pleader in this Court I cannot but be sceptical as to his inability to prosecute his case in Shahabad. The remaining grounds of appeal are vague assertions unsupported by any substantial reasons to the effect that the complainant fears that he will not have a fair and impartial trial in the Court of Pandit Lajja Ram. Pandit Lajja Ram is a Magistrate of wide experience and of the highest possible reputation. I have not the sligtest ground for supposing that he will not give the complainant a fair and impartial trial. The application is rejected.

N. H. *Application rejected.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 202 OF 1924.

September 17, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

CHANDRI BAWOO—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Bombay Prevention of Prostitution Act (XI of 1923), ss. 3, 10 (1)—Police Officer not specially authorised—Arrest without complaint, legality of—Court, whether can try accused—Report when validly made—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 190.

The arrest of a woman under s. 10 (1) of the Bombay Prevention of Prostitution Act by a Police Officer who is neither specially authorised in this behalf by the Commissioner of Police, nor has received any complaint against her, is illegal, and the Court has no jurisdiction to take cognizance of the offence without a proper complaint within the meaning of s. 4 (1) (*h*) of the Cr. P. C. being filed in the ordinary way. [p. 58, col. 1.]

King-Emperor v. *Sada*, 26 B. 150; 3 Bom. L. R. 586, *Emperor* v. *Vinayak Damodar Savarkar*, 10 Ind. Cas. 956; 35 B. 225; 13 Bom. L. R. 296; 12 Cr. L. J. 356 and *Emperor* v. *Ravalu Kesigadu*, 26 M. 124; 1 Weir 630, distinguished.

Emperor v. *Madho Dhobi*, 31 C. 557; 7 C. W. N. 661, referred to.

Per *Fawcett, J.*—To bring a report within cl. (*b*) of s. 190, Cr. P. C., it must be a report which is validly made in accordance with the law governing a Police investigation and the committing of an accused to a Magistrate's Court. [p. 60, col. 1.]

Criminal Application from an order passed by the Additional Presidency Magistrate, Bombay.

Messrs. *M. A. F. Coelho* and *L. G. Pradhan*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Marten, J.—We have been engaged for over an hour and a quarter in considering the question whether an alleged prostitute has been rightly fined Rs. 5. But the apparent minor nature of the offence is quite disproportionate to the points of general jurisdiction and policy involved.

Shortly stated, the accused alleges that she was wrongfully arrested under s. 10 (1) of the Bombay Act XI of 1923 (the Bombay Prevention of Prostitution Act, 1923) and that accordingly the Magistrate had no jurisdiction to hear the case and that consequently her conviction, notwithstanding her protest, was illegal.

Now under s. 10 (1):—" Any Police Officer on complaint, and any Police Officer authorized in this behalf by the Commissioner of Police by special order without such complaint, may arrest without a warrant any person committing, in his view, any offence punishable under s. 3, if the name and address of such person be unknown to such Police Officer and cannot be ascertained by him then and there."

The offence in question under s. 3 is, to put it shortly, soliciting. I will assume for a moment that the name and address of the accused were unknown to the Police Officer who arrested her, and that it could not be ascertained by him then and there. It is common ground that this Police Officer had not been authorised by the Commissioner of Police by any special order to effect such an arrest. So there is no dispute on this point.

But it was said that this Police Officer had arrested her "on complaint" within the meaning of s. 10 (1). As to that it was contended for the accused that the expression "complaint" meant a formal complaint as defined by s. 4 of the Cr. P. C. It was argued, however, by the prosecution that the true construction of s. 10 (1) is that a complaint means a complaint oral or otherwise made to a particular Police Officer at or about the time when the offence in question is committed, and that it is not confined to a technical complaint within the meaning of s. 4 of the Cr. P. C. Assuming that to be so, there is no evidence here that any such complaint was in fact made to the Police Officer. Counsel for the accused who was also in the proceedings before the Magistrate tells us that no evidence whatever on that point was led by the prosecution, and that on the contrary the Police admitted that there had been no complaint. The learned Government Pleader on instructions told us in reply that the Police had received an allegation about the accused the evening before the arrest and that was why they sent a Police Constable to this particular street the next day. But even if any such allegation made the day before the arrest could be such a complaint as is contemplated by s. 10, as to which I say nothing, there is no evidence on that point, and I accept Counsel's statement that in the Court below nothing of the sort was ever said there.

That being so, it follows that the Police Officer in question cannot rely on s. 10 of the 1923 Act to justify the arrest of the

accused he made. In other words, the arrest was illegal.

That brings us next to s. 190 of the Cr. P. C. That section enables a Magistrate to "take cognizance of any offence; (*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a report in writing of such facts made by any Police Officer; (*c*) upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion, that such offence has been committed." Obviously sub-s. (*c*) does not apply here. And if the arrest was illegal it is not contended that there was a report in writing by a Police Officer within the meaning of sub-s. (*b*). But it is said that there was here a "complaint" within the meaning of sub-s. (*a*). Now when one turns to s. 4 (1) (*h*) of the Code, "complaint" means "the allegation made orally or in writing to a Magistrate, with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a Police Officer."

The answer made by the accused is that the only document before the Magistrate was the charge-sheet and that this was not a complaint within the meaning of s. 4 (1) (*h*) and that the report of a Police Officer is expressly excluded from the definition of a complaint. This charge-sheet is the large brown paper document which is the ordinary document by which cognizable cases are put before the Magistrate by the Police. But on the above findings this was not a cognizable case.

The prosecution next relied on *King-Emperor* v. *Sada* (1) in which it is said that a Police Officer can make a formal complaint in a non-cognizable case, and that it would not then be a report within the meaning of s. 4 (1) (*h*). But, as my learned brother pointed out in the argument, the learned Judge says at page 155: "The proceedings show that the Police Constable purported to file a complaint, and in fact did file a complaint, on which the case was instituted against the accused person. The Magistrate to whom the complaint was made, and who took cognizance of the alleged offence, is a Third Class Magistrate. Therefore s. 190 (1) (c) is inapplicable (see Sch. IV of the Cr. P. C.), and thus the Third Class Magistrate could only have taken cognizance under s. 190 (*a*) or (*b*), that is, upon receiving a complaint, or upon a Police report."

(1) 26 B. 150; 3 Bom. L. R. 586.

It will be seen, therefore, that in that particular case there was an ordinary formal complaint filed in the ordinary way. But here I am unable to look upon this charge-sheet as a complaint within the meaning of s. 4 (1) (*h*). It was not intended to be such, nor is that its normal use.

Then it was argued that even supposing the arrest was illegal the Magistrate could still hear the case and that the conviction should not be set aside. The only Bombay case cited to us is *Emperor* v. *Vinayak Damodar Savarkar* (2). But that was a totally different case where it was alleged that the arrest of the accused outside British India (*viz.*, in Marseilles) was illegal, and, therefore, his subsequent arrest in India when the ship reached Bombay was illegal. The Court there held that the Indian Courts were not concerned with the question whether the arrest in a foreign country was legal or illegal. Here we have nothing of that sort whatever. It is the case of an Indian subject being wrongfully arrested in India under Indian law.

Then two other cases of *Emperor* v. *Ravalu Kesigadu* (3) and *Emperor* v. *Madho Dhobi* (4) were cited. As far as *Emperor* v. *Ravalu Kesigadu* (3) is concerned, that was a case under the Madras Abkari Act, and the question there was whether a Revenue Officer or Excise Officer had made an arrest outside a particular circle or area. It was said that there had been a particular Government Notification which narrowed his circle in such a way that the particular place of arrest was outside it and, therefore, the arrest was illegal. As I read the judgment of the Court they held that this Government Notification did not affect the powers of arrest by this particular officer, whether or no this circle or area was altered in the way I have mentioned. They say (page 125*):—"He (the Magistrate), however, acquitted them on the ground that the officer who arrested them was an officer who, under the terms of the notification of November 24, 1899, had only authority within the area of his circle and that when

(2) 10 Ind. Cas. 956; 35 B. 225; 13 Bom. L. R. 296; 12 Cr. L. J. 356.
(3) 26 M. 124; 1 Weir 630.
(4) 31 C. 557; 7 C. W. N. 661.

*Page of 26 M.—[*Ed.*]

he arrested the accused he was acting outside that area. The notification in question did not, and could not, operate so as to limit the powers conferred upon officers by s. 34 of the Act."

That being so, it seems to me that was sufficient to dispose of the case, *viz.*, that the officer had power to arrest. It is true the Court went on to say (page 125):—"The question whether the officer who effected the arrests was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged. The Magistrate had jurisdiction under s. 190 of the Cr. P. C. to take cognizance of the offence."

Then in *Emperor* v. *Madho Dhobi* (4), the judgment at page 560 states:—"Section 55* of the Code is, however, expressly applicable; so the arrest of Madho Dhobi by Inspector Hamilton, who says he is in charge of a Police station in Calcutta, appears to have been quite legal."

That being so, this appears to me to be another case where the Court on the facts of that particular case came to the conclusion that the arrest was legal. Consequently any observation made to the effect that it did not matter whether the arrest was legal or illegal would appear, with great respect, to be obiter.

In the present case we have a Bombay Act to consider the effect of. It is a new Act, and, as I read s. 10, it has been deliberately inserted so as to afford reasonable protection to the public. An ordinary Police Constable is not to be allowed to arrest any female in a street unless a complaint has been made to him of her conduct, and unless he himself sees the offence committed, and he cannot discover her name and address. Or, on the other hand, the Constable must be authorized by the Commissioner of Police by a special order to effect an arrest of this description, and one can quite understand the reason for this, *viz.*, to ensure that mistakes should not be made and that some innocent woman should not be dragged off to prison or put under arrest in the public street by any ordinary Police Constable.

One knows that mistakes of that kind by the Police in England have led to strong public criticism. I remember in particular, many years ago, one case at Cambridge where a mistake of that nature by the University Proctors led to interference by Parliament and a public inquiry, as a result of which the jurisdiction of the University authorities to arrest women in the streets on an accusation of soliciting was taken away from them altogether.

I, therefore, regard this case as one of some public importance. I am certainly not inclined to stretch a point and hold that the arrest, though illegally made, did not affect the powers of the Magistrate subsequently to hear the case. And when I find here that the question of jurisdiction was taken before the Magistrate at the outset of the proceedings, then, in my opinion, the proper course for us to do, if we come to the conclusion as we do that the Magistrate had no jurisdiction to hear the case, is to quash the proceedings and to direct the fine, if paid, to be refunded.

That accordingly is the order which I would pass.

Fawcett, J.—The question before us is whether the Presidency Magistrate had jurisdiction under s. 190 of the Cr. P. C. The learned Government Pleader argues that whether the accused was validly arrested or not has nothing to do with the question whether she was properly convicted of the offence alleged against her. But in this particular case, in my opinion, the validity of the arrest is a question which does materially affect the question of jurisdiction. It is not the case that a Police Officer is generally authorised to arrest a person committing in his view the offence of soliciting, which is made punishable by s. 3 of the Bombay Act XI of 1923. If that had been so, then, no doubt, the Government Pleader's argument might be valid. But here a very restricted power of arrest is given and certain conditions are laid down as to the circumstances under which that power can be exercised. The ordinary rule of construction regarding penal Statutes requires that those conditions should be strictly complied with before a Court can hold that there has been a proper arrest. And I shall show shortly why this question of proper arrest affects the question of jurisdiction.

When you come to s. 190, in order to bring a case, put up in the way this one was, within the cognizance of the Magistrate it would have to fall under cl. (*b*) of s. 190, *viz.*, upon a Police report of the facts constituting the offence. I have not the slightest doubt that the charge-sheet,

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which was the method employed for bringing the accused before the Court, was meant to be an ordinary Police report within the meaning of that clause. It is a report made in the form prescribed by s. 72 of the Bombay City Police Act, 1902, containing exactly the information that is there prescribed, *viz.*, (*a*) the names of the parties; (*b*) the nature of the information; (*c*) the names of the persons who appear to be acquainted with the circumstances of the case; and (*d*) a statement showing whether any person accused in such case has been arrested or has been released on his bond, and if so, whether with or without sureties. That information, including the fact of this accused being arrested, is contained in this document, and it was sent up in the ordinary way as a report by the Police in regard to a cognizable offence.

I think that is clear, and I do not understand the Government Pleader to have disputed the position, that to bring a report within cl. (*b*) of s 190, it must be a report which is validly made in accordance with the law governing a Police investigation and the committing of an accused to a Magistrate's Court.

That being so, it follows from the provisions of ss. 57 and 58 of the Bombay City Police Act, that a valid report by a Police Officer in the town of Bombay of the kind contemplated by cl. (*b*) of s. 190 can only be made (1) in the case of a cognizable offence and (2) when it contains information of a cognizable offence which he has been authorized by a Presidency Magistrate to investigate.

But the present case satisfies neither of those two conditions. It is not alleged that in this case any authority had been given by the Magistrate to the Police to investigate it, and the origin of the charge shows that this could not have been done.

We have, therefore, to consider whether this was a cognizable offence, and for that purpose one has to look at s. 3 of the Bombay City Police Act, which says that the phrase "cognizable offence" shall have the meaning assigned thereto by the Code of Criminal Procedure. Consequently an offence to be cognizable must be one in which a Police Officer could arrest without a warrant under any law for the time being in force in Bombay City. I have already mentioned that there are very serious limitations on the power of arrest under this s. 10 and I am clearly of opinion that any case where those conditions are not complied with, cannot be described as a cognizable case.

Here we have the fact, as my learned brother has pointed out, that there is no evidence to show that the Police Officer who made the arrest did so "on complaint" within the meaning of s. 10, and the apparent facts go against there having been any such occasion for the arrest. The officer who made the arrest was also not specially authorized in that behalf in the manner required by this section. Therefore, in my opinion, the Police report that was made is not a valid report, which could give the Magistrate jurisdiction under cl. (*b*) of s. 190.

As regards the contention that it can be treated as a complaint under cl. (*a*) of s. 190, I think it is clear that it was not intended to be such a complaint ; it is not in the form in which a complaint is ordinarily made; and the Magistrate was not asked to issue process on the complaint, the accused having already been arrested. The authorities relied upon by the learned Government Pleader in this respect have already been sufficiently commented upon by my learned brother, with whom I agree.

Therefore it seems to me that this is a case where the Magistrate had no real jurisdiction, and that consequently it is not one which can be held to fall within the scope of mere irrigularities dealt with in s. 537 of the Cr. P. C.

In the result I concur with the order proposed by my learned brother. At the same time I quite realise that the Court should not be too technical in matters of this kind, and if it had not been a clear point of jurisdiction I should have been very disinclined to interfere. But the Police can easily make arrangements to meet the difficulty that has arisen in this case, and I do not think our decision should result in any material interference with the proper carrying out of their duties under the Act of 1923.

K. S. D. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1293 OF 1923.
April 14, 1924.
Present:—Mr. Justice Martineau.
MAKHAN SINGH AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Identification evidence, value of—Accused not previously known to witnesses.

No reliance can be placed on the evidence of witnesses, professing after many months to identify persons, previously unknown to them, as having taken part in the crime, unless it is shown that there was a regular identification parade in which they picked out those persons from among others.

Criminal appeal from an order of the Sessions Judge, Lahore, dated the 21st November, 1923.

Dr. *Nand Lal*, for the Appellants.

Mr. *R. C. Soni*, for the Government Advocate, for the Respondent.

JUDGMENT.—It appears that on the night of the 22nd October, 1922, cattle were stolen from Dhara Singh's and Hazara Singh's *haveli* at Sarhali Kalan in the Lahore District. The tracks of the thieves were followed and the tracking party eventually reached one Bur Singh's *haveli* at Asal, where a discussion took place about the '*bhunga*' demanded by the thieves which was at length settled at Rs. 600. Dhara Singh departed ostensibly in order to bring the money, but he came back with a Head Constable and two Constables. The Head Constable tried to enter the *haveli*, but was knocked down with a lump of earth which was thrown at him, and then men sallied out of the *haveli* and attacked the tracking party and the Police causing injuries to several of them, the injuries sustained by one man, namely, Prem Singh, being fatal. Five persons, namely, Makhan Singh, Sulakhan Singh, Nikka Singh, Gurdit Singh *alias* Guria and Sohan Singh, have been convicted of an offence under s. 326, Indian Penal Code, read with s. 149, in respect of the injuries inflicted on Prem Singh, and they have appealed.

The first four of the appellants above mentioned live at Asal and Sohan Singh lives at Hudiara. Ujagar Singh, P. W. No. 5 and Head Constable Sadik Muhammad say they knew Sohan Singh by appearance, but do not say when or how they came to know him. They did not know the remaining appellants, and the other witnesses who have deposed to the occurrence admittedly did not know any of the appellants before. No reliance can be placed on the evidence of witnesses professing after many months, to identify persons, previously unknown to them, as having taken part in the attack at Asal unless it is shown that there was a regular identification parade in which they picked out those persons from among others, as it is not stated that the appellants bear any special distinguishing marks by which they can be recognized. Now it does not appear that any such parade was held for the identification of the appellants Makhan Singh, Sulakhan Singh and Sohan Singh. Sub-Inspector Wali Muhammad (P. W. No. 14) says he had Nikka and Guria identified by some of the prosecution witnesses at *Thana* Barki on the 8th November 1922, but the identification report prepared by him, on which so much would depend, is not forthcoming, as he says it has been lost, and of the various witnesses whom he mentions as having identified Nikka and Guria only two, Phagga Singh and Ujagar Singh, speak about the identification. It is hardly safe to rely on Phagga Singh's statement. He identified Tek Singh (one of the accused in the case) at a parade held at Kasur, although for reasons given by the Magistrate there was considerable doubt about Tek Singh's guilt. With regard to Ujagar Singh it is to be observed that there were two eye-witnesses of that name, and as one of them, namely, Ujagar Singh P. W. No. 5 says he was not asked by the Police to identify the accused, probably Ujagar Singh mentioned by Sub-Inspector Wali Muhammad is P. W. No. 22, who speaks about an identification. That witness, who is said to have identified both Nikka and Guria, is also not to be relied upon as he says they were armed with spears at the time of the assault whereas according to the other witnesses they had sticks. The two Constables Nazar Hussain and Rahim Baksh say they identified Nikka and Guria at the *thana*, but Sub-Inspector Wali Muhammad who held the identification, makes no mention of those two persons having been identified by anybody.

In the report of the occurrence which was sent to the *thana* by Head Constable Sadik Muhammad it was stated that Bur Singh, Makhan Singh, Sulakhan Singh, Nikka Singh, Tehl Singh and Sohni (*i. e.*, Sohan Singh) were identified, but admittedly none of the prosecution witnesses had given those names as the names of the

persons who had committed the assault, for none of them knew the names. The Head Constable says that he learnt the names from Sant Singh, *lambardar* of Asal, but Sant Singh has not been called as a witness, so that the fact that the names of four of the appellants appear in the First Information Report in no way strengthens the case for the prosecution but on the contrary the case is weakened by the fact that Sant Singh is not produced.

Evidence has been given as to Prem Singh, who was Sant Singh's son-in-law, having told his companions on the way to Asal the names of the thieves, including the names of some of the appellants. But the question whether or not the appellants took part in the theft of the cattle is quite distinct from the question, with which this case is concerned, whether they were concerned in the attack subsequently made on the tracking party and the Police at Asal. There is, in my opinion, no reliable evidence that they were concerned in that attack, the evidence as to the identification being far from satisfactory.

I accordingly accept the Appeals Nos. 1293 of 1923 and 60 of 1924, set aside the convictions and sentences, and acquit all the appellants and direct that they be released and that the fines, if paid, be refunded.

K. S. D. *Appeals allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 376 OF 1924.
July 12, 1924.
Present:—Mr. Justice Neave.
SRI NARAIN SINGH—APPLICANT
versus
EMPEROR THROUGH RANDHIR SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 238—Penal Code (Act XLV of 1860), ss. 173—No complaint by public servant—Conviction under s. 173, Penal Code—S. 238, Cr. P. C., application of.

A Magistrate has no jurisdiction to take cognizance of an offence under s. 173, Penal Code, except on the complaint in writing of the public servant concerned. [p. 62, col. 2.]

When the Cr. P. C. provides that the Court shall not take cognizance of a certain offence without complaint from a public servant, it is not open to a Magistrate to ignore this provision by the device of instituting the case with reference to some offence, of which he is entitled to take cognizance, and then convicting the accused for the prohibited offence with the aid of s. 238, Cr. P. C. [p. 64, col. 1.]

Criminal reference made by the Additional Sessions Judge, Mirzapur, dated the 13th of June 1924.

REFERRING ORDER.—This is a revision against an order sentencing the applicant to a fine of Rs. 30 under s. 173 of the Indian Penal Code. The facts are that in execution of a rent decree of one Randhir Singh a warrant of arrest with a notice was issued against the applicant Sri Narain Singh. It is said that the applicant was arrested on the 12th of December 1923 but was rescued by his son Lal Parshad Singh and brother Balmakund Singh. A report was made by the *chaprasis* in the *thana* but they did not want any action to be taken by the Police as they wanted to put the matter before their officer for necessary action. Accordingly no steps were taken by the Police and after waiting for some time the decree-holder Randhir Singh filed a complaint on the 2nd of January 1924 against Sri Narain Singh, Lal Parshad Singh and Balmakund Singh under s. 225/109. Proceedings were started against Sri Narain Singh alone. The learned Magistrate found that the offence under s. 225 was not proved but convicted the applicant under s. 173 of the Indian Penal Code. Now the applicant comes here in revision. The first point taken by him is that the learned Magistrate had no jurisdiction to take cognizance of the offence under s. 173 of the Indian Penal Code except on the complaint in writing of, the *chaprasis* concerned or of some other public servant to whom they were subordinate but as there was no such complaint the learned Magistrate had no power to convict him under s. 173. The second point is that there was no evidence whatsoever, on the record to support the finding of the learned Magistrate that he, the applicant, did intentionally prevent the service of the notice and the warrant on himself. First about the first point, s. 195 of the Cr. P. C., says that no Court shall take cognizance of any offence punishable under s. 173/188 of the Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. Here no complaint in writing had been made by the *chaprasis* or by the officer to whom they were subordinate and, therefore, the learned Magistrate had no jurisdiction to take cognizance of the offence under s. 173, but

on behalf of the opposite party it is said that though the Magistrate had no jurisdiction to take cognizance of the offence under s. 173 of the Indian Penal Code, yet under s. 238 of the Cr. P. C. he had every power to convict the applicant under s. 173 of the Indian Penal Code when he had, on the complaint of Randhir Singh, taken cognizance of the offence under s. 225 because the offence under s. 173 of the Indian Penal Code, was a minor offence and on the facts proved the Magistrate had every power to convict the applicant of the minor offence. In short their point is that though without a complaint in writing of the *chaprasis* or their superior officer the Magistrate had no jurisdiction to take cognizance of the offence under s. 173 yet he had every power to convict the applicant under s. 173 as it was a minor offence of s. 225 of which he had already taken cognizance. But I do not agree with it. In my opinion they are two different offences altogether. Section 173 applies to the prevention of the service of summons, notice, or order; whereas ss. 225 and 225B apply to resistance or obstruction to lawful apprehension, etc. *i.e.*, to warrants of arrest, etc. Sections 225 and 225B do not apply to summonses, notices and orders and in the same way s. 173 does not apply to warrants of arrest, etc. They are two different and distinct offences and the offence under s. 173 is not a minor offence of s. 225 and, therefore, s. 238 of the Cr. P. C. was not applicable and the conviction of the applicant under s. 173 without a complaint as required by s. 195 of the Cr. P. C. was quite illegal. Now taking for granted that s. 173 was a minor offence of s. 225 and s. 238, Cr. P. C., was applicable let us see if the conviction of the applicant under s. 173 was on the facts and evidence on the record legal. This brings us to the second ground of revision. Under s. 238, Cr. P. C., a person can be convicted of a minor offence though not charged with it when he is charged with an offence consisting of several particulars and a combination of some only of which constitute a complete minor offence or when he is charged with an offence and the facts proved reduce it to a minor offence. Now let us see what the facts and evidence here were. In his complaint Randhir Singh had given four particulars: (1) that a warrant of arrest was issued, (2) that the applicant was arrested on the 12th December 1923, (3) that he was rescued by Lal Parshad Singh and Balmakund Singh and (4) that the applicant tore out the notice. The first three had nothing to do with s. 173. The last was no offence at all. It was admitted by the prosecution witnesses that when the notice was tendered to the applicant he took it and it was only when the warrant was shown to him that he tore it out. But that, even if true, did not constitute an offence under s. 173. He had taken the notice and it was some time after that he tore it out. The tearing out of the notice could not mean that he intentionally prevented the service of notice himself. And so it is clear that no combination of the particulars given in the complaint could constitute an offence under s. 173. Now let us see if the fact proved constituted an offence under s. 173. The only fact found by the learned Magistrate against the accused is given by him thus "there is no doubt as to the accused's presence at his house and to the fact that he did intentionally prevent the service of the notice and the warrant on himself." S. 173 has nothing to do with the resistance or obstruction to the execution of a warrant of arrest. As a fact it was found by the learned Magistrate that the offence under s. 225 was not proved. Now about the notice. The learned Magistrate did not state how the applicant prevented the notice upon himself. He had taken the notice when it was tendered to him and it was only when the warrant was shown to him that he tore it out but that was no offence under s. 173. No other fact had been proved which could constitute an offence under s. 173. I do not see how on the complaint filed by Randhir Singh and how on the facts found proved by the learned Magistrate it could be said that the applicant had intentionally prevented the service of the notice upon himself. The only fact about the notice alleged by the complainant and proved by the evidence on the record was that the applicant tore it out when the warrant was shown to him but as already remarked above that was no offence under s. 173. For the reasons above I am of the opinion that the conviction of the applicant under s. 173 of the Indian Penal Code was without jurisdiction and illegal and, therefore, should be set aside.

A copy of the above order will be sent to the learned Magistrate for any explanation he may like to give and on the receipt of the explanation, if any, the papers will be sub-

mitted to the Hon'ble High Court with the recommendation that the conviction of the applicant under s. 173 of the Indian Penal Code be set aside and the fine refunded.

JUDGMENT.—This is a Reference from the Additional Sessions Judge of Mirzapur asking this Court in revision to set aside the sentence passed under s. 173 of the Indian Penal Code.

It is not disputed that there was no complaint in writing made by the public servant concerned or by any public servant to whom he is subordinate as is required by s. 195 of the Cr. P. C. before cognizance can be taken by a Court of an offence under s. 173. The learned Magistrate's explanation is that he took cognizance of an offence under s. 225(*b*) of the Indian Penal Code and that having done so he was entitled under s. 238 of the Cr. P. C. to convict the accused under s. 173 of the Indian Penal Code which he regards as a minor offence of the same character as that for which a penalty is provided under s. 225 (*b*) of the Indian Penal Code.

It is clear that when the Code provides that the Court shall not take cognizance of certain offences without complaint from a public servant it is not open to a Magistrate to ignore this provision by the device of instituting the case under another section of the Indian Penal Code. The conviction was clearly illegal. The Reference is accepted and the conviction and sentence are set aside. The fine, if paid, will be refunded.

K. S. D. *Conviction set aside.*
N. H.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 393 OF 1924.
October 10, 1924.
Present:—Mr. Justice Marten and Mr. Justice Fawcett.

In re GAFUR DAUD SAHEB—ACCUSED.

Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), s. 476—Sanction to prosecute —Sanction under old Procedure, legalityof.

A sanction to prosecute for perjury granted according to the procedure prescribed by the Cr. P. C., 1898, after its amendment in 1923, prescribing a different procedure, is illegal, and no Court can take cognizance of it.

Criminal appeal against an order passed by the Sessions Judge of Ratnagiri.

Mr. *G. B. Chitale*, for the Accused.

JUDGMENT.

Marten, J.—In this appeal the learned Sessions Judge appears to have made a slip in granting sanction to prosecute the appellants for perjury under the old procedure and in overlooking the circumstance that under s. 476 of the Cr. P. C. a different procedure ought now to be followed. The amended Criminal Procedure Code came into force on September 1, 1923. The above sanction was given long afterwards, *viz.*, on June 30, 1924. It would further appear that even the first application for sanction was not made until September 10, 1923. So the provisions of s. 6 of the General Clauses Act, to which my learned brother has drawn the attention of Counsel, could in no way apply.

We have been referred by Counsel to *Baldeo Misser* v. *Deputy Inspector-General of Police, C. I. D., Bengal* (1), where precisely the same point arose, and where it was held that, having regard to the amending Act, the sanction purported to be there given was illegal and that no Court could take any cognizance of it. It does not appear that there the above section of the General Clauses Act was referred to, and it appears to have been conceded that the Magistrate had no jurisdiction to make the order which he did in that particular case.

The order we make is that we quash the direction granting sanction to prosecute the appellants, and direct the withdrawal of the complaint, which we understand has been presented in accordance with the sanction which the learned Sessions Judge purported to give. Speaking for myself, I prefer to adopt the course which Mr. Justice Greaves took in *Baldeo Misser's case* (1) and to say nothing as to any alternative course which may be still open to the learned Sessions Judge with reference to this alleged perjury.

Fawcett, J.—I concur.

N. H. *Order accordingly.*

(1) 84 Ind. Cas. 62; 51 C. 652; (1924) A. I. R. (C.) 826; 26 Cr. L. J. 238.

CALCUTTA HIGH COURT.

REVIEW RULES NOS. 169-S AND 170-S OF 1924.

August 20, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Justice Sir Suhrawardy, KT.

BRINDABAN CHANDRA GHOSH—PETITIONER

versus

DAMODOR PROSAD PANDAY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—"Error apparent on the face of the record," scope of—Judgment delivered by putting wrong construction on Privy Council decision—Review, whether justified—Court, powers of.

The words "error apparent on the face of the record" in O. XLVII, r. 1 of the C. P. C. are wide enough to cover a case where judgment has been given by putting a wrong construction on a decision that the Court was bound to follow and imagined that it was following, and the Court is, in such circumstances, justified in granting a review of its previous judgment. [p. 66, col. 2.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126 at p. 127; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.) and *Brij Narain Rai* v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 28 C. W. N. 253; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129 (P. C.), referred to.

In granting an application for review the Court can, in addition to setting aside the judgment under review, deliver another judgment on the merits. [*ibid.*]

Applications for review of a judgment of the High Court, dated the 10th May 1923.

Dr. *Dwarka Nath Mitter* (with him Babus *Bireshwar Bagchi* and *Nirode Bandhu Ray*), for the Petitioner.

Babus *Amarendra Nath Bose* and *Dwijendra Krishna Dutt*, for the Opposite Party.

JUDGMENT.

Walmsley, J.—These are applications for review of a judgment delivered by us on 10th May 1923. The facts of the suits are stated in our judgment. It is convenient, however, to mention here that the plaintiffs were mortgagees and the defendants were the sons of the mortgagor and governed by Mitakshara Law: the lower Courts had decreed the suits in part, that is, to the extent that the principal secured by the mortgage corresponded with the debt due on a prior mortgage. The defendants as appellants urged that the prior mortgage was not an "antecedent debt" and they were not liable under the mortgages executed by their father in favour of the plaintiffs. We upheld that contention in the belief that the decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) compelled us to do so.

This application for review was presented on 4th August, and as I was away at the time it could not be dealt with until after the vacation. On 20th November we adjourned the hearing. On 14th November their Lordships of the Privy Council delivered judgment in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2); this was published in India in January and appeared in the Calcutta Weekly Notes on 14th January. When we heard the application for review on 1st February, this later judgment was before us, and we called on the defendants to show cause why in view of that judgment our decision should not be reversed.

Without going into an examination of the differences between the judgment in *Sahu Ram's case* (1) and the judgment in *Brij Narain's case* (2), I think it is enough to say that the circumstances in which we have to deal with this application are altogether unusual.

It is contended on behalf of the defendants that this application is not maintainable, that the ground on which it is pressed was not set out in the application and there has been no amendment, that the rule is in a wrong form, because this Court should at most set aside the judgment delivered instead of replacing it with another, and that on the merits our decision is correct in spite of the judgment in *Brij Narain's case* (2).

The second and third objections may be dismissed in a few words. From the dates I have mentioned, it is obvious that no reference to the recent judgment could have been made in the application; the principle it establishes was, however, mentioned and the judgment was read to us when we granted the Rule, and as the Rule expressly refers to the judgment there can be no prejudice to the defendants in the fact that the application was not amended.

(1) 39 Ind. Cas. 280; 44 I. A. 126 at p. 127; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(2) 77 Ind. Cas. 689; 28 C. W. N. 253; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129 (P. C.).

With regard to the third ground it is no doubt open to us to proceed by stages, but that course is not compulsory: there is precedent for proceeding at once to a judgment on the appeal in favour of the plaintiffs and in the rather special circumstances of this case that seems the only logical thing to do.

There is more substance about the first objection, but I can hardly deal with it until I have considered the merits.

As I have said, in our judgment, we thought that we were following the law as laid down in *Sahu Ram's case* (1). We referred to the case of *Arumugham Chetty* v. *Muthu Koundan* (3) and two Allahabad cases of *Ram Singh* v. *Chet Ram* (4) and *Chet Ram* v. *Ram Singh* (5). The order made by the Allahabad High Court on Brij Narain's application for leave to appeal refers to the Madras decision. Their Lordships of the Privy Council refers to this conflict of opinion between the Courts of Madras and Allahabad, and accepted the Madras view. That is the view which we did not follow. It is quite clear to me that in the light of the judgment in *Brij Narain's case* (2) our decision was wrong.

It is suggested that as we found on the facts that necessity had not been proved, the question of law does not arise. I cannot agree to this contention: it was only in the alternative that the plaintiffs sought to rely on necessity.

Now, I can come to the first objection. It is urged that the application cannot be brought within any one of the three clauses of O. XLVII, r. 1. No one suggests that it can come under the first. "Other sufficient cause" might seem wide enough to cover it but the remarks in the case of *Chhajju Ram* v. *Neki* (6) make me hesitate to use those general words. The remaining clause is "error apparent on the face of the record," and the learned Vakil for the petitioner urges that this expression is wide enough to embrace such a case as this. I think that view is right. The law has not been altered: their Lordships are careful to say that the judgment in *Sahu Ram's case* (1) introduced no modification and that again the judgment in *Brij Narain's case* (2) made no change. The position, therefore, is that we have been told authoritatively that we put a wrong construction on the decision that we were bound to follow and imagined that we were following. In such circumstances I think we ought to hold that there is an error apparent on the face of the record.

Accordingly, I grant the application for review, set aside our judgment of 10th May 1923 and restore the judgments and decrees of the District Judge.

On the appeals we showed indulgence to the plaintiffs in the matter of costs. For similar reasons I think we should now show the same indulgence to the defendants and direct that each party pays his own costs in these applications. The petitioners are entitled to a refund of the excess Court-fees paid on the review applications under s. 15 of the Court Fees Act.

Suhrawardy, J.—I agree.

K. S. D. *Application granted.*

(3) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 (F. B.).

(4) 51 Ind. Cas. 119; 41 A. 529; 17 A. L. J. 706; 1 U. P. L. R. (A.) 52.

(5) 67 Ind. Cas. 569; 44 A. 368; 27 C. W. N. 150; 3 P. L. T. 363; 31 M. L T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).

(6) 72 Ind. Cas. 566; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 202 OF 1923.

June 12 and July 11, 1924.

Present:—Mr. Justice Mukerji and Mr. Mr. Justice Dalal.

July 10, 1924.

Present:—Mr. Justice Daniels and Mr. Justice Neave.

WAJID ALI KHAN—DECREE-HOLDER—APPELLANT

versus

PURAN SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Pre-emption suit, appeal in—Death of one of respondents—Appeal, whether abates—Payment of consideration money, effect of.

Where, in a pre-emption suit, the vendee appeals against a decree allowing the claim of four plaintiff-pre-emptors, and the appeal is decreed in ignorance of the fact that one of the respondents was dead, and

the suit is dismissed, the whole appeal abates and consequently the appellate decree is a nullity. [p. 71, col. 2.]

The fact that the consideration money has been paid by all the pre-emptors jointly without specification of shares in terms of the decree of the Court of first instance, in the said Court, before the appeal is heard, makes no difference, so far as the question of abatement is concerned. [*ibid.*]

Execution first appeal from a decree of the Subordinate Judge, Bulandshahr, dated the 28th of March, 1923.

JUDGMENT.

Mukerji, J.—*(June 12, 1924).*—This appeal is connected with the Execution First Appeal No. 281 of 1923. They have arisen under the following circumstances:—

Four persons, Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh, instituted a suit for pre-emption against Wajid Ali Khan who had purchased a property and who is the appellant in Appeal No. 202 of 1923. The suit succeeded in the Court of first instance and a decree was made in favour of the plaintiffs on 20th February 1921. The consideration money was directed to be paid within one month of the decree becoming final and was actually deposited in Court on 22nd June 1921. Wajid Ali filed an appeal to this Court on 30th March 1921. Amar Singh died pending the appeal on 12th January 1922. The first appeal in this Court was heard in ignorance of the fact that Amar Singh was dead, and a decree was made on 18th January 1923 reversing the decree of the Court of first instance. Before the appellate decree was made, the pre-emptors, on payment of the consideration money, had obtained delivery of possession over the pre-empted property. Wajid Ali on his success in appeal, applied for restoration of possession, and it appears that, by an *ex parte* order, he was restored to possssion on the 2nd of February 1923. Thereupon, the plaintiffs Puran Singh, Lekhraj Singh and Pirthi Singh and the representatives of the deceased plaintiff, Amar Singh, made an application on the 16th of February 1923, in the Court of first instance, asking that they should be restored to possession. Their case was that Amar Singh having died pending the appeal, the decree passed by the High Court was a nullity and, therefore, Wajid Ali got nothing by the decree made by the High Court in his favour.

The Court of first instance held that the sons of Amar Singh were entitled to keep possession of the entire property if the three surviving plaintiffs agreed that the entire consideration money might be taken as having been deposited by the heirs of Amar Singh.

Wajid Ali, the vendee, has appealed, his appeal being No. 202 of 1923. In this appeal the three surviving plaintiffs filed a cross-objection, but they did not pay the Court-fee payable on the same, and their objection should be deemed to have been rejected. It appears that under the decisions of this Court, under certain circumstances, it is cheaper to file an appeal than to file a cross-objection, and accordingly the three surviving plaintiffs, Puran Singh and others, filed the Appeal No. 281 of 1923.

Mr. P. L. Banerji, appearing for the three surviving plaintiffs, tells us that his clients are willing to have the entire money credited as paid by Amar Singh, and that the order passed by the Court below may be taken as effective. The case of the surviving plaintiffs, however, is that the whole appellate decree is a nullity and, therefore, the entire decree made by the Court of first instance should stand, giving all the four plaintiffs in the Court of first instance the fruits of the decree, unhampered by the decree made by the High Court.

On behalf of Wajid Ali Khan it has been contended that the result of not bringing on the record the heirs of Amar Singh was simply this that the decree of this Court reversing the decree of the Court of first instance stood in respect of three-fourths of the property and was a nullity in respect of the share of Amar Singh.

It is common ground that the decision of the question raised between the parties depends on the effect of the provisions made in O. XXII of the C. P. C. The argument on behalf of the surviving plaintiffs is that if the fact that Amar Singh was dead had been brought to the notice of the High Court, the High Court would have been bound to declare that the whole appeal had abated and could not proceed to determine the appeal on its merits. The contention of Wajid Ali is that the abatement would have been declared with respect to the interest of the deceased Amar Singh alone and not with respect to the interest of any of the remaining plaintiffs-respondents.

Order XXII, r. 1 of the C. P. C., declares that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The expression "right to sue" has not been defined anywhere in the C. P. C., but I take it that the expression means 'a right to ask for relief' whether in the Court of first instance or in the Court of Appeal. Rule 2 lays down that where there are more plaintiffs or more defendants than one, and any of them dies, and the right to sue survives either in favour of the remaining plaintiff or plaintiffs or against the remaining defendant or defendants *alone*, an entry will be made by the Court that a party is dead and it will proceed with the disposal of the case before it. Rule 3 says that where the sole plaintiff or sole surviving plaintiff or one of two or more plaintiffs dies and the right to sue survives in favour of the legal representatives as well, the legal representatives of the deceased plaintiff will be brought on the record. The penalty of not bringing the legal representative of the deceased plaintiff is specifically declared, and it is this, namely, the suit shall abate *so far as the deceased plaintiff is concerned.* Rule 4 applies to the case of defendants, and provides that where the sole defendant or sole surviving defendant dies and the right to sue survives against the legal representative as well, the legal representative of the deceased shall be brought on the record. The penalty of not bringing the legal representative on the record would be that the suit would abate as against the deceased defendant. The provision as to defendants and plaintiffs is to be adapted to the case of an appeal as provided in r. 11 of the Order. The sum total of all the provisions in rr. 1 to 4 seems to me to be this: Where the right to sue survives in favour of or against the legal representative as well, and there are more parties than one, the result of not bringing on the record of the legal representative of the deceased party is this and *this only* that the suit or appeal would abate as against the deceased party. It is nowhere laid down in the C. P. C., *as re-enacted in* 1908, that the whole of the appeal will fail if the legal representative of the deceased party be not brought on the record. The addition of the words "as far as the deceased plaintiff is concerned" or the words "as against the deceased defendant" to the Code of 1908 clearly indicates that, the abatement can take effect as against the deceased party only, and the abatement *shall not affect* the entire case before the Court. The main point is whether the right to sue survives or not. If the right to sue does not survive, then and then alone the whole case may go.

Where the language of law is simple and there is no ambiguity, it is not open to look to the reason of the rule. But there can be no doubt that the Legislature acted on a well defined policy in altering the law in 1908. They expressly enacted, O. I, r. 9) that no suit should fail for mis-joinder or non-joinder of parties, and directed the Courts to decide the case as between parties on the record. The same policy, in my opinion, is responsible for the rule that only a part of the suit or appeal should abate and not the whole of it.

Now, applying the rule of law as discussed above to the facts of the present case, we find that when Amar Singh died he had already become entitled to a quarter share in the property subject to the result of the appeal. Indeed, he had completed his title under the decree by deposit of the consideration money along with his co-plaintiffs. It goes without saying that the plaintiffs in a pre-emption suit claim under their individual titles, and in the present case, the four plaintiffs could have instituted four different suits, one for each plaintiff. In the case of their success, the Court would have divided the property among the four plaintiffs. In that case, however, there would have been this further provision that, if one party failed to pay his share of the purchase-money, the other rival plaintiffs would be entitled to pay the same. In the present case the four plaintiffs agreed to take the property among themselves, and it must be taken that each of the plaintiffs was entitled under the decree to a fourth share in the property. When, therefore, Amar Singh died, he was, subject to the result of the appeal, entitled to a fourth share in the property. If the appellant, Wajid Ali Khan, wanted to contest the appeal as against Amar Singh's legal representatives, he was bound to bring them on the record and to argue the appeal in their presence. The death of Amar Singh did not result in the death of the 'right to sue,' because Amar Singh had already obtained a decree in his

favour. In a pre-emption suit when a plaintiff dies, the question whether his son or other legal representative can be brought on the record or not depends on good many circumstances. Where, for example, a plaintiff claims a preferential right of purchase over the vendee, on his death, his son cannot be brought on the record unless he also in his personal right is entitled to pre-empt as against the vendee: see *Partab* v. *Daulat* (1). But where a decree has already been passed and an interest in the property has been acquired, the question of the personal right of the legal representative of a deceased plaintiff, in a pre-emption appeal, does not arise. Anybody who would succeed to the property of the deceased would be entitled to be brought on the record. Thus, it is perfectly clear that the 'right to sue,' so far as the appeal went, did survive not only against the surviving plaintiffs-respondents but also against the legal representative of the deceased plaintiff-respondent. The result of not bringing the legal representatives of Amar Singh on the record in appeal would simply be this that the appeal would abate as against Amar Singh. The appeal would continue to be good as against the surviving plaintiffs-respondents. In this view of the law the legal representatives of Amar Singh would be entitled to take back possession with respect to one-fourth share of the property, and the application of the surviving plaintiffs would be liable to be dismissed for the decree of the High Court would not be a nullity but would be binding on the surviving plaintiffs-respondents.

Now I shall consider the authorities cited at the bar. The learned Counsel for Puran Singh and others, the surviving plaintiffs, referred us to several cases. The first one is *Imam-ud-din* v. *Sadarat* (2). In this case the person who had died pending the appeal was one of the vendees, and it was held that, as his legal representative had not been brought on the record, the decree that was passed in appeal was a nullity. In the judgment it is expressly stated that it was admitted at the Bar that the suit was one in which the cause of action did not continue against the surviving defendants alone and it was necessary to bring on the record the representatives of the deceased respondent. It is clear in that case that the suit being one for pre-emption, the plaintiffs could succeed, if at all, only with respect to the whole property. As one of the vendees was dead and his legal representative was not brought on the record, the decree, if held good, could have only resulted as being against a part only of the pre-empted property. That this is the effect of this ruling was recognized in the case of *Ambika Prasad* v. *Jhinak Singh*(3). At page 94* of the report occurs the following expression of opinion:—"It might, however, be argued on behalf of Ambika Prasad that the principle underlying that decision [*Imam-ud-din* v. *Sadarat Rai* (2)] does not apply to his appeal, inasmuch as the decree against the vendees could not be split up as the shares of the vendees perhaps were not specified in the sale-deed."

It may also be pointed out that the decision in *Imam-ud-din* v. *Sadarat Rai* (2) depended on the interpretation of the law as it stood before the Code of 1908 was enacted.

In the case before us, as I have already indicated, one of the four pre-emptors, who had definitely got each a fourth share in the property, died and the case in *Imam-ud-din* v. *Sadarat Rai* (2), therefore, has no application. The rule that there cannot be pre-emption of a part of the property exists for the benefit of the vendee and cannot be used to his disadvantage. He may say "well, if my appeal cannot succeed with respect to one-fourth share, let it succeed with respect to the rest, three-fourth share." In the case of *Ambika Prasad* v. *Jhinak Singh* (3), it appears that only one of three plaintifis filed an appeal and he stated that he was filing the appeal not only on his own behalf but also on behalf of his co-plaintiffs. These co-plaintiffs were not made parties in the appeal. One of them, Hubedar, died pending the appeal. The appeal was decreed by the High Court. When the successful plaintiffs-appellants tried to take possession, it was contended for the purchaser that the decree of the High Court was a nullity and could not be executed. This Court held, on the authority of a Calcutta case, *Balram Pal* v. *Kanysha Majhi* (4) that where one of several joint

(1) 22 Ind. Cas. 678; 12 A. L. J. 18; 36 A. 63.
(2) 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228.
(3) 71 Ind. Cas. 321; 21 A. L. J. 91; 45 A. 286; (1923) A. I. R. (A.) 211.
(4) 53 Ind. Cas. 518.

*Page of 21 A. L. J.—[*Ed.*]

plaintiffs died and his legal representative was not brought on the record, the suit and the appeal must fail. I have looked through the Calcutta case, and I do not think that it can bear the weight of a broad proposition like this. It is clear, however, that in the case of *Ambika Prasad* v. *Jhinak Singh* (3), the decision did not turn on the peculiar incidents of a pre-emption case.

As against these two cases cited by the learned Counsel for the surviving plaintiffs we have the case of *Imdad Ali* v. *Jagan Lal* (5) decided by two learned Judges of this Court, namely, Sir John Edge, C. J., and Banerji, J. In that case it was found that of two persons against whom a decree had been made, one had died before the decree was passed. It was held that the decree could be executed against the property of the person who was surviving but not against the property of the deceased person. This case was considered and approved of by Chief Justice Richards and Banerji, J., in the case of *Sripat Narain Roy* v. *Tirbeni Misra* (6).

In this conflict of authority, indeed, if, there be any conflict at all, I would prefer to follow the cases of *Imdad Ali* v. *Jagan Lal* (5) and *Sripat Narain Roy* v. *Tibreni Misra* (6) to the case of *Ambika Prasad* v. *Jhinak Singh* (3).

I need hardly point out that my reading of the law is consistent with the rulings I propose to follow.

The result is that I would modify the decree of the Court below and restore Amar Singh's legal representative to the possession of only one-quarter share in the pre-empted property and would dismiss the Appeal No. 281 of 1923 of the surviving plaintiffs Puran Singh, Lekhraj Singh and Pirthi Singh. The cross-objection of Puran and others in Appeal No. 202 of 1923 must be rejected.

Dalal, J.—(*June 12, 1924*).—Wajid Ali Khan was the purchaser in a pre-emption suit brought by Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh for pre-emption of a complete revenue paying *mahal*. A decree was passed on 28th February 1921, jointly in favour of all the four plaintiffs without specification of shares conditional on their depositing Rs. 2,173 and odd for payment to Wajid Ali Khan.

(5) 17 A. 478; A. W. N. (1895) 109; 8 Ind. Dec. (N. s.) 632.

(6) 45 Ind. Cas. 21; 16 A. L. J. 327; 40 A. 423.

The following dates may be quoted in tabular form;

18th March, 1921.—Appeal to the High Court by Wajid Ali against the four plaintiffs.

22nd June, 1921.—The plaintiffs deposited in Court amount as directed in the decree.

30th June, 1921.—Plaintiffs took possession through Court.

12th January, 1922.—Plaintiff Amar Singh died.

18th January, 1923.—The decree of First Court reversed by the High Court.

2nd February, 1923.—Wajid Ali restored to possession.

On 16th February, 1923, the heirs of Amar Singh—his two sons—and the other plaintiffs applied to be put again in possession on the ground that the decree of the High Court having been passed after the death of Amar Singh and without his legal representatives being brought on the record was a nullity. The lower Court dismissed the objection of the three surviving plaintiffs but directed possession to be made over to Amar Singh's sons "provided the purchase money already deposited in Court is consented to go to the opposite party by all the objectors.'

Both Wajid Ali and the three surviving plaintiffs have appealed separately. This is the appeal of Wajid Ali. The reasoning of the lower Court does not satisfy me. The learned Judge held that the appeal against three out of four plaintiffs was competent and that the decree thereunder was binding on them. If so, Amar Singh's sons can retain or receive back one-fourth of the property or property commensurate with Amar Singh's share of the money deposited in Court according to agreement between the four pre-emptors. It is true, as observed by the lower Court, that Amar Singh alone could have pre-empted the entire property but he did not do so, nor is it urged that he alone owned the money which was deposited in Court.

In my opinion the correct reasoning here would be that the decree of this Court was a nullity because the appeal abated against *all* the respondents and that, therefore, the pre-emption decree in favour of the original plaintiffs still operates. Possession was given to Wajid Ali wrongly. It may be mentioned that no plea of *res judicata* is set up on his behalf.

Much stress was laid down by the learned Counsel for the appellant on the change

of phraseology in the C. P. C., 1908. In my opinion the alteration has not changed the law on the subject. According to O. XXII, r. 4, cl. (1), where one of two or more defendants dies and the right to sue does not survive against the surviving defendants alone (as here), the Court shall upon application cause the legal representatives of the deceased defendant to be made parties. Clause (3) of this rule lays down that in the absence of an application the suit shall abate as against the deceased defendant. The words "as against the deceased defendant" are new in the present Code. This means that the appeal abates *primarily* against the deceased respondent *alone*. The provision means that the appeal shall not abate as a whole necessarily as an invariable consequence of abatement against a respondent. At the same time, the provision does not lay down that in every case the appeal shall proceed against the other respondents. The point will have to be decided in every appeal whether the appeal abated as against the deceased unrepresented respondent only or as a whole.

My opinion is that Wajid Ali's appeal here abated as a whole. A vendee cannot admit the right of one out of several pre-emptors to pre-empt a portion and appeal as to the right of the others. The rights of all pre-emptors were of equal degree and admission of the right of one amounted to an admission of the right of all. Amar Singh may have had claims of his own to the entire property which he would not be able to urge if he is not made a party to the appeal. Suppose Amar Singh alone had deposited the money as he was fully entitled to do under the decree and became entitled to possession of the entire property. The purchaser by appealing against the others, who did not want to press their claims, would deprive Amar Singh of the fruits of his victory by depriving him of a hearing in the Appellate Court. The decree in favour of the plaintiffs was joint and not divisible. To my mind, the principles of the ruling in the case of *Imam-ud-din* v. *Sadarat Rai* (2) apply here though the defendants in that case were purchasers and not pre-emptors. Here the interests of the pre-emptors are indivisible just as those of the purchasers were indivisible in the case quoted. The decree can be executed whole or not at all. On this ground the learned Judges rightly distinguished a decree in a pre-emption suit from a decree such as the one under construction in *Imdad Ali* v. *Jagan Lal* (5). There the properties of two judgment-debtors were divisible. The decree was passed against Muhammad Jalil and not Hamid-un-nissa for possession of property, while the lady had died prior to decree and her representative-in-interest was not brought on the record. This Court held that so far as the interests of the lady were concerned, the decree was not enforceable. Presumably it was known to what extent the decree was passed against Abdul Jalil and to what extent against the lady. In the present case the decree in favour of the four plaintiffs is indivisible.

Ambika Prasad v. *Jhinak Singh* (3) was another ruling of this Court quoted on behalf of the respondent. I shall not rely upon it because the reasoning does not appear to me to be sound that one of several pre-emptors in equal degree cannot appeal with respect to the entire property. I should have thought that, taking the facts of the present case for an example, if the plaintiffs had failed in the First Court, any one of them could have appealed alone to pre-empt the entire property.

As, in my opinion, the decree of this Court of 18th January, 1923 is inoperative, I would dismiss this appeal and decree Appeal Execution No. 281 of 1923.

By the Court.—As we are differing on a question of law, we refer the case to the Hon'ble the Acting Chief Justice with the request that he may constitute a Bench for hearing the question under s. 98 (2) proviso of the C. P. C. The question is this:—

(*a*) Where in a pre-emption suit, the vendee appeals against a decree allowing the claim of four plaintiffs-pre-emptors and the appeal is decreed, in ignorance of the fact that, one of the respondents was dead, and the suit is dismissed, whether the whole appeal had abated and consequently the appellate decree is a nullity or whether the decree was operative as against the plaintiffs-respondents who survived ?

(*b*) Further, whether the fact that the consideration money had been paid by all the pre-emports jointly without specification of shares in terms of the decree of the Court of first instance, in the said Court, before the appeal was heard, will make any difference in the answer to be returned to the question (*a*)?

Messrs. *S. Abu Ali*, *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Appelant.

Mr. *P. L. Banerji* and Dr. *K. N. Katju*, for the Respondents.

The appeal again came for hearing before a Bench consisting of Daniels and Neave, JJ., who delivered the following

JUDGMENT.—(*July 10, 1924*).—This is a Reference under s. 98 of the C. P. C. in consequence of a difference of opinion between Mr. Justice Mukerji and Mr. Justice Dalal. The question for decision in the appeal was whether the failure of the appellant Wajid Ali Khan to implead the legal representatives of Amar Singh plaintiff in his First Appeal No. 119 of 1921, to this Court involved the dismissal of his entire appeal or only its dismissal in respect of one-fourth share of the subject-matter.

The facts are stated in the two referring orders. They are that four persons Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh filed a joint suit for pre-emption. Wajid Ali Khan, the vendee of the property under the sale impugned, was the sole defendant. The Trial Court decreed the suit on 28th February 1921 and gave a joint decree in favour of the plaintiffs. On 18th March, 1921, Wajid Ali Khan appealed to this Court. In the meanwhile the decree-holders deposited the pre-emption money and obtained possession of the property.

On 12th January, 1922, Amar Singh died. No steps were taken to implead his legal representatives. This Court, nearly a year later, in ignorance of Amar Singh's death allowed the appeal and dismissed the suit. This was on 18th January 1923. Wajid Ali Khan obtained an *ex parte* order restoring possession to him, but subsequently on the objection of the legal representatives of Amar Singh, this order was set aside and possession delivered to the legal representatives of Amar Singh. As between the decree-holders there is a mutual agreement the effect of which is that it is immaterial whether possession is restored to all the decree-holders jointly or to the representatives of Amar Singh alone. Wajid Ali Khan appealed to this Court and contends that he should have been allowed to retain possession of three-fourths of the property and only the remaining one-fourth restored to the representatives of the deceased. The appeal came before a Bench consisting of Mr. Justice Mukerji and Mr. Justice Dalal. Mr. Justice Mukerji was of opinion that this contention should prevail. Mr. Justice Dalal considered that the order of the Court below was correct. They have accordingly referred to us under s. 98 of the C.. P. C. the following two questions of law :—

(*a*) Where in a pre-emption suit the vendee appeals against a decree allowing the claim of four plaintiffs-pre-emptors, and the appeal is decreed in ignorance of the fact that one of the respondents was dead, and the suit is dismissed, whether the whole appeal had abated and consequently the appellate decree was a nullity or whether the decree was operative as against the plaintiffs-respondents who survived.

(*b*) Further, whether the fact that the consideration money had been paid by all the pre-emptors jointly without specification of shares in terms of the decree of the Court of first instance, in the said Court, before the appeal was heard, will make any difference in the answer to be returned to the question (*a*)?

We agree with the view of Mr. Justice Dalal that the order of the Court below should be upheld. A reference has been made to the difference in language between O. XXII, r. 4 of the C. P. C. and the corresponding provision of the Code of 1882. The old Code said that the whole appeal should abate. The present Code says that it shall abate as against the deceased defendant or respondent. This does not mean that the appeal can in all cases succeed against the remaining respondents. Whether this is so depends entirely on whether the interest of the deceased respondents can be separated from that of the remaining respondents so that it is possible to give a separate decree against the latter without affecting the interest of the legal representatives whom the appellant has failed to implead. When several persons have a joint interest in property, it is in general impossible to give a joint decree for possession against some of them when the decree declaring the right of the other joint holders to retain possession has become final, otherwise the result would be two contradictory decrees both of equal authority. Our answer to the first question must depend, therefore, on whether the other three plaintiffs had a separate interest in the property which could be restored to Wajid Ali Khan without prejudice to the rights of Amar Singh's representatives. Clearly they had not. The

decree was a joint decree; each plaintiff was given a joint interest in the entire property. It was open to any of the four to pay the entire pre-emption money if his co-plaintiffs failed to do so. To suggest that Amar Singh obtained by the decree a one-fourth share in the property which can be separated off from the share decreed in favour of his co-plaintiffs, is directly contrary to the decree itself. The rulings relied on by Mr. Justice Mukerji do not, in our opinion, affect the question at all. In *Imdad Ali* v. *Jagan Lal* (5), the report shows that the judgment-debtor, whose representatives had not been impleaded, had a distinct and separate share in the property in suit, and this would naturally be the case as the parties were Muhammadans. The case of *Sripat Narain Roy* v *Tirbeni Misra* (6) merely decided that a decree against a dead man was a nullity, but expressly left open the question whether the decree could be given effect to against the surviving defendants. On the other hand, *Ambika Prasad* v. *Jhinak Singh* (3) is a strong authority against the appellant. Other instances in which an appeal was held as wholly abated because the legal representatives of one of the joint decree-holders had not been impleaded are *Sardari Lal* v. *Ram Lal* (7) and *Tej Narain Sahu* v. *Dal Ram Sahu* (8).

Our answer to the second question is that the rights of the parties are not affected by the fact that they jointly paid in the pre-emption money in accordance with the decree of the Trial Court. The argument of the appellant is that they must be presumed to have paid in equal shares and, therefore, to have become tenants-in-common of one-fourth share of the property each. Such a presumption could only be drawn as between the decree-holders in the absence of any evidence to the contrary. As against the judgment-debtor the money was paid in jointly in pursuance of a joint decree. No party could have claimed to deposit a fourth share of the price separately; nor would he have acquired any rights by so doing. Moreover, the order of the Trial Court was that the money should be paid in within thirty days after the decree became final. In fact the decree never did become final because an appeal was filed. The payment was, therefore, only provisional and the rights of the parties cannot be affected by it. Our answer to question (*a*), therefore, is that the whole appeal abated, and our answer to question (*b*) is that the payment into Court of the pre-emption money by the decree-holders makes no difference to the answer returned to question (*a*).

(7) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.

(8) 69 Ind. Cas. 624; 1 Pat. 699; (1922) A. I. R. (Pat.) 606; 4 P. L. T. 170; (1923) Pat. 207; 1 P. L. R 103.

FINAL JUDGMENT.

Mukerji and Dalal, JJ.—(*July 11, 1924*).—This appeal owing to a difference of opinion between the Judges constituting this Bench was heard so far as the question of law was concerned by two Hon'ble Judges of this Court and their opinion and the opinion of one of us are that the decree made by this Court on appeal in the pre-emption suit was nullity. The result of that finding is that Wajid Ali Khan must restore possession to all the four plaintiffs who made the application in the Court below. The Court below allowed the application of the heir of the deceased plaintiff Amar Singh. But according to the decision of this Court now all the four plaintiffs ought to be restored to possession. The appeal of Wajid Ali, the vendee, therefore, fails and Appeal No. 202 of 1923 is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 433 OF 1922.
November 10, 1924.
Present:—Mr. Kinkhede, A. J. C.
Sheikh DANGU—DEFENDANT No. 1—APPELLANT
versus
NARAYAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Land Revenue Act (II of 1917), s. 188—Land separately held by co-sharers—Lambardar, *whether can grant lease.*

Section 188 of the C. P. Land Revenue Act gives no authority to the *lambardar* to grant a lease of land already separately held by the other co-sharers and thus to oust them. [p. 75, col. 2.]

Appeal against the decision of the District Judge, Wardha, in Civil Appeal No. 43 of 1922, decided on the 31st July 1922.

Mr. *M. Y. Sharif*, for the Appellant.

Dr. *H. S. Gour*, Mr. *N. G. Bose*, R. B., and Messrs. *M. R. Bobade* and *K. V. Deoskar*, for the Respondents.

JUDGMENT.—In *Mauza* Panjar, Tahsil Arvi, District Wardha plaintiffs Nos. 1 and 2 and plaintiff No. 3 and defendant No. 2 are co-sharer *malguzars*. Defendant No. 2 is the *lambardar* of the village. In this village there is a large tract of *banjar* land. The plaintiffs Nos. 1 to 3 who own a fifth share in the village commenced on 21st October 1920 to break up some portion of the *banjar* of the village. By 21st January 1921 they had brought under plough about 73 acres of *banjar* land and made it ready for sowing after removing the roots and trunks and clearing it of the bushes and brambles, and also of stones lying therein. This reclamation of the *banjar* land cost them nearly Rs. 1,500. While the land thus brought under cultivation by the plaintiffs at their own cost and labour, was in their possession, the defendant No. 2 maliciously and with the express intention of causing loss to them executed a bogus *patta* in the name of defendant No. 1 Sheikh Dangu on 28th Decembar 1920 and caused it to be registered on 1st February 1921. By means of this document the defendant No. 2 purported to grant a lease in perpetuity to the said Sheikh Dangu in respect of 28·44 acres of the land forming part of the tract brought under cultivation by the plaintiffs in consideration of his paying him Rs. 235 on account of *nazrana*. On the basis of this *patta* the defendant No. 1 went to the field on 2nd February 1921 with a large number of people and took forcible possession thereof. Plaintiffs, therefore, instituted the present suit for recovery of possession of the field on 13th May 1921 as against the said Sheikh Dangu, and have also impleaded Ratansa the *lambardar* as defendant No. 2.

The defence of the defendants Nos. 1 and 2 is practically common. According to both of them the land was first leased by the *lambardar* to defendant No. 1 on 8th October 1920 in consideration of the latter agreeing to pay Rs. 235 as *nazrana*, and that as evidence of that contract of lease a receipt for Rs. 10 as earnest money was passed by defendant No. 2 to defendant No. 1 it is Ex. 1 D-1. That a few days thereafter the defendant No. 1 began to break up the land and after he had prepared it for sowing with cotton and *juar* plaintiffs desired to enter forcibly into possession thereof. The defendant No. 1, however, resisted their forcible entry. It was further alleged that defendant No. 2 as *lambardar* had every authority to grant the lease to defendant No. 1 and that in any case the defendant No. 1 was a *bona fide* lessee and could not, therefore, be ejected from the land given to him in tenant-right by the *malguzar*. It was pleaded in the alternative that in any case plaintiffs were not entitled to claim more than 1/5th share of the land. It was thus clear that each party claimed to have first come upon the land and the validity or otherwise of the transaction of the alleged lease must, therefore, depend upon the decision of the question that as to who or which of the party was in previous possession of the land leased. Both the Courts have concurrently held that the agreement dated 8th October 1920 (Ex. 1 D-1) though proved to be executed by Ratansa defendant No. 2 was not actually executed on that day, and that it was a fraudulent transaction. That the *patta* dated 28th December 1920 (Ex. 1 D-2) was collusive, and that the defendant No. 2 assisted defendant No. 1 by entering into the collusive transaction with him for depriving the plaintiffs of the field in suit; and that defendant No. 2 thus succeeded with help of defendant No. 1 in forcibly ousting the plaintiffs from the land in suit. It was also concurrently found that the so-called lease was for a grossly inadequate consideration. As regards the question of who first broke up the land it was held that the land was first brought under cultivation by plaintiffs and not by defendant No. 1. With regard to the question of the competency of the *lambardar* to grant the lease of land brought under cultivation by and in the actual occupation of other co-sharers, both the Courts have held that it was beyond the scope of the *lambardar's* authority, in view of the peculiar circumstances of the case and of the fact that the land in suit was reclaimed by the plaintiffs at their own cost.

On these findings the plaintiffs' suit was decreed as against the defendants Nos. 1 and 2 by the Munsif of Arvi. The appeal preferred by defendant No. 1 was dismissed by the District Judge, Wardha. The defendant No. 1 has, therefore, come up in second appeal.

During the pendency of the litigation, plaintiff No. 3 assigned his *malguzari* share to one Shesh Rao and the latter seeks sub-

stitution of names whereas the vendor opposes it on the ground that the benefit of this litigation is not assigned to the purchaser. But the terms of the assignment are clear and I do not see any justification for refusing to *add* the name of the purchaser as a co-respondent.

The next important thing what has happened since the institution of the present appeal is that the *lambardar* and the plaintiffs have adjusted their account of village profits and that this adjustment comprizes according to one party the lease money or *nazrana* realised by defendant No. 2 from defendant No. 1 in respect of the land in question, while according to the other party it is not so comprised. It is contended on behalf of the appellant and the defendant No. 2 that by this adjustment the conferral of tenancy by the defendant No. 2 on defendant No. 1 was impliedly consented to by the other co-sharers, and that whatever defect there may have been in the initial letting of the land, it was cured by the subsequent ratification for consideration evidenced by the receipt dated 28th March 1923—marked Ex. A-1. The respondents other than the *lambardar* Ratansa urge that the adjustment was with an express reservation of the rights of the parties as regards the land in suit as the receipt Ex. R-1 executed by Ratansa in favour of the respondents Nos. 1 and 2 simultaneously with receipt (Ex. A-1) would show; that the plaintiffs might at the most be regarded as having only conditionally ratified the defendant Ratansa's act of letting because they have agreed to abide by whatever decision this Court might give on that question, and that it is not an unqualified acceptance or unconditional ratification.

I have gone through the two documents Exs. A-1 and R-1 and am of opinion that they clearly show that the co-sharers have expressly reserved their right to share the land in the event of the decree appealed against being confirmed in second appeal. This must necessarily mean that they have not accepted the defendant No. 1 as the tenant of the land unconditionally. I do not, therefore, think that the appellant's position has in any way been improved by the so-called adjustment of accounts. Moreover the mere fact that defendant No. 1 may have been the party evidently intended to be benefitted by the adjustment, still as he was admittedly not a party but a stranger to the adjustment between the co-sharers and the *lambardar inter se*, I am of opinion that he cannot take advantage of it and claim to avoid the hearing and disposal of the second appeal on its merits.

This brings me to the consideration of two questions :—

(1) Whether the status of the defendant No. 1 is that in respect of tenant of the land in suit, or is he a mere trespasser liable to be ejected ; and

(2) Whether the defendant No. 2 was legally competent to oust the plaintiff from possession of land in suit through the instrumentality of the defendant No. 1 under colour of the so-called lease dated 28th December 1920.

I am of opinion that the finding of fact to the effect that the land in suit was first brought under cultivation by the plaintiffs at their own cost, is fatal to the defence. Moreover the plaintiffs being first on the land, the other co-owner, namely, defendant No. 2 had no right to oust them from the actual possession, they enjoyed, much less could he grant a valid lease of land not in his own possession but in the exclusive occupancy of the other co-sharers. If the authority of the *lambardar* in the matter of granting leases, *i.e.* creating tenancies extends to lands already appropriated to their individual or separate use by the co-sharers, then very anamolous results will follow and there will be a great anarchy in the village. It is not the intention of law to enable the *lambardar* to do anything through his lessee which he himself could not do. He had no right to take the law in his own hands and dispossess the plaintiffs from the possession of the lands brought by them under their own cultivation at enormous cost and with the avowed object of carrying on cultivating operations thereon for their own benefit. I, therefore, hold that s. 188 of the Land Revenue Act gives no authority to the *lambardar* to grant a lease of land already separately held by the other co-sharers and thus to oust them. The defendant No. 1 was thus a trespasser and was rightly held liable to be ejected as such by the present plaintiffs.

For these reasons I dismiss the appeal with costs. Costs in the lower Courts will be paid as already ordered.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1595 OF 1922.
April 14, 1924.
Present :—Mr. Justice Neave.

BHAUN PRATAP SINGH—PLAINTIFF—APPELLANT
versus
BHAGWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Matter directly and substantially in issue—Subject-matter of previous litigation different—Res judicata.

Plaintiff sued for a half share of certain groves by partition. It appeared that there had been a previous litigation of the same nature between the parties but it related to another grove:

Held, that as the groves now in suit were different from the grove which formed the subject-matter of the previous litigation, it could not be said that the matter now in issue between the parties was directly and substantially in issue between them in the former litigation and the matter was not *res judicata*. [p. 77, col. 1.]

Appeal from a decree of the Judge of the Court of Small Causes, Allahabad, dated the 18th July, 1922.

Mr. *Haribans Sahai*, for the Appellant.

Messrs. *P. L. Banerji* and *J. N. Dutt*, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiff, and his learned Advocate states that the matter will not be taken further, whatever the decision of this Court may be. The suit was for partition of certain groves in which the plaintiff claimed one-half share. The genealogy appended to the plaint shows that the parties are descendants from a common ancestor, Aman Singh who has several sons. The plaintiff is the descendant of one of these sons, Pancham Singh, and the defendants are the descendants of another son, named Harnam Singh. Defendants Nos. 1 and 2, who are the sons of Harnam Singh's son Jawahir Singh, have admitted the plaintiff's claim but defendants Nos. 3, 4, 9 and 10, who are descended from another son of Harnam Singh, contested the claim. The remaining defendants did not put in an appearence. The appellant's case was that originally all the parties were members of a joint Hindu family. Some 40 years ago, separation took place but the groves belonging to the family were not divided. The groves in suit continued to be recorded in the name of Harnam Singh, until in 1325 *Fasli* defendants Nos. 1 and 2 got the appellant's name entered in respect of a half share of the groves in suit. The other defendants, however, denied the appellant's title and disputes arose. The appellant accordingly filed this suit for partition.

The defence was that the property belonged to Harnam Singh's branch alone and the plaintiff had no right to it. It was also pleaded that the suit was barred by limitation, as the plaintiff has never been in possession. The First Court decreed the suit, but the lower Appellate Court dismissed it, holding that the groves belonged entirely to the branch of Harnam Singh alone. Two points only have been argued in appeal: the first, that the matter is *res judicata*, the second, that as defendants Nos. 1 and 2 confess judgment the appellant should at least get a decree from their share in the property.

It is in evidence that in 1910 there was a dispute among the descendants of Harnam Singh over the groves. This was referred to arbitration, and Sitla Bakhsh, the father of the plaintiff-appellant was one of the arbitrators. On the 6th July 1910, an award was made granting a one quarter share to the present defendants No. 1 and 2. Later on a creditor of defendant No. 1 got half the share in another grove (not one of those now in suit) attached and brought to sale. It was purchased at auction by the plaintiff-appellant and the contesting defendant instituted a suit to recover three quarters of the property, claiming that the whole grove had belonged to Harnam Singh's branch. The present plaintiff who was defendant in the suit, pleaded that he was the owner of half the grove in his own right and that he was entitled to the other half as purchaser at the auction-sale. The Munsif decreed the suit holding that the groves had belonged to Harnam Singh's branch of the family alone, but on appeal the District Judge took the view that half the grove belonged to the plaintiff in his own rights as a descendant of Pancham Singh and that he got only one eighth of it at that auction.

It is contended that this decision operates as *res judicata* in the present suit for though the subject-matter of the suit is not the same, the matter in issue is substantially the same. In support of this contention the learned Advocate for the appellant relies on *Panchu Mandal* v. *Chandra Kant Saha* (2) and *Pahlwan Singh* v. *Risal Singh* (1). With this view I am unable to

(1) 12 Ind. Cas. 9; 14 C. L. J. 220 at p. 223.
(2) 4 A. 55; A. W. N. (1881) 110; 6 Ind. Jur. 432; 2 Ind. Dec. (N. S.) 610.

agree, as the groves now in suit are different from the grove which formed the subject of the previous litigation; and it cannot be said that the matter now in issue between the parties was directly and substantially in issue between them in the former litigation.

Turning to the other point raised, it is difficult to see why the plaintiff should not have been allowed a decree as against defendants Nos. 1 and 2. The lower Appellate Court has found that they are colluding with the plaintiff and the history of the case supports this view; but it is nowhere denied in the written statement of the other defendants that defendants Nos. 1 and 2 are entitled to a share in the groves in suit, nor does it appear that the other defendants would in any way be prejudiced by the granting of a decree against defendants Nos. 1 and 2 from their share of the property.

The appeal is dismissed as against all the defendants except Nos. 1 and 2 Bhagwan Singh and Tej Singh, and against them a decree for partition of one-half of their one quarter share in the groves in dispute is granted to the appellant. No order as to costs against defendants Nos. 1 and 2.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 97 OF 1923.
November 12, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RAMDHANI GOPE AND ANOTHER—APPELLANTS

versus

MISS C. V. SCOTT AND OTHERS—RESPONDENTS.

Lease, construction of—Document reserving yearly rent—Intention of parties—Tenancy terminable by death, whether heritable—Tenant-at-will, ejectment of—Notice, whether necessary.

Every document which reserves a yearly rent or which states that the rent is payable in proportion to certain *aliquot* parts of the year does not necessarily create a tenancy from year to year. [p. 78, col. 1.]

Morton v. *Woods*, (1869) 4 Q. B. 293; 38 L. J. Q. B. 81; 9 B. & S 659; 17 W. R. 414, *Vaman Shripad* v. *Maki*, 4 B. 424 at p. 425; 2 Ind. Dec. (N. S.) 788 and *Jagjivandas Javherdas* v. *Narayan*, 8 B. 493; 4 Ind. Dec. (N. S.) 703, referred to.

Where the intention of the parties is that the tenancy is to be determined by the death of either party there can be no estate which the heir can take. [p. 79, col. 1.]

Killick v. *Manser*, (1910) W. N. 61, followed.

It is settled both in England and in India that in the case of a tenancy-at-will no formal notice is required but a demand for possession is sufficient. [p. 79, col. 2.]

Deo Nundan Pershad v. *Meghu Mahton*, 11 C. W. N. 225 at p. 229; 5 C. L. J. 181; 34 C. 57, followed.

Appeal against the judgment of Mr. Justice Foster, dated the 24th July 1923, confirming a decision of the Subordinate Judge, Patna, dated the 25th July 1921.

Mr. *A. K. Roy*, for the Appellants.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Mullick, J.—The decision of this appeal depends on the construction of a *kabuliyat* executed on the 6th January 1894 by one Khaderan Passi in favour of Mr. James Scott in respect of 1 *katha* 16 *dhurs* of land in *Mauza* Bankipore Jaibar. Khaderan was a seller of toddy and took the land to build a shop on it for carrying on his business. Subsequently Mr. James Scott devised the land by Will to his son George Scott who in his turn devised it to the plaintiffs, and upon Khaderan's death, which took place some time before the year 1909, the land came into the possession of his four daughters one of whom *Musammat* Subhagia together with her son Tuni on the 2nd March 1909 executed a mortgage in respect of the whole 1 *katha* 16 *dhurs* in favour of defendant No. 2 who is the son and *benamidar* of defendant No. 1. Eventually the defendant No. 2 sued upon this mortgage and purchased the property in execution in 1917. *Musammat* Subhagia's three sisters thereupon brought a partition suit against her and defendant No. 2 and recovered their twelve-annas share in the holding leaving an area of 9 *dhurs* constituting the four-annas share of *Musammat* Subhagia in the possession of defendant No. 2. It is said that the plaintiffs have come to terms with the three sisters, and that in regard to *Musammat* Subhagia's share they, on the 15th April 1919, wrote to the defendant No. 1 asking him to execute a *kabuliyat* if he wished to be recognised as a tenant and that on the 23rd April 1919 the defendant No. 1 declined. Thereupon on the 29th April 1919 the plaintiffs served the defendant No. 1 with a notice calling upon him to give delivery of possession on the 14th May 1919. The present suit was instituted on the 27th August 1919 for the ejectment of the defendants.

The Munsif dismissed the suit holding that the defendant No. 2 had a right of occupancy and also that in any event he was entitled to six months' notice.

On appeal the Subordinate Judge held that Khaderan was a tenant-at-will, that neither he nor *Musammat* Subhagia had any transferable interest in the property, that the plaintiffs never recognised the defendant No. 2 as a tenant and that no notice was necessary. The learned Subordinate Judge accordingly made a decree for ejectment.

There was then a second appeal to the High Court which was heard by Mr. Justice Foster. The learned Judge agreed with the Subordinate Judge and dismissed the appeal.

The present Letters Patent Appeal has been preferred by the defendants against the decree of Mr. Justice Foster.

Now, the first question is whether *Musammat* Subhagia was a tenant-at-all, and if so, whether she was a tenant-at-will or a tenant from year to year or a tenant from month to month.

Now, in this case the principle that a doubtful grant is to be construed in favour of the grantee has no application. The *kabuliyat* is clear and I agree with the Courts of Appeal below that it creates a tenancy-at-will. Every document which reserves a yearly rent or which states that the rent is payable in proportion to certain *aliquot* parts of the year does not necessarily create a tenancy from year to year. In *Morton* v. *Woods* (1), the lease was for a term of ten years at a yearly rent of £ 800, but it provided that notwithstanding anything therein contained and without any notice or demand of possession it should be lawful for the lessor to determine the term of the tenure and to eject the lessee. It was held by Chief Baron Kelly that the lease created a tenancy-at-will and not one for a term of years because whatever might be the nominal duration of the tenancy it was intended that it should be in the power of the lessor at any time to put an end to it. Here the relevant words in the lease in question are as follows :—

"I shall without any objection and plea whatsoever on my part continue to pay the said fixed rent annually from 1301 *Fasli* as per instalment given below and taking receipts therefor. Should the rent of one instalment, *i. e.*, of six months in respect of the said land remain due by me or by my heirs or representatives, the said proprietor shall be competent to realise from me or my heirs or representatives, the said rent with interest thereon at two-annas per rupee per month from the date of default to that of realisation, in case of non-payment of the same without instituting a suit. So long as I shall remain in possession of the said land with the consent of the said landlord, on payment of fixed annual rent, I shall continue to pay the same."

These words, in my opinion, leave no room for doubt that it was the intention of the parties that the tenancy should be terminable at the will of either party.

In *Vaman Shripad* v. *Maki* (2), the lease gave the lessee the right to hold the land so long as the lessee chose to occupy it and it was held that the lease was a tenancy-at-will terminable upon the death of the lessee.

In *Jagjivandas Jarherdas* v. *Narayan* (3), the *kabuliyat* provided that the tenant might claim possession for one year and that he should pay rent so long as the landlord should leave the land with him. It was held that the lease was not for a period beyond one year but created a tenancy-at-will.

In the present case the express words limiting the duration to the will of the lessor cannot be ignored.

The next question is whether the tenancy was heritable. In Halsbury's Laws of England, Vol. XVIII, page 437, the rule is stated thus: "A tenancy-at-will is a personal relation between the original landlord and tenant, and is determined by the death of either of them." Woodfall in his Law of Landlord and Tenant, 14th Edition, page 237, varies the rule slightly and states it as follows: "An estate-at-will may be determined by a demand of possession or by the express declaration of either of the parties, or by implication of law : of the latter description will be the death of either party, which in general determines the will." The reason for the rule is that as death determines the will the tenancy terminates by efflux of time and that in such a case the successor of the tenant being at best a

(1) (1869) 4 Q. B. 293; 38 L. J. Q. B. 81; 9 B. & S. 659; 17 W. R. 414.

(2) 4 B. 424 at p. 425; 2 Ind. Dec. (N. S.) 788.

(3) 8 B. 493; 4 Ind. Dec. (N. S.) 703.

tenant by sufferance he may be ejected without notice: *James* v. *Dean* (4).

It is necessary, however, to observe that in *Morton* v. *Woods* (1), Chief Baron Kelly expressed an opinion regarding the subsistence of a tenancy-at-will after the death of one of the parties in the following words: "The whole law on this subject is based on very fine distinctions ; but when we come to look at the cases, it would rather seem that a tenancy-at-will may continue to subsist after the death of one of the parties, unless the heir or legal representative shall do something to manifest his intention to determine the tenancy. At all events, it is necessary to say that the mention of heirs and assigns does not necessarily manifest an intention to create anything more than a tenancy-at-will."

It would appear that these words were *obiter* and, in my opinion, they are not an authority for holding that a tenancy-at-will is necessarily heritable. They might perhaps be applicable to the facts of such a case as *Killick* v. *Manser* (5), where a tenant-at-will died intestate and his administratrix in her affidavit for the inland revenue treated the land as copyhold and valued it at £200. Subsequently she was accepted as a tenant by the landlord on signing the usual acknowledgment that she held as a tenant-at-will. The intestate's next of kin having asked for a decision whether the new tenancy acquired by the widow formed part of the intestate's estate, and also for general administration, the Court, without delivering a formal judgment, made an order for administration of the intestate's real and personal estate, including the property comprised in the widow's acknowledgment. It would seem that for the purpose of administration the new tenancy was treated there as an accretion to the intestate's estate ; but the case is not an authority for the general proposition that all such estates are heritable. Where the intention of the parties is that the tenancy is to be determined by the death of either party there can be no estate which the heir can take and I think it follows upon principle that the Indian law on the subject must be the same as the English Law, and that in the present case *Musammat* Subhagia had no tenancy in the land.

(4) (1805) 11 Ves. 383; 32 E. R. 1135; 8 R. R. 178.
(5) (1910) W. N. 61.

In any event she had no transferable interest in it, for even if she became a tenant-at-will by inheritance, the tenancy was determined by an act of assignment. The defendant No. 2 acquired no title to the property by the execution purchase.

Our attention has been drawn to the words in the *kabuliyat* providing that in the event of any rent remaining due from Khaderan or his heirs or his representatives, the proprietor would be competent to realise it from him or his heirs or his representatives. The reference to the heirs in this connection has been found by the learned Judge of this Court to relate to the realisation of rent accruing due before and not after his death. In my opinion that is a correct construction of the lease.

Finally it is to be determined whether the plaintiffs are entitled to a decree for ejectment in this suit. Now, it is settled both in England and in India that in the case of tenancy-at-will no formal notice is required but a demand for possession is sufficient: *Deo Nundan Pershad* v. *Meghu Mahton* (6). In the present case it is established that a demand for possession was made and I can see no reason why the defendants should not deliver up possession to the plaintiffs.

The decree of the Subordinate Judge and the learned Judge of this Court were correct and the appeal is dismissed with costs.

Miller, C. J.—I agree.

K. S. D. *Appeal dismissed.*

(6) 11 C. W. N. 225 at p. 229; 5 C. L. J. 181; 31 C. 57.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 53 OF 1921.
May 22, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

MUHAMMAD SAID—DEFENDANT—APPELLANT

versus

BISHAMBHAR NATH—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 11—Contract of sale by minor—Suit for cancellation of sale—Decree conditional on re-payment—Court, equitable power of—Test.

Notwithstanding the fact that a contract of sale entered into by a minor has been declared to be destitute of legal effect, the Court has the equitable power, wholly distinct from the existence of a contractual or non-contractual relation of the parties, to

make a decree for cancellation of the sale-deed conditional upon re-payment of the purchase-money. In each case the test must be the conduct of the parties. [p. 80, col. 2.]

The very request for equitable relief puts upon the Court the obligation of looking carefully into the conduct of the petitioner in each case. [p. 81, col. 1.]

First appeal from a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 13th of December 1920.

Mr. *B. E. O'Conor* (with him Maulvi *Iqbal Ahmad*), for the Appellant.

Dr. *K. N. Katju* (with him Munshi *Krishen Bihari Lal*), for the Respondent.

FACTS.—Bishambhar Nath, a minor son of Janki Prasad, sold his interest in the ancestral property to Muhammad Said, son of Abdul Aziz who had already acquired by purchase the interest of Sheo Narain, another son of Janki Prasad. Bishambhar Nath brought the present suit through his father as his next friend and certificated guardian for the cancellation of the said sale and for possession of the property transferred on the ground of minority at the date of the sale. Muhammad Said pleaded, firstly, that the plaintiff was not in fact a minor at the date of the sale and had further assured him of his being major by producing horoscope and medical certificate and secondly, that, in any case, the plaintiff was not entitled to relief prayed for without re-payment of the consideration actually received by him from the defendant on account of the sale in question. The next friend in reply charged Abdul Aziz with having brought about the moral and financial ruin of his two sons and maintained that Abdul Aziz, having first secured influence over Sheo Narain and by providing him with funds for dissipation, acquired the whole of his share in the family property and the defendant adopted the same course with the present plaintiff and most carefully kept back all knowledge of his transaction from him. He further contended that the defendant's claim for the refund of the sale consideration was not legally admissible. The lower Court decreed the suit having held that the plaintiff was a minor at the date of sale and the defendant was not entitled to any refund. The defendant appealed. Their Lordships after discussing the evidence on the record held that the plaintiff was a minor at the date of sale and on the question of restitution, delivered the following

JUDGMENT.—We now turn to the second question. Should the decree in favour of the plaintiff be made subject to any and what conditions of re-payment?

Notwithstanding that the effect of our first finding is to declare the contract between the parties destitute of legal effect, we are of opinion that we have an equitable power, wholly distinct from the existence of a contractual or non-contractual relation of the parties, which entitles us in a case of this kind to make a decree conditional upon re-payment. In each case the test must be the conduct of the parties. On the one hand, the father of the plaintiff contends that the defendant and his father have brought about the moral and financial ruin of his two sons. He maintains that Abdul Aziz secured influence over Sheo Narain, influenced him adversely to his own interests and those of his father, acquired the whole of his share of the family property, and by putting him in funds enabled him to commence a course of dissipation. Similarly when Bishambhar Nath, in July, 1916, was minded to raise money, he was brought by Sheo Narain to the defendant and the latter adopted the same course with him and most carefully and cautiously kept all knowledge of his transactions with Bishambhar Nath from the father. He accepted from Sheo Narain a document of doubtful authenticity, the horoscope; he relied upon a paragraph in a written statement of the father, he contented himself with a medical certificate whereas, it is contended, he ought to have gone to the father and told him of the son's intentions and asked him for proof of his age. It is said that he did not do so as he was well aware that the father would have disapproved strongly of the suggested transactions and would have asserted his son's minority, and, as against the defendant, the case has been put as one of studied abstention on his part from all communication with the father and as one on which he was prepared to take risks, actuated by a desire to add to the

property originally owned by Sheo Narain that of his brother Bishambhar Nath.

In one view of the case it is possible that Sheo Narain and Bishambhar Nath did perpetrate a fraud upon the defendant. They may have "planted" a forged horoscope upon him and Sheo Narain may have made verbal representations as to the age of Bishambhar Nath. This is, however, largely a matter of surmise, and proof of these matters was on the defendant. He failed to give the requisite proof. Whilst due protection must be given to persons in the position of the defendant, when victims of a clear fraud, they must nevertheless make out a plain case for equitable relief, and the very request for such relief puts upon the Court the obligation of looking carefully into the conduct of the petitioner in each case. We think that the father of the minor plaintiff is right in charging the defendant with having been to some extent unscrupulous in his dealings with his two sons, and, as regards Bishambhar Nath, we think that in the defendant's anxiety to acquire the property he was content to run some degree of risk. Purchasers or money-lenders who deal with persons who are hovering upon majority, and the ascertainment of whose exact age is impossible must not complain if their cupidity leads them at times into litigation and loss. We are of opinion that we ought not to exercise our powers of equitable relief in this case and that the appeal must be dismissed. We, however, direct that in this and the Trial Court each party shall pay his own costs.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 544 OF 1922.

July 23, 1924.

Present:—Mr. Kinkhede, A. J. C.

NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

IKRAM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 26—Easement—Right of way—Uninterrupted user for twenty years—Presumption—Failure to draw presumption—Second appeal, whether competent.

An open user continued without interruption for a period of over twenty years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of s. 26 of the Limitation Act. [p. 82, col. 1.]

Failure on the part of an Appellate Court to draw from such user a presumption that it was as of right is an error of law which makes a second appeal competent. [p. 81, col. 2.]

Diwan v. *Jagta*, 56 Ind. Cas. 728; 1 L. 206; 113 P. L. R. 1920, followed.

Mahomed Ali v. *Joogul Ram Chunder*, 14 W. R. 124; 5 B. L. R. App. 84, relied on.

Appeal against a decree of the District Judge, Chhindwara, dated the 11th August 1922 in Civil Appeal No. 62 of 1922.

Dr. *H. S. Gour*, for the Appellants.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—This appeal raises two questions. One is as to whether the lower Appellate Court was right in making a presumption that the user of way was as of right. The District Judge relied on *Mahomed Ali* v. *Joogul Ram Chunder* (1) which was followed in *Hari* v. *Mahadeo* (2) and held that the evidence on record was sufficient to raise the presumption that the long user not being attributable to permission or sufferance was as of right. The District Judge has believed the plaintiff when he said that he did not obtain permisson but used the way because he thought he could pass; with regard to this matter the appellants' learned Counsel urges that the District Judge was wrong in his interpretation of Mr. Kotval, Additional Judicial Commissioner's order of remand and in making the presumption that the user was as of right. Mr. Kotval, Additional Judicial Commissioner, had pointed out that all that long user or enjoyment showed was that it was peaceful and without interruption and that the other elements about the user being as of right and as an easement must be distinctly established. The District Judge on a proper consideration of the evidence on record has drawn that conclusion that the user was as of right. Failure on the part of the District Judge, to draw such a presumption was held to be an error of law which made a second appeal competent. See *Diwan* v. *Jagta* (3) where the case of *Mahomed Ali* v. *Joogul Ram Chunder* (1) has been referred. It was pointed out that where a plaintiff used a pathway without let or hindrance for a period of 20 years and the pathway was

(1) 14 W. R. 124; 5 B. L. R. App. 84.
(2) 61 Ind. Cas. 569.
(3) 56 Ind. Cas. 728; 1 L. 206; 113 P. L. R. 1920.

the only way they could use to gain access to the well and still the District Juge held that the plaintiff had not proved user "as of right," the High Court held that in not making the presumption the lower Appellate Court had committed an error of law so as to justify an interference in second appeal. It was further held that having regard to the habits of the people of this country the enjoyment of the passage "as of right" within the meaning of s. 26 of the Limitation Act should have been presumed.

There is also authority of our own High Court to the same effect in *Ramchandra Rao* v. *Venkat Rao* (4). I, therefore, hold that an open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of s. 26 of the Indian Limitation Act. I, therefore, think that the District Judge was not wrong in making the presumption.

As regards the second point I think the finding that the pathway lies between the fields of the two contending sets of defendants over their common *dhura* or uncultivated land is sufficiently definite under the circumstnnces of the case. I do not see any useful purpose would be served by remanding the case to make it more definite.

The appeal, therefore, fails and is dismissed with costs. Costs in the lower Courts will be paid as already ordered.

G. R. D. *Appeal dismissed.*

(4) 45 Ind. Cas. 936; 16 N. L. R. 76.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2063 OF 1918.

February 2, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

DAULAT RAI—DEFENDANT—APPELLANT

versus

LILA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Suit against defendant through trustee—Appeal by defendant himself—Expenses, payment of, by trustee—Death of appellant—Failure to bring legal representative on record—Abatement.

A suit against one *D*, through one *M* the trustee of *D's* estate, having been decreed, *D* himself filed an appeal through Counsel but died during the pendency of the appeal and no one was brought on the record as his legal representative. *M* paid the expenses of the appeal and an application was made on his behalf stating that the suit had been against the estate of *D* and that the appeal also had been filed on behalf of that estate and praying that *M* may be shown in the appeal as representing the estate. *M* was not, however, brought on the record as a party to the appeal. At the hearing, an oral application was made on behalf of *M* that *N*, the son of *D*, should be brought on the record as the legal representative:

Held, (1) that as *D* alone had preferred the appeal and nobody had been brought on the record as his legal representative, the appeal had abated; [p. 83, col. 2.]

(2) that the payment of the expenses of the appeal by *M* did not necessarily make him a party; [p. 83, col. 2.]

(3) that the application for bringing *N* on the record was untenable, having been made after the lapse of a considerable time since the death of *D*. [p. 84, col. 1.]

First appeal from a decree of the Subordinate Judge, Muzafferpur, dated the 23rd March 1918.

Dr. *G. C. Narang*, Messrs. *Kanhya Lal* and *S. K. Mukerjee*, for the Appellant.

Bakhshi *Tek Chand* and Mr. *Hargopal*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken by Mr. Tek Chand on behalf of the respondent that this appeal cannot proceed. It appears that the suit which gave rise to this appeal was filed by Lila Ram against Daulat Rai and others. The principal defendant was Daulat Rai. He was described in the plaint as "Lala Daulat Rai, son of Lala Chela Ram, caste Gaha, resident of Lieah, late Managing Director of the Hindustan Bank in liquidation, at present a prisoner in the Central Jail, Delhi, *aur niz batawassat* Lala Mulkh Raj Bhalla, ex-Managing Director of the Co-operative Bank, Lahore, in liquidation, the alleged trustee of the property of the said Lala Daulat Rai."

It appears that Daulat Rai had got into certain difficulties in connection with some Banks which had resulted in his being sent to prison for a period. As his exact whereabouts were not known, his address was given as stated above, the reference to Mulkh Raj being due to the fact that Daulat Rai had executed a trust deed on the 3rd October 1914, conveying all his property, moveable and immoveable to the said Mulkh Raj, in trust for payment of all debts due by Daulat Rai and the recovery of all the assets. Daulat Rai being in jail the suit was defended *on his behalf* by Mulkh Raj, who, in due course, filed two written statements which were filed *on behalf of* Daulat Rai through the said Mulkh Raj *vide* pages 56, 57 and 58 of the printed

book. It appears that objection was taken to the conduct of the defence by the said Mulkh Raj and this matter was put in issue *vide* Issue No. 5 at page 64 of the printed book. It will thus be seen that Mulkh Raj was never brought on the record as a defendant in his capacity as trustee, but defended the suit on behalf of Daulat Rai, the principal defendant.

The plaintiff's suit was decreed on the 23rd March 1918, and an appeal against that decree was filed by Mehta Bahadur Chand on the 4th June 1918. At that time Daulat Rai had come out of jail and the appeal was filed *on his behalf*, as is evidenced by the memorandum of appeal as well as by the power-of-attorney executed by him, and him alone, in Mehta Bahadur Chand's favour. A reference to the memorandum of appeal clearly shows that Daulat Rai was the sole appellant although the description given in the heading *vide* page 123 is admittedly incorrect, for on that date he was not a prisoner in the Central Jail at Delhi and he was appealing through himself and not through Lala Mulkh Raj Bhalla. Subsequent to the filing of this appeal Lala Daulat Rai died on the 4th September 1919. He left him surviving at least one son, named Nain Sukh Rai, Barrister-at-law, at present practising at Lyallpur. The fact of his death was brought to the notice of Mehta Bahadur Chand *vide* the High Court Office letter No. 5718-J dated the 13th August 1921. To this letter Mehta Bahadur Chand replied by a letter dated the 5th September 1921, in which he pointed out that Lala Mulkh Raj ex-Managing Director of the Co-operative Bank, Lahore, in liquidation, was a trustee of the deceased appellant and would deposit any printing fees if communicated with and would *take steps to bring himself on to the record.* It is thus perfectly clear that the gentleman who filed the appeal and was responsible for the filing of this appeal understood that he was doing *so on behalf of Daulat Rai and nobody else.* Mulkh Raj was duly communicated with and paid the necessary money. By a letter No. 3687-J dated the 11th May 1922, from the High Court Office Lala Mulkh Raj was reminded that no legal representative of the deceased Daulat Rai had as yet been brought on to the record.

On the 2nd June 1922, an application purporting to be under ss. 151 and 153, C. P. C., was filed on behalf of Lala Mulkh Raj by Mr. S. K. Mukerji in which it was stated that the "suit" had been against the "estate" of the said Daulat Rai and that the appeal had also been filed on behalf of that "estate."

It was prayed that the necessary alterations might be made and Lala Mulkh Raj as trustee shown as representing the said estate. This application was granted subject to all just exceptions and on the 23rd January 1923, Lila Ram, the plaintiff-respondent, filed an affidavit pointing out that Daulat Rai the real defendant and appellant, had died and that as no application to bring his legal representatives on the record had been made, the appeal had abated.

At the hearing before us Dr. G. C. Narang appeared for Mulkh Raj and contended first that inasmuch as Lala Mulkh Raj was already on the record as trustee, no question of abatement arose; secondly, that the appeal might and should be considered as an appeal on behalf of the "estate" in which case the question of abatement did not arise and, thirdly, that in the event of our decision being adverse on these two contentions, he asked that on his oral application, made on behalf of Mulkh Raj, Mr. Nain Sukh Rai, son of Daulat Rai, should be brought on to the record as the legal representative. Our attention was invited to *Krishna Chandra* v. *Mohesh Chandra* (1), *Srinath Das* v. *Probodh Chandra Das* (2) and *Hafiz-un-nissa* v. *Jawahir Singh* (3). With these authorities we see no reason to differ but we are unable to see that they in any way assist in the present case. As stated above the examination of the record shows that Mulkh Raj was never brought on the record as a party to the case. Daulat Rai was the defendant from start to finish. Further, the appellate record shows that it was Daulat Rai, and Daulat Rai alone, who preferred this appeal on his own behalf. Mehta Bahadur Chand acting under his authority. Mulkh Raj has filed an affidavit to the effect that he has been defraying the costs of this litigation out of the trust fund. Even so, that does not necessarily make him or the "estate" a party, and we must hold that the appeal has been filed by Daulat Rai alone. As to the oral application for an order under O. XXII, r. 9, bringing

(1) 9 C. W. N. 584
(2) 6 Ind. Cas. 244.
(3) 66 Ind. Cas. 24

Mr. Nain Sukh Rai on to the record. *Firstly*, no application has been made on behalf of Mr. Nain Sukh Rai and *secondly* the time that has elapsed since the death of Daulat Rai is very considerable. Even when Mulkh Raj's attention was drawn to the fact that Daulat Rai's legal representatives had not been brought on to the record, no application was made to remedy that defect, instead, the application referred to as having been filed by Mr. Mukerji, was put in. That application is, in our opinion, wholly untenable.

The appeal has, therefore, abated and is dismissed with costs as such.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 83 OF 1922.
October 25, 1924.
Present:—Mr. Kinkhede, A. J. C.
WASUDEO—PLAINTIFF—APPELLANT
versus
SHANKAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easement—Right of way—Long and uninterrupted user—Presumption—Nature of obligation—Servient owner, whether can object on ground of inconvenience—Right of way, limit of—Failure to draw inference that user is as of right—Second appeal.

Long, uninterrupted and peaceful enjoyment of a right of way is presumed to be as of right. There is no presumption that the enjoyment is by license. [p. 85, col. 1.]

Narayan v. *Ikram*, 85 Ind. Cas. 81 and *Kunjammal* v. *Rathnam Pillai*, 66 Ind. Cas. 11; 45 M. 633 at p. 639; 15 L. W. 266; (1922) M. W. N. 143; (1922) A. I. R. (M.) 5; 31 M. L. T. 150; 42 M. L. J. 417, referred to.

Under law, the nature of the obligation resting on the owner of the servient tenement is purely negative, that is to say, he must not so deal with the servient tenement as to render the easement incapable, or more difficult of enjoyment by the owner of the dominant tenement. [p. 86, col. 1.]

Easements of way must not be vague or indefinite, that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose. [p. 86, col 2.]

Gooroo Churn Goon v. *Gunga Gobind Chatterjee*, 8 W. R. 268, *Joy Doorga Dossia* v. *Juggernath Roy*, 15 W. R. 295 and *Wimbledon and Putney Commons Conservators* v. *Dixon*, (1876) 1 Ch. D. 362; 45 L. J. Ch. 353; 33 L. T. 679; 24 W. R. 466, relied on.

When once a right of way has been acquired, the servient owner cannot object to it on the ground of inconvenience, nor can he put an end to the right by showing that there is another pathway which the dominant owner might use. [p. 86, col. 2; p. 87, col. 1.]

Sham Bagdee v. *Fakeer Chand Bagdee*, 6 W. R. 222, *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory*, 22 W. R. 302 and *Goluck Chunder Chowdhury* v. *Tarinee Churan Chuckerbutty*, 4 W. R. 49, followed.

The question of the precise limit of the right in any particular case must depend upon the proof of the particular line between the *terminus a quo* and the *terminus ad quem* over which the owner of the dominant tenement claims the right. [p. 87, col. 1.]

Doorga Churn Dhur v. *Kally Coomar Sein*, 7 C. 145 at p. 147; 8 C. L. R. 375; 3 Ind. Dec. (N. S.) 643 and *Jibananda Chakrabarti* v. *Kalidas Malik*, 26 Ind. Cas. 213; 42 C. 164; 20 C. L. J. 97; 18 C. W. N. 1296, referred to.

Where there has been long and continuous user of a right of way by a party, it is open to the Court to draw the inference that the user was of right, and a failure to draw it from the facts proved is a ground for interference in second appeal. [p. 84, col. 2; p. 85, col. 1.]

Diwan v. *Jagta*, 56 Ind. Cas. 728; 1 L. 206; 113 P. L. R. 1920 and *Mohamed Ali* v. *Joogal Ram Chunder*, 14 W. R. 124; 5 B. L. R. App. 84, followed.

Appeal against a decision of the Additional District Judge, Wardha, in Civil Appeal No. 143 of 1920, decided on the 7th November 1921.

Messrs. *M. Gupta* and *S. K. Barlinge*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—The appellant is a purchaser of a vacant site from a *malguzar* and the respondent No. 1 is a neighbour of that site who claims a right of way over it for the beneficial enjoyment of his own dwelling house standing on a site adjacent to the site in dispute. The First Court decreed the claim for injunction restraining the defendants from using the way while the lower Appellate Court has reversed the decree and dismissed the suit. The plaintiff, therefore, appeals urging that the defendant-respondents' enjoyment of the right of way over the site was not proved to be as "an easement" or "as of right", and that no easement of a right of way could be acquired by persons who are mere licensees of *abadi* sites as against the *malguzar* under whom the plaintiff claims the site in dispute.

The lower Appellate Court has found it as a fact that the defendant No. 1 and his ancestors or occupants of his houses Nos. 2 and 3 (*vide* map B) did, as a matter of fact, use the site in suit for a way to the road to its east for more than 40 years before the date of the suit (this was also the finding of the First Court).

There is thus a concurrent finding as to the long and continuous user of the right of way by the defendant No. 1 and his predecessors-in-title. The Court of first in-

stance however refused to draw the conclusion from such user that it was "*of right.*" The lower Appellate Court has drawn such a conclusion on the authority of the rulings in *Mathuradas Nandvalabh* v. *Bai Amthi* (1), and *Sitaram* v. *Petia* (2). This conclusion is attackad in second appeal. That it is open to a Court to draw such a conclusion, and a failure to draw it from the facts proved is a ground for interference in second appeal is well established on the decided authorities. See *Diwan* v. *Jagta* (3), where the case of *Mahomed Ali* v. *Joogal Ram Chunder* (4), was followed. It was also followed in *Hari* v. *Mahadeo* (5). This High Court has also held in *Ramchandra Rao* v. *Venkat Rao* (6), that long uninterrupted and peaceful enjoyment of a right of way may be presumed to have a lawful origin or *to be as of right.* I have also held in *Narayan* v. *Ikram* (7) that where from an open user continued without interruption for a period of over 20 years, and not shown to be attributable to permission or sufferance on the owner's part the final judge of fact *i.e.*, the first Appellate Court draws an inference or presumption that it is *as of right*, the High Court cannot interfere with the finding. Such user is *prima facie* evidence of enjoyment as of right, within the meaning of s. 26 of the Indian Limitation Act or of the provisions of the Easements Act, according as the case may come under the one or the other Act. Halsbury's Laws of England, Vol. XI, p. 259, quotes cases in which as will be found, every presumption was made in favour of long user being *as of right.* There is no presumption that enjoyment is by license, but that long user is presumed to be as of right. *Kunjammal* v. *Rathnam Pillai* (8).

The respondent's Pleader also relies on the following Bombay case as justifying the same conclusion and showing that even 35 years' user is immemorial. *Rambhai* v. *Vallabbhai* (9). The case in *Rajrup Koer* v. *Abdul Hossein* (10) is an authority for the view that long enjoyment must be referred to a legal origin, *i.e.* to an "implied" or "lost grant." The latest case which supports the view that an easement may be claimed on the basis of an immemorial user is to be found in *Tinkori Pathak* v. *Ram Gopal Pathak* (11), which also lays down that although a tenant cannot acquire a prescriptive right and easement in land belonging to his lessor, he may claim a right of easement based on immemorial user.

In view of the lower Appellate Court's findings that the user has been proved to have continued for over 40 years, I think the case is either a case governed by the provisions of s. 26 of the Limitation Act or a case of an implied grant and not one governed by the Easements Act. The right of way can, therefore, be deemed to have been acquired independently of the Indian Easements Act, the house or houses in respect of which the way has been used for so long a time must have thus been in existence from before 1882 when the Easements Act came into force. The right of way which the plaintiff now wants to circumvent by the present suit can, therefore, be safely referred to a legal origin, *i. e.* to an implied or lost grant, which it was open to the *malguzar* to make. In ordinary parlance it may be called an easement acquired by grant and not necessarily by prescriptive enjoyment under the Easements Act. The defendant No. 1 is admittedly not an agriculturist, and his houses are presumably in existence since before 1882 and the former occupants of those houses are found to be non-agriculturists residents of the *abadi.* Whether they were mere licensees or owners of the sites over which their houses stood is a very debatable question which I do not see any necessity to decide in the present case. I can, on the material on record, however, safely presume that the right of way claimed by the defendant No. 1 must have had its origin in a lost grant by the proprietor of the *abadi.*

I need not, therefore, discuss the other question raised by the appellant whether a *prescriptive* easement could have been acquired by the defendant No. 1, or his predecessors-in-interest over the vacant land

(1) 7 B. 522; 8 Ind. Jur. 145; 4 Ind. Dec. (N. S.) 352.
(2) 43 Ind. Cas. 932; 14 N. L. R. 35.
(3) 53 Ind. Cas. 728; 1 L. 206; 113 P. L. R. 1920.
(4) 14 W. R. 124; 5 B. L. R. App. 84.
(5) 61 Ind. Cas. 569.
(6) 51 Ind. Cas. 936; 16 N. L. R. 76.
(7) 85 Ind. Cas. 81.
(8) 63 Ind. Cas. 11; 45 M. 633 at p. 639; 15 L. W. 263; (1922) M. W. N. 143; (1922) A. I. R. (M.) 5; 31 M. L. T. 150; 42 M. L. J. 417.
(9) 62 Ind. Cas. 65; 45 B. 1027; 23 Bom. L. R. 422.
(10) 6 C. 394 at p. 403; 7 I. A. 240; 7 C. L. R. 529; 5 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).
(11) 70 Ind. Cas. 663; 50 C. 356 at p. 361; 36 C. L. J. 161; (1923) A. I. R. (C.) 8.

in dispute for the beneficial enjoyment of their dwelling houses as against the *malguzar*.

Although this disposes of the objections specifically raised in the grounds of appeal Nos. 1 to 5, there remains the objection taken in ground No. 6 that the decision of the lower Appellate Court is not in accordance with law particularly the law of easement and that it is not properly applied to the present case.

I think if this objection has any bearing on the facts found it is this: that the decree gives to the defendant an unrestricted right of using the whole of the vacant site from any and every point as a passage which is against all law and principle, because it places the owner of the servient heritage under a perpetual obligation to keep the whole of his open space vacant for the exercise of the defendant's right of way over it.

Under law, the nature of the obligation resting on the owner of the servient tenement is purely negative, that is to say, he must not so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement.

Consistently with such duty, the servient owner may use the servient tenement in any way he pleases. He may ....impose subordinate easements upon it or exercise on it in his own favour any of the ordinary rights of ownership, *vide* Peacock's Law relating to Easements in British India, 3rd Edition, page 523. The learned Tagore Law Lecturer proceeds to illustrate this general principle and supports it by a citation of cases at pp. 524 to 525 of the Volume. I may give an extract from it as it will illustrate the above principle.

"An easement of way does not, as a general rule, entitle the dominant owner to the use of the whole width of the road unless it is necessary for the full and free exercise of the easement, but is confined to such part of the centre of the road as may be necessary for the purposes of the particular right [*Hutton* v. *Hamboro* (12)]. In this respect the only obligation resting on the servient owner is that he shall not unreasonably narrow the width of the road or do anything which practically or substantially prevents the way from being used as conveniently as before." *Hawkins* v. *Carbines* (13), *Hutton* v. *Hamboro* (12), *Clifford* v. *Hoare* (14). Compare *Toolseemony Debee* v. *Jogesh Chunder Shaha* (15). *Doorga Churn Dhur* v. *Kally Coomar Sein*(16). It, therefore, follows that "so long as the dominant owner obtains a reasonable enjoyment, of his easement, he cannot complain of anything done on the servient tenement."

The following extract from the case of *Clifford* v. *Hoare* (14) is very illuminating. A right of way granted for all purposes with or without carriages along a road forty feet in width was in dispute in that case.

Lord Coleridge, C. J., said:—

"Now, what right or easement did the plaintiff acquire in reference to that road?... .....It was pointed out in the course of the argument that that could not be an absolute grant of every part of the road for all the purposes mentioned;...If this had been an absolute conveyance of a forty-feet road set out by metes and bounds, and a portion of it had been obstructed by the conveying party, no doubt an action might have been maintained for that trespass. But that is not the case; that which is granted is a right of way, an easement, over the road the soil of which remains in the grantor. ..... The intention was to grant the plaintiff an easement only, the reasonable use and enjoyment of an ascertained way; and it is not suggested that plaintiff has not such reasonable enjoyment." (Peacock's Law of Easements, p. 525).

Easements of way must not be vague or indefinite, that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose. *Gooroo Churn Goon* v. *Ganga Gobind Chatterjee* (17), *Joy Doorga Dossia* v. *Juggernath Roy* (18), *Wimbledon and Putney Commons Conservators* v. *Dixon* (19).

When once a right of way has been acquired, the servient owner cannot object to

(12) (1860) 2 F. & F. 218; 121 R. R. 787.

(13) (1857) 27 L. J. Ex. 44; 114 R. R. 1002.

(14) (1874) 9 C. P. 362; 43 L. J. C. P. 225; 30 L. T. 465; 22 W. R. 828.

(15) 1 C. L. R. 425.

(16) 7 C. 145 at p. 147; 8 C. L. R. 375; 3 Ind. Dec. (N. s.) 643.

(17) 8 W. R. 268.

(18) 15 W. R. 295.

(19) (1876) 1 Ch. D. 362; 45 L. J. Ch. 353; 33 L. T. 679; 24 W. R. 466.

it on the ground of inconvenience, nor can he put an end to the right by showing that there is another path-way which the dominant owner might use—*Sham Bagdee* v. *Fukeer Chand Bagdee* (20), *Mokoondonath Bhadoory* v. *Shib Chander Bhadoory* (21).

The right of easement of way is a right—appurtenant to the dominant tenement—of passage over a neighbour's land to and from the dominant tenement. It is not, a right to wander at pleasure, but a right to pass along a particular route from the *terminus a qao* to the *terminus ad quem: Goluck Chun der Chowdhry* v. *Tarinee Charn Chuckerbutty* (22) and *Wimbeldon and Putney Commons Conservators* v. *Dixon* (19) quoted above. The question of the precise limit of the right in any particular case, must depend upon the proof of the particular line between the *termini* over which the owner of the dominant tenement claims the right. "Compare *Jibananda Chakrabarti* v. *Kalidas Malik* (23) and *Doorga Charan Dhur* v. *Kally Comar Sein* (16) where it is pointed out that the right extends to that portion of the centre of the road, which is necessary for the due exercise of the right of passage and that unreasonable contraction of width is not permissible. The servient owner has the right to set out the line of way to be followed by the dominant owner, and if he fails to set it out, the dominant owner must take the nearest way he can. In any case the selection of the road must be such as a person of reasonable and ordinary skill and experience would make, and if the road has to be made it must be made in such a manner as a reasonable and prudent person would adopt if he were making a road over his own land. *Abson* v. *Fenton* (24)."

The above quotations from English and Indian decisions will show that although the defendant No. 1 has got a right of way it does not extend to the whole width of the vacant land, but that it can be and has to be confined to such part of the centre of the land as may be necessary for the reasonable use and enjoyment of an ascertained way, and that the plaintiff has got a right under law to select and set out that line of way or particular route. I have however not got very definite material before me to fix this line or route nor have the reasonable requirements of the defendant been ascertained so as to enable me to determine the most suitable and convenient line for both the parties. Hence I throw out my suggestions for their consideration and call for their statements on these points before I make those suggestions the directions of this Court to the parties or to the lower Court.

In my opinion the defendants cannot be allowed to have their right of way through the new door which the defendant No. 1 has made or put up near points B C shown by me on map B (by arrows in red ink). This was admittedly newly put up. To allow him to have his way through that door is to compell the plaintiff to abstain from building his compound wall along the line A-B of map A, or between lines in red ink marked by me on map B as Y-Z to indicate the direction in straight line, of the extension of the defendant's compound wall A-D-Y on map B or D-B on map A. The plaintiff has got, and I declare that he has, the right to construct the compound wall B-A in such a manner as will bring it into a straight line with the northern face of the defendant's existing wall D-B, and that he has got a right to compel the defendant to close the new door put up as shown above, and to shift it, towards the west in his (defendant's) own wall D-B so that it may not in any way cause obstruction to the construction of the plaintiff's wall B-A or Y-Z as it may be called; and further that over the vacant space that will thus lie outside the wall B-A and to its north the defendant shall have a passage 9 feet wide measurad from the northernmost point of the said wall and along side it (the said wall). The plaintiff shall not be entitled to construct anything upon the land thus set apart for the passage.

12. I propose to pass a decree in these terms. If the parties accept this well and good, if not, the case will be remanded to the Court of first instance for giving effect to these directions and for fixing the positions on the spot and passing a decree in these terms. An injunction will also be embodied in the decree enjoining the defendants for ever, not to obstruct the plaintiff in the construction of the contemplated compound wall B-A or Y-Z and directing him (defendant) to close his existing door

(20) 6 W. R. 222.
(21) 22 W. R. 302.
(22) 4 W. R. 49.
(23) 26 Ind. Cas. 213; 42 C. 164; 20 C. L. J. 97; 18 C. W. N. 1296.
(24) (1823) 1 B. & C. 195; 1 L. J. (o. s.) K. B. 94; 107 E. R. 73.

at B-C and shift it at his own cost within two months from the date of the decree to any other suitable position beyond and to the west of point Y from where the plaintiff shall have a right to construct his own compound wall.

The parties are asked to say on the 30th October 1924 whether they accept this decree in which case a decree will accordingly be passed here, or if they do not accept it, a decree remanding the case to the First Court for drawing up the decree as per directions given above will issue.

I reserve orders as to costs of this litigation for my final judgment.

K. S. D.

LAHORE HIGH COURT.

MISCELLANEOUS APPEAL No. 693 OF 1924.

June 5, 1924.

Present:—Mr. Justice Moti Sagar.

KALIAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat SHANNO *alias* GOVIND KAUR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. (1) (b)—Injunction—Plaintiff, what must prove.

No injunction can be granted under O. XXXIX, r. (1) of the C. P. C. unless the plaintiff proves by definite evidence that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors.

Miscellaneous appeal from an order of the Senior Subordinate Judge, Amritsar, dated the 11th March, 1924.

Dr. *Nand Lal*, for the Appellants.

Mr. *Badr-ud-Din Qureshi*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Senior Subordinate Judge, Amritsar, dated 11th March, 1924, granting plaintiff a temporary injunction, restraining defendant from alienating his property and from realising a certain sum of money due from one Ajit Singh till the decision of the suit The application for a temporary injunction was not accompanied by an affidavit and no other evidence was produced to show that the defendant intended to alienate his property with a view to defraud his creditors as required by O. XXXIX, r. (1) (*b*), C. P. C. A copy of a statement made by the defendant in another case, dated the 30th April, 1923, was put in in which the latter is alleged to have stated that on account of necessity he has been raising money by the mortgage of his property. No notice was given to the defendant to show cause why injunction should not be granted and I do not see how the statement relied on could be regarded as evidence in the case. The learned Senior Subordinate Judge, without calling upon the plaintiff to prove the allegations which she had made in her application, granted the temporary injunction prayed for and restrained the defendant from alienating his property till further orders of the Court. In my opinion there was no justification for passing such an order. The requirements of O. XXXIX, r. (1), C. P. C., had not been complied with and no injunction could be granted until the plaintiff proved by definite evidence that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors. This was not done and under the circumstances the prayer for a temporary injunction ought to have been refused.

I accept the appeal, set aside the order of the learned Senior Subordinate Judge and dismiss the plaintiff's application with costs.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 52 OF 1924.

May 9, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

AMOLAK CHAND—APPELLANT

versus

MANSUKH RAI MANGAN LAL—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 2 (1) (d) —"Property," meaning of—Joint Hindu family—Business resulting in insolvency—Ancestral property, whether liable.

Ancestral property of a joint Mitakshara family is "property" within the meaning of s. 2 (1) (*d*) of the Provincial Insolvency Act and is liable to be sold for the satisfaction of antecedent debts of the insolvents.

Fakirchand Motichand v. *Motichand Hurruckchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswami*, 26 M. 214 and *Bawan Das* v. *O. M. Chiene*, 64 Ind. Cas. 976; 44 A. 316; 20 A. L. J. 155; (1922) A. I. R. (A.) 79, followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 133; 33 M. L. J. 14; (1917) M. W. N. 439; 26 M. L. T. 22; 6 L. W. 213 (P. C.), referred to.

Appeal from an order of the District Judge, Bhagalpur, dated the 13th March 1924.

Messrs. *Susil Madhab Mullick* and *Satya Sunder Bose*, for the Appellants.

Mr. *Noresh Chandra Sinha*, for the Respondents.

JUDGMENT.

Ross, J.—This is an appeal against a decision of the District Judge of Bhagalpur, holding that certain properties vested in the Receiver in insolvency.

The facts of the case are that one Lachmi Chand, who acquired considerable properties, moveable and immoveable, died leaving a son Jiban Ram who had four sons, two of whom are minors and two of whom had two sons who are minors. The appellants are these four minors. Jiban Ram and his two major sons embarked on business which proved unsuccessful; and heavy debts having been incurred they were adjudged insolvent at the instance of the creditors and a Receiver was appointed. As the Receiver is selling the joint family property this objection has been raised by the minors that this is not property within the meaning of s. 2 (*d*) of the Insolvency Act.

This contention was overruled by the learned District Judge. It is contended in appeal that as the property is admittedly the ancestral property of a joint Mitakshara family, it cannot be proceeded against at all, or, if at all, only to the extent of the share of the major members of the family. Two decisions of this Court have been cited in support of this contention [*Sahaj Narayan Sahi* v. *Wajid Hussain* (1) and *Sant Prasad Singh* v. *Sheodut Singh* (2)]. The principle was discussed in the latter decision. That decision, however, proceeded expressly on the authority of *Sahu Ram Chandra* v. *Bhup Singh* (3). That case has been recently considered by the Judicial Committee and certain propositions laid down therein have been overruled. Therefore, the decision in *Sant Parsad Singh* v. *Sheodut Singh* (2) cannot now be considered to be an authority on this subject. On the other hand there are the decisions in *Fakirchand Motichand* v. *Motichand Hurruckchand* (4), *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswami* (5) and *Bawan Das* v. *O. M. Chiene* (6), to mention only three of the decisions which have been referred to by the respondents; and, in my opinion, it is too late now to contend that property over which a person has a disposing power which he may exercise for his own benefit does not include ancestral property which may be sold for the satisfaction of antecedent debts.

I would, therefore, dismiss this appeal with costs.

Das, J.—I agree.

K. S. D. *Appeal dismissed.*

(1) 49 Ind. Cas. 848.

(2) 77 Ind. Cas. 589; 2 Pat. 724; (1924) A. I. R. (Pat.) 259.

(3) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 133; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(4) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

(5) 26 M. 214.

(6) 64 Ind. Cas. 976; 44 A. 316; 20 A. L. J. 155; (1922) A. I. R. (A.) 79.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 300 OF 1923.

May 27, 1924.

Present :—Mr. Justice Moti Sagar.

POKHAR MAL—DEFENDANT—APPELLANT

versus

JAI BHAGWAN—PLAINTIFF—RESPONDENT.

Second appeal—Inference from documentary evidence—Question of fact—High Court, whether will interfere.

Inference drawn by the Court from the documentary evidence relied on by the parties are inferences of fact and not of law, and the High Court cannot interfere in second appeal even if the inferences in question are not correct. [p. 90, col. 2.]

Second appeal against the decree of the District Judge, Delhi, dated the 23rd November 1922, reversing that of the Munsif, First Class, Delhi, dated the 28th February 1922.

Mr. *Sardha Ram*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—This was a suit for rendition of accounts by a principal against an agent. The defendant pleaded that he was not an agent and that the plaintiff was not entitled to sue for accounts. The plaintiff's case was that he had deposited Rs. 2,180-11-9 with the defendant and that the latter was bound to show how the sum

had been expended and disposed of. On the 9th December, 1920, a preliminary decree for rendition of accounts was passed in favour of the plaintiff and the defendant was called upon to file his pleas on the merits. The main contention of the defendant on the merits was that he had paid off the whole of the money which had been deposited with him by the plaintiff and that nothing remained due.

The payments, it was alleged, were entered in a pocket book belonging to the plaintiff in the possession of the defendant, and it was further stated that the relevant entries therein were in the handwriting of the plaintiff himself. The plaintiff admitted that the entries were in his handwriting, but denied that the pocket book was his or that the entries related to the deposit in question. The following issue was framed :—"Had the plaintiff got back the sum of Rs. 2,180-12-0 from the defendant and was nothing due to the former in view of the entries made in the pocket book." The Trial Court found that the defendant was not an agent of the plaintiff and that a suit for rendition of accounts was consequently not maintainable. On the merits also the finding was in favour of the defendant and it was held that the whole of the money alleged to have been deposited by the plaintiff with the defendant had been paid off.

On appeal the learned District Judge held that the Munsif was not justified to go behind the preliminary decree calling upon the defendant to render accounts and that the finding originally arrived at that the latter was an agent of the plaintiff was conclusive for purposes of this case. On merits also the learned District Judge disagreed with the Munsif and held that payments had not been fully established and that the debit entries in the pocket book relied on were utterly unworthy of credit. A sum of Rs. 442 was found to be due on accounts and a decree to the extent of that sum was passed in favour of the plaintiff against the defendant.

Against this decision the defendant has preferred a second appeal to this Court, and it has been strenuously urged on his behalf by Mr. Sardha Ram that the learned District Judge has not drawn correct inferences from the entries in the pocket book and that they conclusively establish the re-payment of the entire sum to the plaintiff. In my opinion the appeal must fail on the short ground that the finding arrived at by the learned District Judge is clearly a finding of fact and that no point of law arises in the case. The inferences drawn by the learned District Judge from the documentary evidence relied on are inferences of fact and not of law, and it is not competent to this Court to go behind a finding of fact even if the inferences in question are not correct. The entries in the pocket book have been fully considered and the finding of the learned District Judge is that they are worthless and that they do not clearly show what has happened to the deposit made by the plaintiff. The finding is not vitiated by any misapprehension or error of law and must be accepted as final for purposes of this appeal.

I reject the appeal with costs.

K. S. D. *Appeal rejected.*

PATNA HIGH COURT.

CIVIL REVISION No. 373 OF 1923.

April 28, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

RAMJI PANDEY—PLAINTIFF—PETITIONER

versus

ALAF KHAN—RESPONDENT.

Partition suit, nature of—Order striking out defendant's name—Appeal, whether lies—Civil Procedure Code (Act V of 1908), O. I, r. 10.

It is open to a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint disclosed no cause of action against him. [p. 91, col. 2; p. 92, col. 1.]

Gangadhara Ramarao v. *Surya Rao* [*Raja of Pittapur*], 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184, followed.

A partition suit differs from other suits, in that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff, in so far as every party, whether plaintiff or defendant, is entitled to ask the Court to allot a share of joint property to him. [p. 91, col. 2.]

Civil revision from an order of the Officiating Judicial Commissioner, Chota Nagpur, dated the 27th July 1923, reversing that of the Munsif, Palamau, dated the 1st February, 1923.

Mr. *Parmeshwor Dayal*, for the Petitioner.

Messrs. *Ram Chandra Bhaduri* and *Sant Prasad*, for the Respondent.

JUDGMENT.—This application is directed against the order of the learned

Judicial Commissioner of Chota Nagpur, dated the 27th July, 1923, by which he set aside the order of the Munsif, dated the 1st February, 1923. The facts are as follows. The plaintiff who is the petitioner in this Court brought a suit for partition as against various persons. He also cited one Bichan Panday as defendant No. 12 in the action. Bichan Panday is the nephew of defendants Nos. 10 and 11. The defendants Nos. 10 and 11 filed a written statement in which they stated that their nephew Bichan Panday had no title to the properties, which were the subject-matter of the partition. Bichan Panday sold his alleged interest in the properties to one Ritubhanjan Singh and on the 27th January, 1923, Ritubhanjan applied that he might be added as a party on the ground that he had purchased Bichan's interest. The Munsif added him as a party-defendant.

On the 31st January the plaintiff applied for an order that Bichan Panday and Ritubhanjan should be dismissed from the action and their names struck out. It is this application which resulted in the order which is the subject-matter of the present proceedings.

The learned Munsif did not decide the question whether Bichan Panday had any interest in the joint property. All that he says is that according to the plaintiff Bichan Panday had no interest whatever in the suit properties and that in those circumstances, he and the purchaser Ritubhanjan should not be made parties. In this view, and without deciding the question which was actually raised, he ordered that the names of Bichan Panday and Ritubhanjan should be struck out and he passed a preliminary decree for partition after striking out the names of Bichan Panday and Ritubhanjan.

The learned Judicial Commissioner on appeal has set aside the order of the learned Munsif.

I have been asked in this application to consider whether there was any jurisidiction in the Judicial Commissioner to deal with the matter at all.

It was contended on behalf of the plaintiff-petitioner that the learned Munsif purported to act under O. I, r. 10, of the Code, and that an order under O. I, r. 10, is not appealable under the C. P. C. That position may be conceded to the plaintiffs; but this is an entirely different case. The suit was for partition; Bichan Panday had been added as a party to the suit on the footing that he had an interest in the joint property, Ritubhanjan had actually purchased the interest of Bichan and was added as a party-defendant on his own application. Now a partition suit differs from other suits, in that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff in so far as every party, whether plaintiff or defendant, is entitled to ask the Court to allot a share of joint property to him. Now this was the position. Ritubhanjan was, as a matter of fact, on the record as a defendant on the the 27th January, 1923, and it was open to him to ask the Court to determine the question whether his vendor had any interest in the joint properties; and if he had, whether he was not entitled to a share in the joint properties. It was open to Ritubhanjan to ask the Court to allot a definite share to him. Now this was the position and the plaintiff came to Court and said: "I do not want to proceed against Ritubhanjan and Bichan Banday." Now if this was not a partition, no exception could possibly be taken to the plaintiff withdrawing the suit as against the defendant. A defendant certainly could not complain if the plaintiff himself asked that the suit as against a particular defendant should stand dismissed. But as I have said a partition suit stands entirely on a different footing. Although arrayed on the side of the defendants Bichan Panday was in the position of a plaintiff in so far as he was entitled to ask the Court to allot a share of the properties to him, and the learned Munsif, by the course which he took, declined to consider the case of Bichan Panday. The result of his order is that Bichan Panday is unable to get any relief in the partition action.

That being so, the question is whether the order of the Munsif was appealable. In my opinion it was. Although the order was passed under O. I, r. 10 of the Code, the effect of the order was that the Court declined to adjudicate on the question distinctly raised by Bichan Panday. It was held in the case of *Gangadhara Ramarao* v. *Surya Rao* [*Raja of Pittapur* (1)] that it is open to a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint

(1) 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184.

disclosed no cause of action against him. Similarly in this case the effect of the order of the Munsif is that the claim of Bichan and, therefore, of Ritubhanjan remains undecided. There was an appeal open to Ritubhanjan, not indeed from the order of the Munsif looked upon as an order passed under O. I, r. 10, but from that order looked upon as a decree declining to adjudicate upon the claim of Bichan and, therefore, of Ritubhanjan. That being so, this application must fail and must be refused with costs.

K. S. D. *Application dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1897 OF 1919.
February 17, 1920.
Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

CHANDU LAL—PLAINTIFF—APPELLANT
versus
The Firm of LAKHMI CHAND-JOWALA DAT—DEFENDANTS—RESPONDENTS.

Second appeal—Question of fact not put in issue—Finding, whether can be challenged.

Where the Court gives a finding on a question of fact not put in issue, such finding can be contested in second appeal.

Second appeal from a decree of the District Judge, Delhi, dated the 26th June 1919, reversing that of the Senior Subordinate Judge, First Class, Delhi, dated the 4th June 1918.

Lala *Moti Sagar*, R. S., for the Appellant.

Bakhshi *Tek Chand* and Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—On the 25th November 1916 the defendants sold 20 cases of red shirtings to the plaintiff, and on the 29th November 1916 the plaintiff at the request of the defendants paid Rs. 2,798-7-0 to the dealers from whom the defendants had obtained the goods. Nine out of the 20 cases were delivered to the plaintiff on payment of their price, but disputes arose between the parties about the remaining 11 cases and other goods, and on the 15th April 1917 an agreement (Ex. D-1) was made by which it was settled, in regard to the remaining 11 cases that five would be delivered to the plaintiff on payment of their value within three days, and six on payment of the value within one month or as soon as the defendants could supply them. On the 19th April 1917 the plaintiff paid Rs. 2,000 more to the defendants, but the latter did not deliver any of the remaining 11 cases, and the plaintiff accordingly sues to recover the Rs. 4,798-7-0 paid by him together with damages and interest.

The defence is that it was agreed on the 15th April 1917 with regard to the Rs. 2,798-7-0 that this sum was to be retained by the defendants as a guarantee for the performance of the contract by the plaintiff, and was to be returned when the plaintiff had taken delivery of the 11 cases. The defendants maintain that it is the plaintiff who has not performed his contract by not paying the price of the goods and taking delivery, and they say they have always been ready to deliver the goods on receipt of the price.

The Senior Subordinate Judge gave the plaintiff a decree for Rs. 4,798-7-0 but on appeal the District Judge has held that the defendants' version is correct as to the sum of Rs. 2,798-7-0 being retained as a guarantee for the performance of the contract by the plaintiff, and that the plaintiff is, therefore, not entitled to a decree, it being still open to him to take delivery of the cases on paying the full price. The plaintiff has preferred a second appeal to this Court.

The principal question in the case is whether or not it was agreed between the parties on the 15th April 1917 that the sum of Rs. 2,798-7-0 already paid by the plaintiff to the defendants' dealers was to be treated as a deposit which the defendants would retain until the plaintiff took delivery of the 11 cases. The Senior Subordinate Judge did not touch on this question in his judgment. If there was no such agreement then the sum of Rs. 2,798-7-0 must be taken into account as part of the price of the goods and in that event there was no breach of contract on the part of the plaintiff, for the one day's delay in the payment of the Rs. 2,000 was, as the learned District Judge has found, waived by the defendants, and that sum and the sum of Rs. 2,798-7-0 taken together exceeded the price of the five cases which came to Rs. 3,515-7-6. The learned District Judge thinks that in any event not more than 5/11th of the Rs. 2,798-7-0 could be treated as a payment made towards the price of the five cases, and he points out that even if

this be added to the Rs. 2,000 paid on the 19th April 1917, the sum total would fall short of the contract price of the five cases. We cannot agree, however, with this view, and we think it is clear that if the defendants' version as to the agreement about the sum of Rs. 2,798-7-0 is incorrect, the whole of that sum must be regarded as a part payment of the price of the five cases.

It is contended on behalf of the respondents that the finding of the District Judge as to the agreement in regard to their retaining the Rs. 2,798-7-0 as security for the performance of the contract cannot be contested in second appeal. Had the question of the agreement been put in issue this contention would have been correct as there is some evidence, *viz.*, that of the defendant Jowala Dat, as to a certain agreement having been made. But the issues framed by Lala Murari Lal, Subordinate Judge, were recast by his successor, Mr. Tapp, the issue originally framed with regard to the object with which the plaintiff had paid the money being replaced by a general one as to whether the plaintiff was entitled to a refund on account of the defendant's refusal or inability to deliver the goods. We think it is, therefore, doubtful whether the plaintiff understood that he was required to produce evidence on the question of the alleged agreement about the sum of Rs. 2,798-7-0 especially as Mr. Tapp in his order of the 23rd November 1917 recasting the issues, remarked that the rights of the parties were not covered by the contract and had to be determined by law or usage. There is one witness for the plaintiff, *viz.*, Mahadev (P. W. No. 7), who has stated that nothing was settled as to how the money which the plaintiff had paid on account of profits on delivery orders was to be accounted for, but this statement was made in cross-examination and it is strange if the plaintiff understood the point to be in issue that the witness was not questioned about in examination-in-chief. The only witness for the defendants who deposed that the agreement in question had been made was the defendant Jowala Dat, and it may be noted that he was the last witness in the case.

Another question to be determined is whether it was agreed that the sum of Rs. 2,798-7-0 was to be forfeited if the plaintiff failed to perform his contract.

We think that the case should be remanded for findings on the points mentioned above notwithstanding that they are not taken in the grounds of appeal. We accordingly remand the case to the Court of the Senior Subordinate Judge under O. XLI, r. 25, C. P. C., for inquiry and findings on the following issues:—

(1) Was it agreed between the parties that the sum of Rs. 2,798-7-0 paid by the plaintiff should be treated as a deposit by way of security for the performance of the contract by him and should be retained by the defendants until the plaintiff had taken delivery of the 11 cases?

(2) If so, was it further agreed that in the event of the plaintiff failing to take delivery the whole of the said sum would be forfeited?

We do not at present decide whether or not the defendants are entitled to retain the Rs. 2,798-7-0 in the event of the agreement mentioned in the second of the above issues not being proved.

The senior Subordinate Judge should submit his findings on the issues through the District Judge, who is requested to give his own opinion thereon.

K. S. D. *Case remanded.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 81 OF 1924 AND CIVIL REVISION No. 175 OF 1924.

May 29, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

BHAGWAN DAS—PETITIONER—APPELLANT

versus

SHEONANDAN PRASAD SAHU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Suit for partition—Party to suit when can be appointed.

It is a settled rule that one of the parties to the cause shall not be appointed Receiver without the consent of the other party unless a very special case is made. [p. 94, col. 1.]

In re Lloyd, Allen v. *Lloyd*, (1879) 12 Ch. D. 447; 41 L. T. 171; 28 W. R. 8, followed.

This rule is no doubt subject to exception in partnership and partition cases but the exception is limited to such cases where there is no charge of misconduct against a party and it is not unsafe to trust him. [*ibid.*]

Suprasanna Roy v. *Upendra Narayan Roy*, 22 Ind. Cas. 601; 18 C. W. N. 533; 18 C. L. J. 638, distinguished.

Appeal from an order of the Additional Subordinate Judge, Monghyr, dated the 25th April, 1924.

Mr. *Sultan Ahmed*, for the Appellant.

Mr. *K. P. Jayaswal*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Additional Subordinate Judge of Monghyr appointing Babu Mahesh Narain, Pleader, as Receiver until partition is completely effected, or until the further orders of the Court. The appellant is defendant No. 1. The suit is a suit for partition brought at the instance of the plaintiff a minor, through his next friend his mother. In *In re Lloyd Allen* v. *Lloyd* (1) Jessel, M. R., pointed out that "It is a settled rule that one of the parties to the cause shall not be appointed Receiver without the consent of the other party unless a very special case is made." This rule is undoubtedly subject to exception in partnership and partition cases. But in partnership cases the exception is limited in this way:

"If the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the Court sometimes appoints him Receiver and manager without a salary." (Kerr on Receivers, 7th Edition, page 143).

Reference was made on behalf of the appellant to the decision in *Suprasanna Roy* v. *Upendra Narain Roy* (2) where the defendant, in a partition suit, actually in possession of the property, was appointed Receiver. Now, so far as the judgment in that case goes there were no charges of misconduct against the defendant. But in the present case we must be bound by the findings in the judgment delivered by the learned Subordinate Judge in making the preliminary decree for partition; and there is also a report by a Commissioner. In view of the findings of the learned Subordinate Judge and of the Commissioner's report, it is, in our opinion not reasonable to expect honest and disinterested management from the defendant; and it is to be remembered that the plaintiff is a minor under the guardianship of a *parda nashin* lady and, therefore, peculiarly entitled to protection of the Court. The learned Subordinate Judge has, in the exercise of his discretion, decided the case against the defendant and has appointed a third party as Receiver. We do not think that it would be right in the circumstances of this case to interfere with the exercise of his discretion.

It has been objected, however, that the remuneration of 7 per cent. on the collection imposes too severe a burden on the estate. We think that 7 per cent. is too high and the Subordinate Judge should reconsider it. Five per cent. ought to be sufficient and the Subordinate Judge will see whether he cannot obtain a suitable person to act as Receiver on this remuneration. The name of Jamuna Prasad has been mentioned on behalf of the appellant. Without in any way, fettering the discretion of the learned Subordinate Judge, we think that this name might be considered along with others. It has also been contended on behalf of the appellant that the cost of the Receiver should be charged to the plaintiff but, in our opinion, there is no justification for such a course.

With these observations the appeal is dismissed with costs and the application in revision is also dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) (1879) 12 Ch. D. 447; 41 L. T. 171; 28 W. R. 8.

(2) 22 Ind. Cas. 601; 18 C. W N. 533; 18 C. L. J. 638.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 222 OF 1923 AND CIVIL REVISION No. 355 OF 1923.

May 30, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

Rani JOTIRMOYEE DEBI—PLAINTIFF—APPELLANT

versus

RAGHUNATH PATHAK—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 6—Suit on mortgage—Attachment before judgment, application for—Properties other than mortgaged properties, whether liable.

Where it appears in a suit on a mortgage that the mortgaged property is not a sufficient security and the mortgagee will have to claim a personal decree eventually, he can obtain attachment before judgment of properties other than the mortgaged properties if he satisfies the Court that circumstances entitling him to such an attachment exist.

Jogemaya Dassi v. *Baidyanath Pramanick*, 50 Ind. Cas. 924; 46 C. 245, followed.

Appeal from an order of the Subordinate Judge, Rajmahal, dated the 6th July 1923.

Messrs. *Noresh Chandra Sinha* and *Nitai Chandra Ghosh*, for the Appellant.

Mr. *Sivanandan Ray*, for the Respondent.

JUDGMENT.

Ross, J.—This is an appeal against an order passed by the learned Subordinate Judge of Rajmahal, refusing an application by the plaintiff-appellant to issue attachment before judgment against certain properties other than the mortgaged properties belonging to the defendant, plaintiff's mortgagor. Although no cause was shown against the attachment before judgment, the learned Subordinate Judge was of opinion that in a mortgage suit there can be no attachment before judgment of any property other than the mortgaged property. This opinion is, undoubtedly, wrong [see, for example, the decision in *Jogemaya Dassi* v. *Baidyanath Pramanik* (1)]. There is no reason why, if the mortgaged property is not a sufficient security and the mortgagee will have to claim a personal decree eventually, he should not have attachment before judgment of properties other than the mortgaged properties, if he satisfies the Court that circumstances entitling him to such an attachment exist. In the present case it must be taken that he did satisfy the Court, because no cause was shown by the mortgagor.

I would, therefore, allow this appeal and remand the case to the learned Subordinate Judge with a direction that he should issue an attachment of the properties specified in the plaintiff's petition of such portions thereof as appear to him sufficient to satisfy any decree which may be passed in the suit. The appellant is entitled to the costs of the appeal. The application in revision is dismissed.

A question has arisen as to the representation of the respondents Nos. 6 and 7 who are minors. It appears that Mr. Bindheshwari Prasad, a Vakil of this Court, was appointed guardian on the 12th of May, 1924. Subsequently the respondents entered appearance under the guardianship of the *karta* of their family, *viz.*, respondent No. 2. But respondent No. 2 was never appointed guardian of these minors and they must be taken to be represented by Mr. Bindheshwari Prasad, Vakil the guardian appointed by the Court.

Das, J.—I agree.

K. S. D. *Appeal allowed.*

(1) 50 Ind. Cas. 924; 46 C. 245.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1838 OF 1922.

February 12, 1923.

Present:—Mr. Justice Campbell.

ARJUN—PLAINTIFF—APPELLANT

versus

JUG LAL—DEFENDANT—RESPONDENT.

Custom—Alienation—Ancestral land—Just antecedent debt—Suit for possession—Declaratory decree, whether may be given—Civil Procedure Code (Act V of 1908), O. VII, r. 7, O. XLI, r. 33.

An alienation of ancestral land for the purpose of paying just antecedent debts is permissible by custom. [p. 96, col. 2.]

The discretion allowed to the Court under O. VII, r. 7 and O. XLI, r. 33 of the C. P. C. is very wide and empowers it to pass a declaratory decree in a suit for possession when the plaintiff specifically asks for any alternative relief to which he may be found entitled. [*ibid.*]

Second appeal from the decree of the Additional District Judge, Karnal at Ambala, dated the 29th March 1922.

Mr. *Ram Nand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The suit was by Harji, brother of Ganga Ram deceased, for possession of 29 *bighas* 1 *biswa* of land which were alleged to have been alienated without consideration and necessity to Jug Lal, the daughter's son of Ganga Ram. Harji died during the currency of the litigation and the suit was continued by his son Arjan. The Trial Court gave the plaintiffs a decree for possession of 18 *bighas* 1 *biswa* out of the land in suit holding that this was the extent of the ancestral area. In appeal by Jug Lal to the District Judge the decree was modified to one for a declaration that the alienation of 18 *bighas* 1 *biswa* should not affect the rights of Ganga Ram's reversionary heirs after the death of Ganga Ram's widow *Musammat* Dharman but that before taking possession of the 18 *bighas* 1 *biswa* the reversioners must pay Rs. 914 to Jug Lal or his successor-in-interest.

The facts as found by the District Judge are as follows:—

The transfer by Ganga Ram was made on the 27th June, 1912. He reported to the *patwari* that what had taken place was an oral sale for Rs. 2,000. When the mutation was attested Ganga Ram stated that he had sold the land to Jug Lal for the amount of a debt which he owed to a *mahajan* of the village of Raja Khori. Ganga Ram died about two months before the suit. His widow *Musammat* Dharman is alive and she is living with Jug Lal. She did not marry Harji plaintiff as alleged by him,

She appeared in the Court below and stated that she had no claim for possession of Ganga Ram's estate against Jug Lal but she had such a claim against Harji. The *mahajan* of Raja Kheri is proved to have been one Rati Ram and at the time of the transfer a debt amounting approximately to Rs. 914 was owing to him by Ganga Ram. This debt swelled subsequently by the addition of interest. Some years after the alienation, liability for the debt due by Ganga Ram was transferred to Jug Lal. Jug Lal has been making payments in liquidation of it and over Rs. 900 is still due. The understanding between Ganga Ram and Jug Lal at the time of the transfer was that Ganga Ram should procure mutation of all his land in favour of Jug Lal in return for which Jug Lal should pay the debt due to Rati Ram and should look after and support Ganga Ram for the rest of his life. The primary object of the alienation was to benefit Jug Lal but nevertheless it was agreed that Jug Lal should pay the debt. There was no proof of other debts for which Jug Lal assumed a similar responsibility as consideration for the transfer.

The learned District Judge concluded by holding that the alienation was made in part for a necessary purpose, that is to say, for the payment of the debt to Rati Ram which he held to be a just antecedent debt and on this finding the decree already mentioned proceeded.

Arjan, son of Harji, has come to this Court on second appeal and has asked for the decree of the Trial Court to be restored. But his Counsel on seeing the statement of *Musammat* Dharman on the record, has conceded that the learned District Judge was correct in holding that the appellant could not obtain possession in the lifetime of *Musammat* Dharman.

An attempt has been made to get behind the finding of fact by the learned District Judge that Rs. 914 were due from Ganga Ram to Rati Ram and that Jug Lal assumed responsibility for this debt but there are no grounds upon which this finding which is based on evidence can be attacked in second appeal.

The main contention by the appellant is that when the District Judge had held that the consideration for the transfer was Rs. 914, this amount should not have been charged upon the 18 *bighas* 1 *biswa* of ancestral land. It is argued that the remaining 10 *bighas* of non-ancestral land were an adequate source from which the debt could be defrayed.

No authority, however, has been cited for the proposition that a male-holder of land both ancestral and acquired must charge his just antecedent debts on the non-ancestral land. Custom permits the alienation of ancestral land for the purpose of paying just antecedent debts and a provision that this cannot be done, if there is self-acquired land to alienate for that purpose, would give the reversionary heirs a control over self-acquired property to which they are not entitled. In the present instance Ganga Ram had a perfect right to gift his self-acquired land to his daughter's son and to charge the ancestral land with his debt to Rati Bam. The debt of Rs. 914, moreover, was not the sole consideration for the transfer. There was also the undertaking to support Ganga Ram and Ganga Ram is shown to have lived for more than eight years after the transfer. I can find nothing contrary to law in the condition imposed by the learned District Judge that before taking possession of the 18 *bighas* and 1 *biswa* of ancestral land, the plaintiff or other reversionary heir must refund Rs. 914 to Jug Lal.

Cross-objections have been filed by Jug Lal. The first is that the lower Appellate Court acted illegally in giving a declaratory decree when the plaintiff's suit was for possession and when a separate suit for a declaration would have been time-barred under the Punjab Limitation (Custom) Act, 1920, at the date of the District Judge's decree. The plaintiff, however, specifically asked in his plaint for any alternative relief to which he might be found entitled. His plaint was adequately stamped for a declaration and the discretion allowed to the learned District Judge by O. VII, r. 7 and O. XLI, r. 33 is expressed in so wide terms that it is impossible to hold that the decree awarded by him was in a form not permitted by law.

A second objection is put forward that the ostensible consideration for the transfer was reported to the *patwari* to be Rs. 2,000, that the value of services rendered to Ganga Ram must have been more than the difference between Rs. 2,000 and Rs. 914 and that, therefore, the alienation was for full consideration and necessity and should have been maintained. This is a point which could and should have been raised by the

defendant in his appeal to the District Judge but there is nothing in his memorandum of appeal within which it can be brought. It cannot be taken now, and in any case it is of very little force since there is no evidence on which the services rendered to Ganga Ram, if any, could be expressed in terms of money.

The result is that both appeal and cross-objections are dismissed. The parties will bear their own costs.

K.S.D.

Appeal and cross-objections dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2073 AND 2074 OF 1921.

November 13, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

JOGESH CHANDRA ROY—PLAINTIFF—APPELLANT

versus

IZZAT ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 7—Enhancement of rent, suit for—Plaint, what must show—Fair and equitable rent—Question, when can be entered into.

In order to claim enhancement of rent under s. 7 of the Bengal Tenancy Act the plaintiff must come to Court with the allegation either that the customary rate of rent exists and the defendant is paying rent at a rate lower than the customary rate, or that no customary rate exists and the Court is asked to proceed to enhance the rent up to the limit which it thinks to be fair and equitable. [p. 98, col. 1.]

Hem Chandra Chowdhry v. *Kali Prosanna Bhaduri*, 30 C. 1033; 8 C. W. N. 1; 30 I. A. 177; 8 Sar. P. C. J. 529 (P. C.), distinguished.

Hem Chandra Chowdhry v. *Kali Prasanna Bhaduri*, 26 C. 832; 13 Ind. Dec. (N. S.) 1133, referred to.

Until the Court finds that there is no customary rate in existence, it cannot proceed to enhance the rent up to the limit that the Court finds fair and equitable under sub-s. (2) of s. 7, Bengal Tenancy Act. [p. 98, col. 2]

Midnapore Zamindary Co. v. *Sridhar Mahata*, 67 Ind. Cas. 775; 49 C. 866; 36 C. L. J. 96; (1922) A. I. (C.) 152, followed.

Appeals against the decrees of the Additional District Judge, Chittagong, dated the 8th July, 1921, reversing and affirming those of the Munsif, First Court, Chittagong, dated the 17th May, 1920.

Dr. Jadu Nath Kanjilal and *Babu Nripendra Chandra Das*, for the Appellant.

Babus *Biraj Mohan Majumdar* and *Narendra Kumar Das*, for the Respondents.

JUDGMENT.—These two appeals arise out of a suit for enhancement of rent. The cause of action stated in the plaint is that the defendants are intermediate tenure-holders who have been realising more rent from the tenants than they are entitled to do. Upon this ground alone the plaintiff bases his cause of action for enhancement of rent. At the hearing before the Trial Court some evidence was adduced by the plaintiff to prove that the defendants were holding the tenures at rents lower than the customary rate of rent in the locality for lands of similar description. The learned Munsif found that the plaintiff had failed to prove that the customary rate of rent in the locality for lands of similar description was much above what the defendants paid. Having come to this finding the learned Munsif proceeds to ascertain the price of the yield of land and having deducted the collection charges and reasonable profit to the defendants he allowed a decree in favour of the plaintiff for enhancement of rent to the extent of Rs. 216 over and above the rent already payable for the two tenures. The defendants appealed and the learned District Judge dismissed the plaintiff's suit on the ground that the case as made out in the plaint did not disclose any cause of action.

The plaintiff appeals before us and contends that the view taken by the lower Appellate Court is wrong in law and that he ought to have been allowed enhancement of rent on the ground on which the learned Trial Court had proceeded. The decision of the learned Judge is founded upon the plaint and finding of the Court of first instance. In the plaint, as we have observed the plaintiff does not state any cause of action besides the facts that the defendants are realising more profits than they are entitled to do. It is argued before us that the suit was brought under s. 7, Bengal Tenancy Act and that cl. (2) of that section applies to the present case, namely, that the Court is to enhance the rent to such limit as it thinks fair and equitable. As we read s. 7 it entitles the plaintiff to claim enhancement of rent, firstly, when the rent payable by the defendant is lower than the customary rent; secondly, when such custom-

ary rent does not exist, the rent may be enhanced to such limit as the Court thinks fair and equitable. Reading these two clauses together it seems to be clear that the plaintiff must come to Court with the allegation either that the customary rate of rent exists and the defendant is paying rent at a rate lower than the customary rate, or that no customary rate exists and the Court is asked to proceed to enhance the rent up to the limit which it thinks to be fair and equitable. In this case the plaintiff did not adopt either of these courses. At the hearing an attempt was made to prove the customary rent. The finding of this point is recorded by the learned Munsif in these words: "Some attempt was made by the plaintiff to prove that the customary rate of rent in the locality for lands of similar description is much above what the defendants pay, but it is conceded by the learned Pleader for the plaintiff that the attempt has proved futile." The learned District Judge has correctly interpreted this sentence to mean that the Munsif did not find that there was no customary rate but he seems to think that the plaintiff has failed to prove that the defendants' rent is lower than the customary rent. The learned Judge, therefore, rightly observes that on such a finding the Munsif is not entitled to proceed under cl. (2) of s. 7, Bengal Tenancy Act. The condition precedent to entitle a Court to take assistance of cl. (2) is that it must be found that there is no customary rate of rent. The result of the Munsif's finding seems to be that there is a customary rate but the plaintiff has failed to prove that it is higher than the rent paid by the defendants. If that be so, the plaintiff's suit is liable to be dismissed. It is, however, argued before us that if the Court finds that the plaintiff failed to prove the customary rate of rent, it amounts to a finding that there is no customary rate and in support of this contention our attention has been drawn to the decision of the Judicial Committee of the Privy Council in the case of *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (1). In that case, as appears from the judgment of their Lordships, the Trial Court found that the plaintiff had failed to prove the existence of any customary rate and accordingly proceeded to ascertain by an examination of the evidence before him the limit to which the rent might be fairly and equitably enhanced. We do not know the nature of the defence in that case and cannot ascertain the effect of the Subordinate Judge's finding. The case proceeded not upon the correctness of the procedure adopted by the Subordinate Judge in that case but upon the admissibility of certain road-cess return paper on which the decision of the Subordinate Judge was based. The High Court and the Judicial Committee differed in their opinion as to the admissibility of those documents. The question of the interpretation of cl. (2) of s. 7, Bengal Tenancy Act did not arise in that case as it appears from the judgment of the High Court in *Hem Chandra Chowdhry* v. *Kali Prasanna Bhaduri* (2) that the point was conceded and the decision proceeded upon the question of the admissibility of the road-cess returns. It is not necessary for us in the present case to go the length of holding that where the plaintiff asserts the existence of a customary rate of rent and fails to prove it, the Court is or is not justified in holding that no customary right exists. There is no finding by the Munsif that the plaintiff has failed to prove customary rate of rent. What he finds is that the plaintiff has failed to prove that the defendants are holding at a rate lower than the customary rate. On this finding we are of opinion that the Munsif was not justified in proceeding to ascertain the assets of the tenures under cl. (2) of s. 7. The learned District Judge in appeal rightly observes that until the Court finds that there is no customary rate in existence, it cannot proceed to enhance the rent up to the limit that the Court finds fair and equitable under sub-s. (2) of that section; and in support of this view we may refer to the case of *Midnapore Zamindary Co.* v. *Sridhar Mahata* (3), where the learned Judges observe as follows:— "Where the landlord seeks to have the rent of a tenure-holder enhanced under s. 7, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative, that the rent can be enhanced up to such limit as the Court thinks fair and equitable." We, there-

(1) 30 C. 1033; 8 C. W. N. 1; 30 I. A. 177; 8 Sar. P. C. J. 529 (P. C.).

(2) 26 C. 832; 13 Ind. Dec. (N. s.) 1133.

(3) 67 Ind. Cas. 775; 49 C. 866; 36 C. L. J. 96; (1922) A. I. R. (C.) 152.

fore, hold that the view taken by the learned Judges is correct and the plaintiff's appeals must fail.

It is, however, argued before us that the plaintiff's suit should not have been totally dismissed. It is further alleged that he is entitled to cesses and damages. These matters should have been investigated by the lower Court if they were brought to its notice. We, therefore, dismiss the appeals in substance and remand the cases to the lower Appellate Court for a determination whether the plaintiff is entitled to any decree in respect of rent, cesses and damages payable to him at the old rate. As this defect in the judgment of the lower Appellate Court could have been remedied by way of review we think that the proper order to make is to allow the costs of these appeals to the respondents.

K. S. D. *Appeals dismissed; Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1571 OF 1922.
April 3, 1924.
Present:—Mr. Justice Daniels.
GULZARI LAL—PLAINTIFF—APPELLANT
versus
DR. HAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Document to be read as a whole—Court, duty of—Intention of parties, conjectures as to, not permissible—Agreement regarding sale of share—Successors of parties, whether bound.

It is a cardinal principle of construction that a deed must be read as a whole and that it must be read as far as possible so as to make the different clauses which it contains consistent with each other. [p. 100, col. 1.]

The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. [*ibid.*]

An agreement regarding the sale of a share in a grove is binding even on the successors of the parties who entered into it. [*ibid.*]

Basdeo Rai v. *Jhagru Rai*, 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; (1924) A. I. R. (A.) 400, referred to.

Second appeal against a decree of the District Judge, Farrukhabad, dated the 11th November 1922.

Mr. *K. N. Malaviya* for Mr. *Bhagwati Shankar*, for the Appellant.

Mr. *G. N. Kunzroo* for Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—Gulzari Lal the plaintiff-appellant in these two appeals is the mortgagee of a one-fourth share in two groves. The mortgage was executed in the year 1916 by Bhola Chamar. The mortgaged share has now passed into the possession of the *zemindar* by a sale executed by Bhola's widow *Musammat* Umrai in the year 1920. The plaintiff sues for recovery of his mortgage money by sale, if necessary, of the mortgaged share, against *Musammat* Umrai and the legal representatives of the *zemindar* Bhawani Prasad who is now dead. The suit was resisted by the latter set of defendants. They are the respondents to these appeals. The real question in the appeals is whether it was competent to Bhola to mortgage his share in the groves. The two plots in question were originally his occupancy-holding. In the year 1901 long before the mortgage in suit the *zemindar* entered into a formal agreement with him permitting him to convert the plots into groves. This agreement provided that he was to be the owner of one-fourth of the groves and the *zemindar* of three-fourth but reading the deed as a whole his right of ownership was not absolute. It was restricted in various ways. He was for instance not at liberty to cut down any green trees. There was a further restriction, and this is the clause which is material for the purpose of this case, that he was not entitled to sell the share in the groves except to the *zemindar*. There was no prohibition against the groves being mortgaged but the learned District Judge has held that if the right of sale is excluded the right of mortgage must necessarily be excluded also and on this ground he has reversed the Munsif's decree in favour of the plaintiff and dismissed the suit.

Three points have been argued in support of the appeals.

(1) That under the village custom as recorded in the *wajib-ul-arz* grove-holders have a right to transfer their groves.

(2) That the agreement in dispute gives Bhola a full right of ownership in his share in the groves and that this right cannot be cut down by any subsequent restrictions.

(3) That the learned District Judge was wrong in reading into the agreement a prohibition against mortgage which it does not contain.

The third plea is, in my opinion, the important one. This case is not governed by the general custom set out in the *wajib-*

ul-arz, but by the special conditions of the contract entered into between the parties. The *zemindar* was not obliged to give Bhola leave to plant trees and if he did give leave it was perfectly open to him to make that permission subject to conditions which Bhola himself accepted and which were embodied in a binding agreement.

As regards the second plea, although the word "*malik*" ordinarily connotes full ownership it is a cardinal principle of construction that the deed must be read as a whole and that it must be read as far as possible so as to make the different clauses which it contains consistent with each other. If the deed is read as a whole it is quite clear that it was not intended to give Bhola a full right of ownership. The agreement regarding the sale of the share is very similar to an agreement giving the *zemindar* a right of pre-emption and such agreements have been held in a very recent case to be binding even on the successors of the parties who entered into them [*Basdeo Rai* v. *Jhagru Rai* (1).]

The third plea has much more force and, in my opinion, the appellant is entitled to succeed on it. The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. Sale and mortgage are two quite different things and prohibition against one does not necessarily import prohibition against the other. In the present case the object of the argeement may have been and probably was to prevent Bhola's share passing out and out into the hands of a stranger. A sale to an outsider would necessarily have this effect. The same effect need not follow from a mortgage since if the mortgagee brings the property to sale it will always be open to the *zemindar* to purchase it. In any case construing the contract as it stands there is nothing in it to render the mortgage executed by Bhola illegal.

It has been argued on behalf of the respondents that Bhola remained an occupancy tenant notwithstanding the agreement as to the planting of the groves but it is I think impossible to maintain this view since the decision in *Jaleshar Sahu* v. *Raj Mangal* (2).

(1) 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; (1924) A. I. R. (A.) 400.

(2) 63 Ind. Cas. 437; 43 A 606; 19 A. L. J. 616.

I, therefore, allow the appeals and setting aside the decree of the Court below restore that of the Trial Court with costs throughout including in this Courtfees on the higher scale.

K. S. D. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1921 OF 1920.

November 12, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

MOHAMED NURUL AMIN AND OTHERS—APPELLANTS

versus

MONOHAR SORAN DEB MOHANTA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105—"Affecting the decision of the case," meaning of—Order setting aside abatement—Appeal, whether lies.

An order setting aside an abatement and allowing substitution of the legal representatives of the deceased party is not one which affects the decision of the case and cannot be questioned in appeal from the final decree whether such order is passed before or simultaneously with the decree. [p. 102, col. 1.]

Hem Kunwar v. *Amba Prasad*, 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324, not followed.

Niddha Lal v. *Collector of Bulandshahr*, 35 Ind. Cas. 209; 14 A. L. J. 610, referred to.

Chintamony Dassi v. *Raghoonath Sahoo*, 22 C. 981 at p. 984; 11 Ind. Dec. (N. S.) 651, *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*, 9 C. W. N. 584, *Gulab Kunwar* v. *Thakur Das*, 24 A. 464; A. W. N. (1902) 136 and *Tasadduq Hussain* v. *Hayat-un-nissa*, 25 A. 280; A. W. N. (1903) 39, relied on.

The phrase "affecting the decision of the case" in s. 105 of the C. P. C. means affecting the merits of the case or affecting the decision of the case with reference to its merits. [p. 101, col. 1.]

Appeal against the decree of the District Judge, Bankura, dated the 28th April, 1920, affirming that of the Munsif, 3rd Court, Bankura, dated the 21st November, 1919.

Maulvi *Nuruddin Ahmed* and Mr. *A. S. M. Akram*, for the Appellants.

Dr. *Dwarka Nath Mitter*, Babus *Biraj Mohan Majumdar* and *Narendra Krishna Basu*, for the Respondents.

JUDGMENT.—This appeal raises an interesting question which requires some consideration. In a mortgage suit, the plaintiff (predecessor of the present respondent) died on the 28th January 1916 and the defendant died on the 8th July 1916. After the preliminary decree was passed

by the High Court on the 13th July 1915 no application for substitution of the deceased parties seems to have been made till the 15th July 1918 when an application was made by the heirs of the deceased plaintiff for substitution of their names in place of the deceased plaintiff and for substitution of the heirs of the deceased defendant after setting aside the abatement and for a final decree. That application was dismissed for default on the 4th September 1918. But during the interval between the filing of the application and its dismissal the heirs of the plaintiff had parted with their interest in the mortgage in favour of the present respondent. The respondent thereupon filed an application on the 3rd September 1918 for setting aside the abatement and for substitution of himself in place of the deceased plaintiff and of the heirs of the defendant in place of the deceased defendant and for final decree. The prayer for substitution as well as the prayer for final decree were considered together and the learned Munsif by his judgment dated the 21st November 1919 set aside the abatement and passed the final decree in favour of the respondent. The substituted defendant appealed to the District Judge who dismissed the appeal on the merits. With regard to the question that the application for setting aside the abatement and for the substitution of the heirs of the deceased parties was made after the period of limitation, the learned Judge observes that the C. P. C. does not allow an appeal from an order setting aside an abatement and allowing substitution and, therefore, such an order cannot be challanged in an appeal from the final decree.

The defendants have appealed and the only point urged on their behalf is that the view of the learned Judge that the order setting aside abatement and directing substitution of the heirs of the deceased parties cannot be challenged in an appeal from the final decree is wrong. Reliance has been placed in support of this contention upon s. 105, C. P. C. That section says that where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. The whole question, therefore, turns upon the interpretation of the words 'affecting decision of the case.' The learned Vakil who has ably argued the case for the appellants urges that the expression 'decision of the case' means any question which will influence the ultimate decree to be passed by the Court. This contention is supported by the view taken by the Madras High Court in the case of *Gopala Chetti* v. *Subbier* (1), and by the observations of Mr. Justice Karamat Hossein in the case of *Nand Ram* v. *Bhupal Singh* (2). We are, however, confronted with other decisions of this Court which assign to the expression 'affecting the decision of the case' the meaning 'affecting the merits of the case or affecting the decision of the case with reference to its merits' Reference may be made in support of this view to the cases of *Chintamoney Dassi* v. *Raghoonath Sahoo* (3) and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (4). The Allahabad High Court has also taken the same view as this Court. See the cases of *Gulab Kunwar* v. *Thakur Das* (5) and *Tasadduq Hussain* v. *Hayat-un-nissa* (6). If we were untrammelled by authorities we might have felt disposed to reconsider the meaning of the expression but as they stand we feel overselves bound to follow them. The point which really arises in the case and which has been forcibly pressed upon our attention by the learned Vakil for the appellants is that where the order setting aside the abatement is passed in the same judgment as the decree in the suit, such order can be attacked in an appeal from the decree. In support of this contention our attention has been drawn to the decision of the Allahabad High Court in the case of *Hem Kunwar* v. *Amba Prasad* (7). In that case it has been held that where the matter relating to setting aside of abatement and the merits are dealt with in the same judgment and the findings of the Court as to both are embodied in the decree, the decree may be impugned in appeal on the ground that the order setting aside the abatement was bad in law. The case is, no doubt, in favour of the appellants; but it is the judgment of a Single Judge and is not in consonance with the view consistently taken by that Court. There is no other case directly on the point which

(1) 26 M. 604; 13 M. L. J. 303.
(2) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 139.
(3) 22 C. 981 at p. 984; 11 Ind. Dec. (N. S.) 651.
(4) 9 C. W. N. 584.
(5) 24 A. 464; A. W. N. (1902) 136.
(6) 25 A. 280; A. W. N. (1903) 39.
(7) 22 A. 439; A. W. N. (1900) 133; 9 Ind. Dec. (N. S.) 1324.

decides the question that has arisen in this case—namely, where the order setting aside an abatement and the final decree are passed by the same judgment, whether the order setting aside the abatement can or cannot be attacked in appeal from the decree—except the case to which reference has been made. But the principle on which the Courts have barred the plaintiff's right to challenge the order setting aside the abatement or an order restoring a suit in an appeal from the decree in the suit is that such an order is not one which affects the decision of the case with reference to its merits. The mere fact that the order setting aside the abatement and the order disposing of the case were passed in the same judgment does not, by parity of reasoning, affect the consideration which led the Courts to hold that such an order cannot be attacked in an appeal from the decree. The character of such an order as being one not affecting the merits of the case remains the same whether it is passed before the decree or is passed along with the decree. Our attention has been drawn to another decision of the Allahabad High Court: *Niddha Lal* v. *Collector of Bulandshahr* (8). Similar circumstances happened there with the difference that the order setting aside the abatement was passed sometime before the final decree in the case was passed.

By denying the right of appeal against an order restoring a suit or setting aside an abatement while granting it in the case of refusal to pass such order the Legislature may be taken to have intended that it is desirable in the interest of justice, that a case should be tried on the merits where the Trial Court is of opinion that it should be so tried and so such opinion should not be subject to revision by another Court. By allowing such a decision of the Trial Court to be challenged in appeal after the termination of the trial, may be after enormous expense of time and money occasioned by the act of the Court, is to defeat the intention of the Legislature and put the party winning on the merits to unnecessary loss for which he is not responsible. In our judgment the order setting aside the abatement cannot be questioned in appeal from the decree in the suit whether such order is passed before or simultaneously with the decree.

(8) 35 Ind. Cas. 209; 14 A. L. J. 610.

In this view of the law we think that the decree of the lower Court should be upheld and this appeal dismissed with costs.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2295 OF 1918.
August 3, 1922.

Prsent:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

KARIM BAKHSH—PLAINTIFF—APPELLANT

versus

KARIM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, partial.

A mortgage, though originally indivisible can cease to retain its indivisible character, if the equity of redemption is divided up.

Shankar Das v. *Gobind Ram*, 11 Ind. Cas. 100; 62 P. R. 1911; 197 P. L. R. 1911; 206 P. W. R. 1911, relied on

Appeal from the decree of the District Judge, Sialkot, dated the 4th June, 1918.

Mr. *Badr-ud-din Kureshi*, for the Appellant.

L. *Arjan Das*, for Respondents Nos. 1 and 4.

JUDGMENT.

Abdul Qadir, J.—The suit out of which this second appeal has arisen was one for possession by redemption of occupancy rights in 63 *kanals* 18 *marlas* of land on payment of Rs. 720. The Trial Court decreed the plaintiff's claim as prayed for, but on appeal by the defendants, the decree of the Court of first instance was modified and the plaintiff was given a decree for redemption of one-fourth of the land in suit on payment of one-fourth of the mortgage money. The plaintiff has preferred a second appeal against the above decision of the learned District Judge, asking that he should have been allowed to redeem the whole of the land sued for. Mr. Badar-ud-din Kureshi has argued his case before us and Lala Arjan Das, Vakil, appears for respondents Nos. 1, 3 and 4, while the other respondents are not represented.

The facts of the case are given fully in the judgments of the Courts below, and are

briefly as follows. The plaintiff Karim Bakhsh, son of Mohkam Din, owns one-fourth share of the land in suit, three-fourths of which were owned by certain other relatives of his, who are defendants Nos. 5 to 8. Defendants Nos. 1 and 2, namely, Karim Bakhsh son of Allah Ditta and his brother Karim Din, were occupancy tenants of the whole of this land.

In 1902 the occupancy tenants mortgaged their rights in this land to Sohan Singh and Kirpal Singh, defendants Nos. 3 and 4, for Rs. 720. In 1911 the same tenants sold their occupancy rights in the one-fourth share of this land to the plaintiff. In 1916 the plaintiff applied to the Revenue Court for redemption of the whole of this land, but Sohan Singh and Kirpal Singh resisted this application stating that the three-fourth share of the land had been redeemed by defendants Nos. 5 to 8 paying them three-fourth share of the mortgage money and that subsequent to this redemption the said defendants Nos. 5 to 8 had also purchased the occupancy rights in the three-fourth share from the occupancy tenants by a sale-deed dated the 19th May, 1916. Thus the situation on that date was that the platntiff was the owner of a three-fourth share of this land together with the occupancy rights thereof, while defendants Nos. 5 to 8 were owners of the remaining three-fourths and the occupancy rights of the same. On the 29th August 1916 the plaintiff brought a suit for cancellation of the sale of occupancy rights against defendants Nos. 1 and 2 and 5 to 8, in a Revenue Court, and the sale was cancelled on the 6th December, 1916. He brought the present suit on the 23rd April 1917 for possession of the occupancy rights in the whole land by redemption.

Defendants Nos. 3 and 4, the mortgagees of the occupancy rights, pleaded that the plaintiff could redeem one-fourth share from them, as the three-fourth share had already been redeemed by defendants Nos. 5 to 8.

It is contended on behalf of the plaintiff-appellant that the equity of redemption of a mortgage is indivisible and that the plaintiff is entitled to redeem the whole of the land. The learned District Judge has, however, found that the equity of redemption had been split up and that the plaintiff could only redeem his own share. He refers to *Shankar Das* v. *Gobind Ram* (1) which lays down that a mortgage, though originally indivisible can cease to retain its indivisible character, if the equity of redemption is divided up. In the present case the plaintiff himself purchased the whole of the equity of redemption without consulting the other landlords, and then by virtue of litigation between himself and the other landlords, he was allowed to retain one-fourth share of the equity of redemption of the occupancy rights. Thus he is himself responsible for dividing up the equity of redemption and cannot now take advantage of its being originally indivisible. I can see no sufficient reason for differing from the learned District Judge in the conclusion he has arrived at on the above point, and I uphold his decision which seems to be quite equitable, considering that defendants Nos. 5 to 8 are entitled to three-fourth share of the occupancy rights and that, if the plaintiff were allowed to redeem the whole land, it would only mean further litigation between him and defendants Nos. 5 to 8 who would certainly reclaim their share.

This appeal is, therefore, dismissed with costs.

Shadi Lal, C. J.—I am not prepared to dissent from the view taken by the learned District Judge and must dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 11 Ind. Cas. 100; 62 P. R. 1911; 197 P. L. R. 1911; 206 P. W. R. 1911.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 622 OF 1922.

June 9, 1924.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Chakravarti.

ABDUL HAKIM KHAN CHAUDHURI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ELAHI BAKSHA SAHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenancy, nature of—Appeal, second—Question of law—Permanent tenancy—Presumption—Principles applicable.

The question whether a presumption of permanency of tenancy is justified upon the facts found, is a question of law and is open to correction in second appeal. [p. 105, col. 1.]

The circumstances of each case must determine whether the presumption should or should not be made, as it is impossible to give any exhaustive enumeration of the facts which shall or shall not justify the presumption to be drawn. [p. 106, cols. 1 & 2.]

In the case of non-agricultural holdings, created before the Transfer of Property Act, where the origin of the tenancy is unknown and its inception is lost in antiquity, the principle of a lost grant may be invoked by the tenant, and from the conduct of the parties and the surrounding circumstances, the Court may be asked to presume that the tenancy is a permanent one. The conduct of the landlord in recognising succession and transfer and in standing by when *pucca* buildings have been raised upon the land, may be relied on in finding out the terms of the lease at its inception, or, the tenant may rely upon the principle of equitable estoppel as against the landlord, whereby the landlord may be estopped from showing that the lease is a terminable one. [p. 107, cols. 1 & 2.]

Mere forbearance, however, to enhance the rent or to eject the tenant, where the right exists, means nothing. If transfers are made describing the tenancy as permanent and the landlord recognises the transfer, he allows the creation of evidence by conduct. Otherwise, a transfer of tenancy of homestead land would ordinarily be no evidence of the permanency of the tenancy. The building of *pucca* houses and that to the knowledge of the landlord is evidence of the assertion of the tenant of his belief that the tenancy at its inception, which is unknown, was permanent. In this connection no question of estoppel or acquiescence arises, and the case depends upon the principle of inference of the terms of a lost grant. [p. 109, cols. 1 & 2.]

In order to enable the Court to make a presumption of permanency the following elements must ordinarily be shown to exist, *viz.*, (1) the origin of the tenancy for residential purposes must be unknown; (2) the existence of permanent *pucca* buildings on the land built long before any controversy arises and that to the knowledge of the landlord; (3) uniform payment of rent and (4) recognition of succession and transfer by the landlord. The absence of the 3rd and 4th elements would raise difficulties in the way of raising the presumption, but would not be decisive if there are other circumstances in aid of the presumption. [p. 110, col. 1.]

(Case-law discussed.)

Appeal against the decree of the Subordinate Judge, Rajshahye, dated the 28th of November 1921, reversing that of the Additional Munsif, Rampur Boalia, dated the 18th of September 1919.

Babu *Bireswar Bagchi*, for the Appellants.

Babu *Radhika Ranjan Guha*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiffs and the question raised in this appeal is whether upon the facts found by the lower Appellate Court, the presumption, that the tenancy is a permanent one is correct in law. The Munsif held that the presumption did not arise, the Subordinate Judge has held that it did. The facts shortly stated are these:—

Plaintiffs are the owners of a *kaimi mokarari jote* and the land in suit is a piece of *baslu* land situated within the Municipality of the town of Rajshahye and was let out to Golab Shaha, the father of the defendant, about 44 or 45 years ago by the mother of the plaintiffs, apparently for dwelling purposes. Plaintiffs served a notice to quit on the defendants and after the expiry of the term bring this suit for *khas* possession of the lands, giving the defendants the option to remove the houses standing thereon which the plaintiffs allege, are of an unsubstantial charecter.

The defence of the defendants *inter alia* was, to quote the words of the learned Munsif, "that the defendants and their predecessors-in-interest having resided on the disputed land for a long time by erecting *pucca* and *kucha* structures on payment of a uniform rate of rent and the tenancy having been treated as a heritable, the *jote* in suit is a *kaimi mourashi mokarari* one.

The facts found by the Munsif were:—

"(1) That the tenancy was 44 or 45 years old and its origin was not unknown.

(2) That the rent paid was uniformly Rs. 5-10-0 per year.

(3) That there was one case of succession from Golab to the defendants.

(4) That Golab Shaha father of the defendant, built a house with mud walls and tiled roof, over which there were thatched *chalas*, Golab also constructed *pucca* staircase for the house and a *pucca* gateway. This house, which has been described as a Morataghar by defendants' witnesses, fell down in the great earthquake of 1304 B. S. The *pucca* gate was also destroyed by the earthquake. At present only the *pucca* steps of the Morataghar exist. It is also established by the evidence of P. W. No. 4 that the defendants constructed a *pucca* privy on the land 7 or 8 years ago and that the privy is still in existence. The question is whether the structures raised by the defendants and their father can be called substantial structures. I am of opinion that the house built by Golab Shaha cannot be called a substantial structure as the roof was not a *pucca* one but was covered with mud and required the protection of thatched *chalas*."

On these facts the Munsif held that the defendants have failed to establish that the

lease was a permanent one. The Munsif further pointed out that there was no allegation by the defendants that the lease was a permanent one at its inception.

On appeal by the defendant, the Subordinate Judge has reversed the Munsif's judgment and held that the facts justified the presumption of permanency of the tenure. As to the facts, the learned Subordinate Judge has agreed with the Munsif as to his findings under heads Nos. 1 to 3 and although there is no difference of opinion as to the nature of the structures on the land the learned Subordinate Judge says that: "As the land was let out for building, the presumption is that in its inception the holding was not a temporary holding. In the next place it appears that defendants had a Morotaghar, *i. e.*, house with mud walls and tiled roof, over which there were thatched *chalas*, with *pucca* staircase and *pucca* gateway There is also a *pucca* privy. The learned Munsif says that the privy was constructed without the knowledge of the plaintiff. I do not agree to that view."

"I am satisfied upon the evidence that plaintiffs had knowledge of the existence of the *pucca* privy. In my opinion all these structures are of a substantial character." The Munsif held that the defendants gave no evidence as regards the actual cost incurred in constructing the house and other structures. The learned Subordinate Judge has not said anything as regards this matter. The Munsif held that the structures were not of a substantial character but the Subordinate Judge on the same facts says: "In my opinion all these structures are of a substantial character." There were no *pucca* buildings on the land; *pucca* steps and a brick-built privy within a Municipality are not, in my opinion, structures to which any reasonable landlord could object, so long as the tanancy subsisted.

As I have already observed the question raised in this appeal is, is a presumption of permanency of the tenancy justified upon the facts found by the learned Subordinate Judge. The question thus raised is a question of law and is open to correction in a second appeal

The learned Subordinate Judge has mainly based his judgment upon the cases reported as *Beni Madhab* v. *Jai Krishna Mookerjee* (1) and *Durga Prasad Misser* v. *Brindaban Sookul* (2) and the case of *Nabu Mondul* v. *Cholim Mullik* (3) and he concludes by a bare reference to the cases of *Upendra Krishna Mondal* v. *Ismail Khan Mahomed* (4) and *Nilratan Mondal* v. *Ismail Khan Mahomed* (5).

Upon the question now at issue, there are numerous cases of this Court and a number of decisions of the Judicial Committee of the Privy Council. It is somewhat strange that the learned Subordinate Judge has not noticed them. It is indeed true, that the cases are so many that it is neither possible nor profitable to refer to so many cases but it seems to me that the case of *Beni Madhab* v. *Jai Krishna Mookerjee* (1) is hardly of any assistance in this matter. Sir Barnes Peacock when dealing with the question as to the permanency of the tenancy observed that "the evidence showed that *pucca* buildings had been erected, and that the lands had, in fact, been held for upwards of 35 years and had descended from father to son, and the *kabuliyat* showed that the tenures were not merely of a temporary nature" and further on he said "that in equity the plaintiff was not entitled to turn the defendants out of the land, because he stood by and saw the tenants erecting *pucca* buildings on the land without any objection whatever. If he allowed the defendants to erect *pucca* buildings upon the land without objecting, it appears to me that he was bound in the same way in equity as if he had granted them a *pattah* with the privilege of building *pucca* houses on the land." The decision in this case was based upon the terms of the lease and upon the principle of equitable estoppel. The question is different here.

As to the case of *Durga Prasad Misser* v. *Brindaban Sookul* (2), the passage quoted by the Subordinate Judge shows that the main fact which was relied upon was that the land "was not given for any temporary purpose." What these words were actually intended to mean it is impossible to find out. At any rate there is no finding as to the purpose precisely for which the lease was created at its inception and the main question raised and decided was that of the transferability of the tenancy.

The case reported as *Nabu Mondal* v. *Cholim Mullik* (3) is helpful in so far as it gives us a list of most of the cases then available. The view of the learned Judge

(1) 7 B. L. R. 152; 12 W. R. 495.
(2) 7 B. L. R. 159; 15 W. R. 274.
(3) 25 C. 896; 13 Ind. Dec. (N. s.) 584.
(4) 32 C. 41; 31 I. A. 144; 8 C. W. N. 889 (P. C.).
(5) 32 C. 51; 31 I. A. 149; 8 C. W. N. 895 (P. C.).

referring the case to the Full Bench was against the raising of a presumption of permanency merely upon long occupation and ultimately the reference fell through without any decision by the Full Bench on the points referred to it. The cases reported as *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (4) and *Nilratan Mondal* v. *Ismail Khan Mahomed* (5) which as I said before, were only mentioned by the Subordinate Judge, have no application here as I shall show later on.

The learned Vakil who appeared for the appellant submitted that the facts found do not justify the presumption and referred us to the cases of *Lala Beni Ram* v. *Kundan Lal* (6), *Raja of Venkatagiri* v. *Mukku Narsaya* (7), *Secretary of State for India* v. *Luchmeswar Singh* (8), *Winterscale* v. *Sarat Chandra Banerjee* (9), *Seturathan Iyer* v. *Venkatachala Goundan* (10) and *Nainapillai Marakayar* v. *Rama Nathan Chettiar* (11). The learned Vakil for the appellant argued that in the present case the origin of the tenancy was not unknown; there were no substantial buildings on the land, therefore, there was no justification for raising the presumption of permanency of the tenure. The learned Vakil for the respondents, in addition to the cases quoted by the Subordinate Judge cited the following cases of *William M. Grant* v. *Robinson* (12) and *Maharam* v. *Telamuddin* (13) and contended that the facts found in the present case brought it within the principle laid down in these cases.

As I have already observed the cases on the point, as one could expect, are not only many but are not easily reconcilable. In these circumstances it may be said, if that can be said of a question of law, that the circumstances of each case must determine whether the presumption should be made or not as it is impossible to give any exhaustive enumeration of the facts which shall or shall not justify the presumption to be drawn.

I shall endeavour to find out from some of the leading cases, and the general law, as to what are the principles upon which the Court has proceeded in deciding the question now raised. I must not, however, be understood to attempt an exhaustive analysis of all the cases.

I shall now briefly refer to some of the principles which underlie a question of this nature as between landlord and tenant, and I am here speaking only of the non-agricultural holdings created before the Transfer of Property Act of 1882.

When a tenant claims to hold land as a tenant under the landlord, the tenant must prove the nature and the extent of the interest which the landlord, the owner of the full rights, granted to him and thereby put a limitation to his own rights. In this connection I shall quote a few passages from the decision of Lord Hobhouse in the case of *Secretary of State for India* v. *Luchmeswar Singh* (8). His Lordship says: "The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff to explain the possession: it is the business of the defendants to show that it leads to the inference of a parpetual tenancy." The Judicial Committee referred to this case and re-stated the law in these words: "That permanant right of occupancy can only be obtained by a tenant by custom or by a grant from an owner of the land who happens to have power to grant such a right or under an Act of the Legislature. "*Nainapillai Narakayar* v. *Ramanathan Chettiar* (11). No person can after the Transfer of Property Act came into operation, claim to hold a permanent tenancy

(6) 26 I. A. 58; 21 A. 496; 3 C. W. N. 502; 1 Bom. L. R. 400; 7 Sar. P. C. J 523; 9 Ind. Dec. (N. S.) 1022.

(7) 7 Ind. Cas. 202; 37 M. 1; 8 M. L. T. 258; (1910) M. W. N. 369.

(8) 16 I. A. 6; 16 C. 223; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. S.) 147 (P. C.).

(9) 8 C. W. N. 155.

(10) 56 Ind. Cas. 117; 47 I. A. 76; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 43 M. 567; 25 C. W. N. 485 (P. C.).

(11) 82 Ind. Cas 226; 51 I. A. 83 at p. 90; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 909 (P. C.).

(12) 11 C. W. N. 242; 5 C. L. J. 148.

(13) 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220.

in what is called *bastu* land unless it was created by a written and registered lease. It is common knowledge that numerous leases of the class we are dealing with now, were and are daily created in Bengal more especially in the towns, and one may safely say that 50 years back and thereafter written leases had come into general use and except under special circumstances, no tenant would consider it safe to take a permanent lease without a registered deed evidencing the demise, particularly when the tenant paid a substantial premium, or intended to spend large sums on the land for building and other purposes. The granting of a permanent right in land is a matter of considerable importance and usually is evidenced by appropriate deeds. The Transfer of Property Act must have had regard to the habits and practices of the people of Bengal when it was made applicable to them. Before the Transfer of Property Act there was no Statute dealing with homestead land as distinguished from agricultural land as to which numerous Statutes beginning with the Regulations passed at the time of the Permanent Settlement, down to the passing of the Tenancy Act in Bengal in 1885 regulate the relationship between the landlords and the tenants. There are numerous judicial decisions with reference to agricultural land and they have no direct bearing on the question now at issue.

The cases, some of which I shall presently discuss, proceed upon two broad principles and some of them rely upon a combination of both, whenever the inference of permanency of the tenancy has been made in favour of the tenant when the terms of the original tenancy could not be directly proved. The first principle is that in cases where the origin of the tenancy is unknown and its inception is lost in antiquity the principle of a lost grant has been invoked by the tenant and from the conduct of the parties and the surrounding circumstances, the Court has been asked to presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and in standing by when *pucca* buildings have been raised upon the land, have been mainly relied on in finding out the terms of the lease at its inception.

The second principle relied upon is that of equitable estoppel against the landlord, from showing that the lease was a terminable one.

The first of those principles was relied upon by the tenant in the case already cited and reported as *Secretary of State for India* v. *Luchmeswar Singh* (8). Their Lordships refused to draw the inference although in that case the lease was created in 1764 and one uniform rent was paid for 80 years before the dispute arose. This principle was also relied upon by the tenant but this Court refused to draw the inference in the following cases:—

In the well-known case of *Prosunno Coomaree Debee* v. *Rutton Bepary* (14), Sir Richard Garth on a careful consideration of the earlier cases laid down the law in the following words:—

"The truth is that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied," then again "there is no law, of which we are aware, in this country, which converts a holding-at-will, or from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, chooses to build a dwelling-house upon land demised."

In this case the defendants, their father and grandfather had occupied the land for fity or sixty years and used it as a homestead consisting of a house and fruit trees. Sir Richard Garth refused to draw the inference of permanency in this case although the origin of the tenancy was unknown.

This case was followed in a number of subsequent cases and I shall refer to some of them only: "*Tarukpado Ghosal* v. *Shyama Churn Napit* (15), *Prosunno Coomar Chatterjee* v. *Jagan Nath Bysack* (16), and *Rakhal Das Addy* v. *Dinamoyi Debi* (17). In these cases the Court refused to presume the permanency of the holding.

In the cases, which I shall next discuss, the principle was relied upon and the Court drew the inference in favour of the permanency of the tenancy. I have already discussed the case of *Beni Madhab* v. *Jai Krishna Mookerjee* (1). In the case of *Prosunno Coomar Chatterjee* v. *Jagan Nath Bysack* (16), Sir Richard Garth discussed some of the cases and distinguishing

(14) 3 C. 696; 1 C. L. R. 577; 1 Ind. Dec. (N. S.) 1026.
(15) 8 C. L. C. 50.
(16) 10 C. L. R. 25.
(17) 16 C. 652; 8 Ind. Dec. (N. S.) 430.

the case of *Prosunno Coomaree Debee* v. *Rutton Bepary* (14) and held at page 30*: "No doubt if land is let for building *pucca* houses upon it, or if the tenant, with the knowledge of the landlord, does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with a long continued enjoyment of the property by the tenant or his predecessors-in-title, might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained. But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessors, becuse a landlord might let property of that kind in the same way as agricultural land, at will, or from year to year." In the case of *Gungadhur Shikdar* v. *Ayimuddai Shah Biswas* (18) Sir Richard Garth again distinguished the case of *Prosunno Coomaree Debee* v. *Rutton Bepary* (14) and held that (at page 962†): "It was apparently let upwards of sixty years ago for building purposes; because it is found that, after the grant (whatever it was), these buildings, which are of a substantial character, were erected some sixty years ago by the defendants' ancestors, and that they and their ancestors have lived there ever since. Under these circumstances we think that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character." These two cases might be considered as laying down the principle clearly and definitely. These cases were followed by Sir F. Maclean, C. J., in the case of *William M. Grant* v. *Robinson* (12) and the circumstances from which the inference was drawn were that "the original nature of the grant was unknown the defendants were tenants on the land and were 'in occupation for nearly sixty years and that they raised substantial structures on the land and the grant was for the purpose of residence." These cases really settled the grounds upon which such a presuption in favour of the tenant may be drawn and the subsequent cases which followed these cases stressed the facts that the origin of the tenancy must be unknown and that substantial *pucca* structures must be built without objection long before the controversy arose. The present case does not come within the principle so laid down.

In the case of *Maharam* v. *Telamuddin* (13), their Lordships found that the origin of the tenancy was unknown, the rent never varied, the landlord treated the tenancy as heritable and that the land was let out for residential purposes and relied upon the authority of a number of cases both of this Court and of the Judicial Committee. Their Lordships summed up as follows :— "There can be no doubt that in view of the decision of this Court in the cases of *Dinendra Narain Roy* v. *Tituram Mukerjee*(19) and *Winterscale* v. *Sarat Chandra Banerjee* (9) and of the Judicial Committee in the cases of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai* (20), *Dhundput Singh* v. *Gooman Singh* (21), *Ramachunder Dutt* v. *Jogeshchunder Dutt* (22), *Rajah Suttosurrun Ghosal* v. *Tarinee Chunder Ghosal* (23), *Upendra Krishna Mondal* v. *Ismail Khan Mahomed* (4), *Nilratan Mondal* v *Ismail Kham Mahomed* (5) and *Naba Kumari Debe* v. *Behari Lal Sen* (24), the inference is irresistible that the tenancy in its inception was of a permanent character. The Subordinate Judge himself indeed would have arrived at the same conclusion but for the error into which he fell when he assumed that to bring a case within this rule, it was essential to establish that there were permanent structures on the land. But the decision of the Judicial Committee in *Naba Kumari Debi* v. *Behari Lal Sen* (24) shows conclusively that although the presence of permanent structures on the land may be a very important factor, it is by no means essential to establish that the tenancy in its inception was of a permanent character."

This case for the first time definitely held that a tenancy in homestead land, without any substantial structures built on it by

(18) 8 C. 960; 4 Shome L. R. 274; 4 Ind. Dec. (N. S.) 619.

*Page of 10 C. L. R.—[*Ed.*]

†Page of 8 C.—[*Ed.*]

(19) 30 C. 801; 7 C. W. N. 810.

(20) 10 M. A. I. 183 at p. 191; 3 W. R. P. C. 1; 1 Suth. P. C. J. 588; 2 Sar. P. C. J. 93; 19 E. R. 941.

(21) 11 M. I. A. 433; 9 W. R. P. C. 3; 2 Suth. P. C. J. 92; 2 Sar. P. C. J. 309; 20 E. R. 164.

(22) 12 B. L. R. 229; 19 W. R. 353.

(23) 12 M. I. A. 263; 11 W. R. P. C. 10; 2 B. L. R. P. C. 23; 2 Suth. P. C. J. 180; 2 Sar. P. C. J. 420; 20 E. R. 338.

(24) 34 C. 902; 6 C. L. J. 122; 11 C. W. N. 855; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433 (P. C.).

the tenant, may be presumed to be a permanent tenancy even in the absence of any admission by the landlord, or an circumstance importing permanency of tenure.

The cases cited in support of that view, it is respectfully submitted, lend no support to that proposition. The first case cited is the case of *Dinendra Narain Roy* v. *Tituram Mukerjee* (19) and realtes to a question of apportionment of compensation money and has little to do with the question now in issue.

The next case of *Winterscale* v. *Sarat Candra Banerjee* (9) was decided on the ground that the landlord was aware of a *kobala* and of a *pattah*, from the terms of which the Court presumed that the landlord was bound to recognise the permanency of the tenure. The next four cases are decisions of the Judicial Committee in which the question of the permanency of agricultural tenures was discussed and decided and as I have shown before, this class of tenancy stands upon a different footing altogether. The case of *Nilratan Mondal* v. *Ismail Khan Mahomed* (5) which is next referred to, deals no doubt with tenancy in homestead land, but in that case the headnote itself shows this "that the execution and exchange of the *pattah* and *kabuliyat* shows knowledge and recognition on the landlord's part of the transmission of permanent rights." Obviously this case has nothing to do with the proposition under consideration in this case. The last case of *Naba Kamari Debi* v. *Behari Lal Sen* (24) deals also with an agricultural tenure and the decision is mainly based on an admission by the landlord. It seems to me, therefore, the case of *Maharam* v. *Telamuddin* (13) went beyond the rule which had been adopted by the leading cases which I have already discussed, and they show that in these cases permanency was presumed, on the theory of a lost grant.

The fact that the tenant is allowed to continue in possession of lands for generations without alteration of the rent, is of common occurrence in this country and is usually attributable to the reluctance of a landlord to eject a tenant from his home so long as he does not make himself objectionable and regularly pays his rent. Mere forbearance to enhance the rent or eject the tenant, where the right exists, means nothing. If transfers are made, describing the tenancy as permanent and the landlord recognises the transfer, then landlord allows creation of evidence by conduct, otherwise, transfer of tenancy of homestead land would also be ordinarily no evidence of the permanency of the tenancy.

The building of *pucca* houses and that to the knowledge of the landlord is evidence of the assertion of the tenant of his belief that the tenancy at its inception, which is unknown, was permanent. In this connection, no question of estoppel or acquiescence arises, the case depends upon the principle of inference of the terms of a lost grant.

The second principle, namely, of estoppel against landlord, the Privy Council deals with in the case of *Lala Beni Ram* v. *Kundan Lal* (6) the decision runs thus :—

"In order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation.

Their Lordships have had no difficulty in coming to the conclusion that the respondents have failed to discharge themselves of that onus. If there be one point settled in the Equity Law of England, it is, that in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him in the knowledge of and without interference by his lessor will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below." Lord Watson in discussing the case of *Ramsden* v. *Dyson* (25), the leading authority in the Law of England quoted the following passage from the judgment of the Lord Chancellor (Lord Cranworth).

Lala Beni Ram v. *Kundan Lal* (6): "It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to

(25) 1 H. L. 129 at p. 141; 12 Jur. (N. S.) 506; 14 W. R. (1866) 926

prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

In order to avail himself of the equitable estoppel against his landlord, the tenant is bound to prove special circumstances, the mere building of a costly structure is not enough. In the present case the principle of equitable estoppel was not relied upon and could not be.

An analysis of the cases cited before, in which presumption of permanency was made, shows that the following elements existed in those cases, *viz.* firstly, the origin of a tenancy for residential purpose, must be unknown; secondly, existence of permanent *pucca* buildings on the lands built long before any controversy arises and that to the knowledge of the landlord; thirdly, uniform payment of rent; fourthly, recognition of successions and transfers by the landlord. Many cases were decided upon the admission by landlords as to permanency of the tenure, in various ways but these cases are based on a different consideration as also the cases in which an equitable estoppel is raised against the landlord. It seems to us that the absence of either of the elements Nos. 1 and 2 as stated above would be ordinarily fatal to any claim of permanency on the theory of lost grant.

Absence of the 3rd and the 4th elements usually would raise difficulties in the way of raising the presumption, but may not be decisive if there are other circumstances in aid of the presumption.

In the case now before us, both the Courts have agreed in holding that the origin of the tenancy was not unknown and no evidence was adduced to prove its terms. Absence of written lease, cannot improve the position of the tenant because, a tenant must know under what terms he holds the land of his lessor. At the time, when the building was first constructed, the tenancy was one, in which no presumption in favour of the tenancy existed and the tenancy in the absence of proof of any definite terms of permanency, would be at best, one from year to year. On this ground alone, we think that the presumption of permanency raised by the lower Appellate Court is erroneous, and the case of *Maharam* v. *Telamuddin* (13) is distinguishable. Upon the findings of the lower Appellate Court it appears to us that there were no substantial *pucca* buildings on the land as understood in the cases in which the presumption has been sustained and some of which I have already discussed. In the circumstances of this case we do not think the inference of permanency is justifiable. The result is that the judgment and decree of the lower Appellate Court is set aside and those of the Munsif are restored, with costs in all Courts.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 7 OF 1922.

December 21, 1922.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Kulwant Sahay.

MANGAL PATHAK AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

MESAR SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Decree allowing interest only on costs—Stay of execution—Security bond reciting payment of interest on principal amount—Decree whether varied—Decree-holder, whether entitled to interest on principal amount.

A decree was passed in favour of the appellant for damages and costs and in the decree interest was allowed only in respect of costs. An appeal was preferred against the decree by the respondents, and, in order to obtain a stay of execution during the pendency of the appeal, the respondents executed a security bond which recited the fact that interest was payable upon the sum allowed for damages also, but there was no specific agreement to pay interest upon this sum nor was there any recital of the rate of interest. The appeal was eventually dismissed. In execution of the decree:

Held, that the Appellate Court by dismissing the appeal affirmed the decree of the Trial Court and that the only decree which could be executed was that decree which had not in any way been modified by the terms of the security bond, and that the appellant was, therefore, not entitled to recover any interest upon the principal amount mentioned in the decree. [p. 111, col. 2.]

Appeal from an order of the Subordinate Judge, Third Court of Gaya, dated the 9th July 1921.

Mr. *S. N. Ray* for Mr. *J. P. Sinha*, for the Appellants.

Messrs. *B. N. Mitter* and *B. K. Sinha*, for the Respondents.

JUDGMENT.

Mullick, J.—The paper-book in this case does not contain the necessary papers and we have been considerably inconvenienced by the omission of the appellants in this respect.

On reference to the original records we find that on the 27th February 1917 a decree was made in favour of the appellants for Rs. 2,715-6-0 damages and Rs. 1,647-12-4 on account of costs. Although it is now contended that the decree allowed interest both on principal and costs, it is quite clear on a reference to the decree that the direction of the Court was that interest was to be paid only upon costs. Then the defendants appealed against the decree. While the appeal was pending, the decree-holders proceeded to execute and the judgment-debtors filed an application before the Appeal Court asking for stay of execution and agreed, it is alleged by the appellants, to pay not only the amount of damages due up to that date but also interest and thereby to modify the original decree. The Appeal Court allowed stay upon the judgment-debtor's executing the necessary security bond and paying Rs. 1,699-2-6 in cash. The security bond in its earlier portion states that they were liable to pay interest both upon the principal sum and the costs, but in the concluding portion it is stated that the security is being given for Rs. 2,854-11-3 on account of the mesne profits only.

However, that may be, it is contended now before us that there was a clear admission in the security bond that the judgment-debtors were liable to pay interest upon the principal money. The Appeal Court finally dismissed the appeal, and the question now is, whether in the execution, which is now proceeding, the decree-holders are entitled to interest not only upon the costs but also upon the principal. The Subordinate Judge has held that upon a construction of the decree, the claim of the decree-holders is not tenable, and the present appeal is filed against his order.

It is quite clear that there was no specific agreement in the security bond to pay interest upon principal, nor is there any recital of the rate of interest; so that on that ground alone this appeal must fail. But even if it were admitted that there was an agreement to pay interest at the rate of 6 per cent. the question is whether that agreement can be enforced in execution of the decree.

Reliance is placed upon *Sreeshteedhur Shaha* v. *Woomeshnath Roy* (1) and *Lakshmana* v. *Sukiya Bai* (2). In both these cases an application was made by the judgment-debtor at the execution stage for the stay of the sale and in the presence of the Court the judgment-debtor agreed to pay interest upon the decretal sum. It was held that the Court's order allowing the prayer was in effect an amendment of the decree by consent and was operative. But in the present case the difficulty is that the agreement, if any to pay interest was made not in the Execution Court but in the Appeal Court and that notwithstanding any arrangement that may have been arrived at between the parties with the consent of the Court, the Court eventually by dismissing the appeal before it affirmed the original decree; and, therefore, the decree that now stands between the parties is not the decree amended by the alleged consent but the original decree in which no provision is made for the payment of interest upon the principal.

In these circumstances the Subordinate Judge was right and the appeal must be dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 5 W. R. Mis. 1.
(2) 7 M. 400; 2 Ind. Dec. (N. S.) 842.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 533 OF 1923.
March 25, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

NARINJAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KIRPAL SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Interest in trust—Suit in respect of place of worship—Worshippers, whether competent to sue.

In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries, and must, as such, be held to possess a sufficient interest to support a suit under s. 92 of the C. P. C.

Ramachandra Aiyar v. *Parameswaran Unni*, 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370, referred to.

First appeal from the decree of the Additional District Judge, Gujranwala, dated the 23rd December 1922.

Dr. *G. C. Narang* and Mr. *Balwant Rai*, for the Appellants.

Messrs. *Ram Chand Manchanda* and *Jagan Nath Bhandari*, for the Respondent.

JUDGMENT.—In the city of Wazirabad there is a *dharmsala* known as the *dharmsala* of Bhai Abnasha Singh. According to the plaint this institution is meant for purposes of charity to the public, religious purposes and public utility. There is a *jagir* grant of about Rs. 3,500 per annum made by the Government for the maintenance of the *dharmsala* and the upkeep thereof. Recitation of the *Granth Sahib* is carried on there and sermons are delivered by Sikh priests. Wayfarers and visitors of all castes and creeds are fed there and a *langar* is maintained for this purpose. Kirpal Singh is its present *mahant*. The plaintiffs, seven in number, applied for permission to bring a suit for the removal of Kirpal Singh and the appointment of a new *mahant* and also for the framing of a scheme for the future management of the *dharmsala*. Permission was granted to them by Mr. Alan Mitchell, Collector, Gujranwala and Sheikhupura Districts. On the strength of this sanction the present suit was instituted by the plaintiffs, five of whom, namely, Narinjan Singh, Mahan Singh, Ishar Singh, Bhagat Singh and Tirath Singh, are residents of Gujranwala town. Parshotam Singh and Lila Ram reside at Wazirabad itself. They describe themselves as Sikhs and state that they and the other members of the Sikh community are beneficiaries under the *wakf* and as such are entitled to maintain the suit. They allege that the defendant is leading a dissolute life, is squandering the income of the *wakf* property and is neglecting the affairs of the *dharmsala*. The defendant denied all the allegations made against him and pleaded that the *dharmsala* and the property attached to it being his private property and not *wakf*, the plaintiffs as members of the Sikh community were not entitled to maintain the suit. It was further pleaded that in any case the plaintiffs had not such interest in the property as is contemplated by s. 92 of the C. P. C. and that, therefore, they had no *locus standi* to maintain the suit and the sanction granted to them by the Collector was illegal. The following issues were framed by the Court with reference to the pleadings of the parties :—

(1) Is the sanction granted by the Collector under s. 92, C. P. C., invalid and *ultra vires* because the plaintiffs have no interest in the property in suit, and because it is not trust property ?

(2) Is not the *dharmsala* in dispute a charitable or religious trust though it is a religious and a charitable institution ?

(3) If the defendant holds the whole or part of the property as *jagir*, is he subject to the jurisdiction of a Civil Court as regards that property.

(4) Is the defendant the manager or the trustee of the *dharmsala* in suit ?

(5) If he is the manager and trustee, is he unfit to continue in that office because of his immoral habits, mismanagement and incapacity ?

(6) Are plaintiffs precluded from denying defendant's status of *jagirdar* because he has been holding the property as his personal *jagir* for more than twenty years ?

(7) Is the suit not maintainable for the reasons stated in the suplementary pleas filed by the defendant on the 9th July 1921 ?

(8) To what reliefs, if any, are the plaintiffs entitled ?

On the question whether all the plaintiffs had sufficient interest in the institution to entitle them to maintain the suit the Court held that only Parshotam Singh, a merchant of Wazirabad, was qualified to maintain the suit. As to Lila Ram a doubt was expressed as to whether he was a Sikh at all. The other five plaintiffs not being residents of Wazirabad were held not qualified to sue. As s. 92 of the C. P. C. requires that at least two persons having an interest in the trust and having obtained the consent of the Collector may institute a suit of this nature the Court dismissed the suit on this preliminary point. In this view it was unnecessary to try the remaining issues ; but the Court below dealt with those issues also and decided them against the defendant. The findings on the remaining issues being unnecessary need not have been recorded. The learned Judge arrived at the following conclusion towards the end of his judgment :—

"I am certainly of opinion that Kirpal Singh, whose debased character or indifference to the welfare of the *dharmsala*, has become a byword, is not by any means a fit person to hold the position of *mahant* of

the *dharmsala* of Bhai Abnasha Singh. It is unfortunate that the plaint has been found to be legally defective so that no action can be taken on it against the defendant. But I do not see why executive action cannot be taken for suspension of the *jagir* so long as Kirpal Singh persists in clinging to the office of *mahant*. Finding on Issue No. 1 that the sanction of the Collector is invalid and the plaint defective in consequence, I dismiss the plaintiff's suit."

Against the decree of the Court below the present appeal has been preferred. The question, which we have to decide, is whether at least the six of the plaintiffs, namely, Narinjan Singh, Mahan Singh, Ishar Singh, Bhagat Singh, Tirath Singh and Parshotam Singh, who are admittedly Sikhs and as such beneficiaries under the trust, can maintain the suit. The learned Judge of the Court below has relied on the decision of the majority of the Judges in the case of *Ramachandra Aiyar* v *Parameswaran Unni* (1) in support of the view taken by him. It was held in that case by Oldfield and Trotter, JJ., that "'Interest' under s. 92 of the Code denotes an interest which is substantial and not sentimental or remote: it must be a present and substantial and not a remote and fictitious or purely illusory interest." Those learned Judges were of opinion that a mere right of worship did not create sufficient interest to support a suit of the nature contemplated by s. 92 of the C. P. C. Abdul Rahim, J., on the other hand held that "In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s. 92 of the C. P. C." The case had originally come for decision before the Hon'ble Sir John Wallis, Kt., Chief Justice, and Mr. Justice Kumaraswami Sastri. Those learned Judges having differed, an appeal was preferred under the Letters Patent which came for disposal before Abdul Rahim, Oldfield and Trotter JJ. Mr. Justice Abdul Rahim agreed with the opinion expressed by Mr. Justice Kumaraswami Sastri and held that the suit was maintainable. The view taken by Mr. Justice Abdul Rahim finds support from the decisions of the Calcutta, Allahabad and Bombay High Courts. Those decisions are quoted and fully discussed in the judgments of Mr. Justice Abdul Rahim and Mr. Justice Kumaraswami Sastri. It will serve no useful purpose to go over the same grounds in our judgment, as we entirely agree in everything that has been stated by these two learned Judges. This being so, we must hold that the decision of the learned Judge of the Court below on the preliminary point is wrong.

Having regard to the fact that the remaining issues in the case have also been disposed of by the Court below a question arises as to what order should be passed by us in this appeal. Order XLI, r, 23 of the C. P. C., provides that: "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case." There is no doubt that the suit has been disposed of on a preliminary point and, therefore, it may be remanded under the above-mentioned rule. Then the question arises whether we should remand the case or whether we should deal with it ourselves. It will, however, be necessary in this case to appoint a new *mahant* if the present incumbent of the office is found to be unfit and to frame a scheme for the future management of the institution. It will be necessary to take further evidence for this purpose. We also take into consideration that the findings on the other issues were not material for the passing of the decree which has been passed by the Court below.

We accordingly accept the appeal and setting aside the decree of the lower Court, remand the case under O. XLI, r. 23 of the C. P. C. with the direction that it be placed on its original number in the register of pending suits and be disposed of according to law. Costs will abide the result.

K. S. D. *Appeal accepted.*

(1) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 74 OF 1924.

July 23, 1924.

Present:—Mr. Justice Boys.

FIRM JANKI DAS-GOBIND RAM—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF AGRA AND ANOTHER—OPPOSITE PARTIES.

Railways Act (IX of 1890), ss. 72, 76—Goods consigned under Risk Note, Form "B"—Duty of Railway Company—Delay in delivery—Deviation from route—Deterioration—Burden of proof.

When a contract is entered into, the parties must be held to be bound by the ordinary meaning of the words used, where the words are not proved to be used in some special sense. [p. 115, col. 1.]

If goods consigned to a Railway Company for carriage have deteriorated by failure of the Company to deliver at the proper time, and that failure is due in its turn to failure of the Company to use ordinary prudence, the Company is, in the absence of a special contract, responsible for the deterioration. [p. 114, col. 2.]

Under s. 76 of the Railways Act it is sufficient for a plaintiff in a suit to recover damages for deterioration of goods delivered to a Railway Company for carriage, apart from any special contract, to prove the deterioration; the burden of proof is not on him to show how it was caused. [*ibid.*]

A carrier is bound to carry the goods by the ordinary route by which he professes to carry and is, therefore, liable for damages for delay caused by unnecessary deviation from that route. [p. 118, col. 1.]

Where goods are consigned under Risk Note, Form "B" the Railway Company is protected by the terms of the contract contained in the note only so long as it carries the goods along the route which is expressly or impliedly indicated in the note, and in taking the goods off the ordinary route the Company goes outside the terms of the contract and cannot found a claim for exemption on the terms of the contract. [p. 116, col. 1.]

London and North-Western Railway Co. v. *Neilson*, (1922) 2 A. C. 263; 91 L. J. K. B. 680; 127 L. T. 469; 66 S. J. 502; 38 T. L. R. 653; (1922) W. N. 162, relied on.

Ram Kishun Ram v. *North Western Railway*, 77 Ind. Cas. 1020; 20 A. L. J. 973; (1923) A. I. R. (A.) 122, distinguished.

Civil revision from an order of the Judge of the Court of Small Causes at Agra, dated the 20th December, 1923.

Mr. *S. K. Dar* and Dr. *K. N. Katju*, for the Applicant.

Messrs. *L. M. Banerji* and *Ladli Prasad Zutshi*, for the Opposite Parties.

JUDGMENT.—This case raises an important question as to the rights and liabilities of the public and of the Railways when goods are despatched under an owner's Risk Note, Form B. Some timber was despatched on June 18th from Nimtolla station on the Eastern Bengal Railway to the Jumna Bridge Station at Agra for delivery to the plaintiff. Two Railways were concerned, but it is agreed that for the purposes of this case they may be treated as one Company. I shall, therefore, speak of "the Company." The usual period of transit would be about eight days and there is no question as to what the route should have been, *i. e.*, there is no suggestion of ordinarily alternative routes. The goods were in fact sent by the Railway Company to Jubbulpore where by some further mistake they where delivered there to the Military Authorities. On the 18th of September the timber was traced to Jubbulpur, recovered by the Company and re-booked to Jumna Bridge. On the 25th of September, it was delivered to the plaintiff after a Railway Officer had assessed the damage at Rs. 350-6-0. The Company, however, refused to pay anything on the ground that the goods had been despatched under an "owner's Risk-Note," Form B. The plaintiff thereupon sued the Company alleging loss due to delay and deterioration in consequence of the negligence and carelessness of the Company.

The responsibility of the Company is governed by the Railways Act, IX of 1890, s. 72. That section, subject to any provisions of the Act, imposes on the Company the responsibility of a bailee under ss. 151, 152 and 161 of the Contract Act, IX of 1872. Under s. 151 of the Contract Act the Company is bound to take such care of the goods as a man of ordinary prudence would take of his own goods. If it has taken that care, s. 152 lays down that it is not, in the absence of a special contract, responsible for deterioration; and under s. 161 if, by default of the Company, the goods are not delivered at the proper time the Company is responsible for deterioration. So far as responsibility is regulated by s. 72 of the Railways Act, the Common Law of England and the Carriers Act (III of 1865) are inapplicable.

If then the goods have deteriorated by failure of the Company to deliver at the proper time and that failure is due in its turn to failure of the Company to use ordinary prudence, the Company is, in the absence of a special contract, responsible.

Under s. 76 it is sufficient for the plaintiff, apart at any rate from any special contract to prove the deterioration; the burden of proof is not on him to show how it was caused.

Here there is a special contract, the owner's Risk Note. It is not a special con-

tract within the meaning of s. 152 of the Contract Act, for it is not a contract increasing the responsibility of the Company and saddling it with responsibility even though it has used the due care required by s. 151. It is a contract purporting to limit its responsibility under ss. 151 and 161, such an agreement as is referred to in s. 72 (2) of the Railways Act. The important words of the Risk-Note are:—

"Whereas the consignment.....is charged at a special reduced rate..... I, the undersigned, do in consideration of such lower charge, agree and undertake to hold.....Railway Administration .....over whose Railways.....the said goods may be carried in transit from Nimtolla Station to Jumna Bridge Station harmless and free from all responsibility for any loss, damage, destruction or deterioration of or damage to, the said consignment, from any cause whatever except for the loss.....due to wilful neglect .....or to theft.....before, during and after transit over the said Railway lines."

No question of loss due to wilful neglect or theft has been raised before me. The plaintiff contends that this Form B did not exempt the Company from liability for damage suffered owing to his goods being sent, not from Nimtolla to Jumna Bridge by the ordinary route but from Nimtolla to Jubbulpur, a place off the ordinary route, and thence later to Jumna Bridge. It is not contended by the defendant Company that Jubbulpur is on the ordinary route or that it could possibly be considered to be on an alternative route; but simply that the Form B absolves them provided they delivered the goods eventually at Jumna Bridge. This defence was accepted by the learned Judge of the Court of Small Causes and the plaintiff has come to this Court in revision.

I will deal with the matter first as it presents itself to me independently of authority. The issue seems to me to be really simple When a contract is entered into, the parties must respectively be held to be bound by the ordinary meaning of the words where the words are not proved to be used in some special sense.

For the Company it is contended that if they at some time or other eventually got these goods from Nimtolla to Jumna Bridge, irrespective of where they went in the course of their journey or how long they took, the Company is exempt.

To establish this defence the Company must show not only that this is the construction which they themselves put and which they intended should be put by consignors on the Risk-Note, but they must further establish that it is the reasonable construction which any ordinary intelligent person acquainted with the English language must put upon it. As it appeared to me when reading this Risk-Note for the first time no one could fail to understand by it that the consignor's agreement to make no claim for certain cases of damage was limited by the understanding that he was holding the Company free from responsibility while taking his goods from Nimtolla to Jumna Bridge by the ordinary route. The words of the Risk-Note could never to my mind be reasonably held to raise in the mind of an ordinary person any idea that his goods might be carried half round the world by the act of the Railway and that he would have no claim for damage suffered provided that the goods eventually arrived at their destination. The words are plain "over whose Railways .....the said goods may be carried in transit from Nimtolla Station to Jumna Bridge." There is one ordinary transit route from Nimtolla to Jumna Bridge and not an infinite variety of routes spread all over India as the Company would have it. The words that I have just quoted are followed later by the words "before, during and after transit." I should not have considered it necessary to mention this second reference to "transit" but that my attention was invited to it, though I was unable to appreciate the exact argument that it was intended to found thereon. There is no question here of any damage before the transit began or after it was completed. It is clear that the words "transit" can only have the same meaning that it has when used earlier in the note and that the phrase "during transit" can only mean during transit on "the route expressly *or impliedly* indicated", to quote the phrase used by Lord Atkinson (page 273) in the case *London and North-Western Railway Co.* v. *Neilson* (1) to which I shall later refer. Here there is no question of damage during transit on such route. The damage resulted from departure from the route expressly or at least impliedly indicated.

(1) (1922) 2 A. C. 263; 91 L. J. K. B. 680; 127 L. T. 469; 66 S. J. 502; 38 T. L. R. 653; (1922) M. W. N, 162.

Apart altogether from authority, I am of opinion that in taking the goods off the ordinary route, the Company went outside the terms of the contract and cannot found a claim for exemption on the terms of that contract. I should have no hesitation in setting aside the order of the Court of Small Causes and returning the case for decision of the other issues that arise.

I will now turn to the authorities. The learned Judge of the Small Causes Court held the Company exempted from responsibility by the Risk-Note, holding that "the facts in this case are on all fours with those of *Ram Kishun Ram* v. *North Western Railway* (2)." It is true that the facts were much the same in that case, though there was in fact no wrongful handing over of the goods to a third party between the despatch and the delivery such as occurred in the present case, which in itself might differentiate the case. A suit was brought against the Railway Company because of damages suffered owing to certain goods despatched from Umballa to Ballia having been carelessly carried by mistake to Bally. The learned Judges before whom the case came in this Court decided against the plaintiff. If the point which is now before me had been decided I should, of course, be bound by the decision unless I referred the present case. They did not, however, decide the point. It does not even appear that it was raised before them. It is true that it was said: "Under the terms of that Risk-Note, the N.-W. Railway Company would only be responsible in the event of the loss of the consignment.....due to wilful neglect". But the very next words show that the only point which, so far as appears from the judgment, was argued was that "deterioration" was not the same as "loss". In other words the judgment only dealt with the second portion of this Risk-Note which makes the Company liable for theloss of a consignment due to wilful neglect or theft.

On the other hand, the point now before me was definitely raised and decided in a Bombay case, *Vali Mahomed Hamad* v. *G. I. P. Railway Co.*, (3). That case does not appear to have been referred to in the Allahabad case; probably it had not then been published. The learned Judges of the Bombay High Court held: "It seems obvious that the contract was to carry the goods by the nearest route". By taking the goods by another route the Company "went outside the terms of the contract and could no longer rely on the protection afforded by the Risk-Note so as to be absolved from liability for the loss which occurred". The case for the plaintiff before me is, if possible, even more clear, for it cannot even be suggested that Jubbulpur was on an alternative route.

The only other case to which it will be necessary to refer, but one of very great importance, is that of *London and North-Western Railway Co.* v. *Neilson* (1) a decision of the House of Lords. In that case the House of Lords upheld an order of the Court of Appeal [*Neilson* v. *London and North Western-Railway Co.* (4)] affirming an order of the Divisional Court [*Neilson* v. *London and North-Western Railway Co.*, (5)], which reversed a judgment of the County Court given in favour of the defendant Railway. On behalf of the defendant Company here an endeavour has been made to distinguish that case from the present. It is, therefore, necessary to state the facts of it in some detail. Examined carefully I believe it will be found to be wholly applicable. A Theatrical Company desired to move with their belongings, including their theatrical costumes, from Llandudno to Bolton. The ordinary route, as was admitted, would be *via* Manchester. For the benefit of Theatrical Companies there existed a special form of Risk-Note. Under ordinary circumstances Neilson's Company, having more than ten tickets, were entitled to have their property placed in a sealed van which would travel along with them attached to their passenger train. Had the contract remained at this, it is clear there would have been no shadow of doubt that there was an expressly agreed route for the luggage to travel, *i. e.*, the route along which the passenger train would travel. I hold that in the case before me there is also a clearly agreed route, but if those had been the only facts in *Neilson's case* (1) the point would not have even been arguable. It was on the ground that in *Neilson's case* (1), the passenger route was expressly indicated that it was argued on behalf of the Railway here that that case was distingu-

(2) 77 Ind. Cas. 1020; 20 A. L. J. 973; (1923) A. I. R. (A.) 122.

(3) 67 Ind. Cas. 366; 46 B. 830; 24 Bom. L. R. 316; (1922) A. I. R. (B.) 74.

(4) (1922) 1 K. B. 192; 91 L. J. K. B. 266.

(5) (1921) 3 K. B. 213; 90 L. J. K. B. 1196.

ishable, but that is not so. I have quoted above the ordinary Theatrical Company contract, but in the case of Neilson's Theatrical Company there was a specific variation of the ordinary contract made with such Theatrical Companies. The plaintiff Neilson was informed before-hand by the Railway Company that it was impossible to send the van along with the passenger train in which the Theatrical Company would travel further than Manchester and that thence it would be forwarded later and would arrive at Bolton "probably" in time for their theatrical performance. It is, therefore, important to appreciate that in *Neilson's case* (1) the special condition of the ordinary theatrical Risk-Note (that the goods should travel with the passengers) only affected the route from Llandudno to Manchester and that from Manchester to Bolton that condition did not apply, and so far as this second portion of the route was concerned upon which the trouble arose the conditions were identical with those in the present case. I have only quoted the portion of the conditions specially relating to Theatrical Companies in order to show that those special conditions do not in the particular circumstances of Neilson's contract differentiate that case from the present. The remaining conditions were those of the ordinary owner's Risk-Note. The terms of the English Risk-Note in *Neilson's case*, (1) will be found in the judgment of Lord Buckmaster at pages 263* and 263*. A comparison will show that the English Note differs from the Form B in this case in only two particulars. In the English Note the words "in transit" only occur and are not followed by the names of the stations of despatch and destination. The insertion of those names in the Indian Risk-Note, if it makes any difference at all, makes the case stronger against the defendant Railway here. The other point of difference is that there do not occur in the English Note the words "before, during and after transit". I have already noted that these words do not add anything to the meaning of the word "transit".

Now briefly what happened in *Neilson's case* (1) was this. The van accompanied the passenger train as agreed as far as Manchester. It was there cut off as agreed. It should have followed later to Bolton but by some accident the label on the van had become detached. Owing to this accident and the further careless reading of a telegram by a Railway servant the latter did not know what to do with the van. He, therefore, opened it and took out all the luggage. Some members of the Theatrical Company knowing that their luggage was to proceed in a sealed van had not taken the trouble to relabel their own articles with the result that some had no labels and some had old labels. The articles with no labels the Railway servants placed in the Manchester Exchange Station Cloak Room and those which had labels he sent to various towns whose names were borne on the labels. The result of course was that the Theatrical Company did not get their costumes in time for their performance and sued the Railway for damages. It may be noted that in *Neilson' scase* (1) an endeavour was made by the plaintiff to show wilful neglect but this was held not to be established (page 276*). It would, in fact, be very difficult to establish.

The House of Lords, upholding the two lower Courts, held that the Railway Company was liable. Lord Buckmaster (page 238*) said:

"The exemption is from liability during the "transit", and when once the goods are diverted from that route the protection ends", and again (page 239)*: "If the route be abandoned, whether it was due to oversight, ignorance, accident or design, equally the agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease".

In quoting the English Note Lord Buckmaster put the words "the transit" in italics; and the above qoutations make it perfectly clear that the breach of contract referred to was not in the breaking open of the van nor in the failure to send the luggage in Company with the passengers from Manchester to Bolton, a condition of the contract which had been specifically waived by agreement between the parties, but in sending the goods off the ordinary route. That is what has happened in the present case.

Lord Atkinson said (page 273*):—The special provision absolving the Railway must be held "to refer to the subject matter of the contract and of that alone—namely, the carriage of the goods from the point of departure to the destination named, *by the route expressly or impliedly indicated*". And again "As soon as the carrier deliberately deviates from the stipulated

* Pages of (1922) 2 A. C.—[*Ed.*]

route he carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed that he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it-ceases to act in accordance with it, in fact violates it".

It may be incidentally noted that Lord Sumner, J. held (page 277*) that even taking the goods out of the sealed van and storing them in the cloak-room of a station on the agreed route was a breach of the contract to take them by the agreed route. "Neither on the findings nor on the printed contract did the route from Llandudno to Bolton run through the Manchester Exchange Cloak-Room." With how much more force would this apply to actually delivering the goods to some third party, as in this case to the Military Authorities in Jubbulpur, and leaving them with them for weeks. But even without this element the case against the Railway is clear. On this question of "transit", we find further in Halsbury's Laws of England, Volume IV "Carriers" (page 7). "A carrier is bound to carry by his *usual and customary route* and must not deviate therefrom unnecessarily"; and (at page 14) "the carrier is bound to carry the goods by the *ordinary route* by which he professes to carry, and is, therefore, liable for damages for delay caused by unnecessary deviation from that route".

I hold that in fact there is no ambiguity about Form B on the only point which I have to decide; but if there were such ambiguity it is certain that it is not the defendant company who could avail themselves of it; and it could be said as was said in *Neilson's case* (1) by Lord Buckmaster at page 269* (in reference to the use of the word "misconveyance" in the English Note): "Were the appellants' contention accepted it would amount, as Counsel were compelled to concede, to reading the clause as one providing that the Company should not be liable for loss or damage for any cause other than wilful negligence on the part of their servants ..... I decline to give to confused phrases in such a contract a meaning which an ordinary man would be slow to realise".

Lush, J., in the Divisional Court *Neilson v. London and North Western Railway Co.*, (5) commented "A consignor may well consent to bear the risk of loss or delay while his goods are being carried a specified distance of say twenty miles, but it is quite another thing to ask him to bear that risk while his goods are being carried a distance of perhaps five hundred miles through some mistake on the part of the Railway Company's servants".

No further authority is required for the well established proposition that limitation of the liablity of the Company, if they wish to plead it, must be in precise terms.

The result is that in my opinion the route by which the timber was to travel was "expressly indicated", at the very least "impliedly indicated", by the terms of the contract to be the ordinary route from Nimtolla to Jumna Bridge and that in taking the goods off that route the Company violated the contract and are not exempted by the owner's Risk-Note from liability. I, therefore, set aside the decree of the Court of Small Causes with costs on the higher scale against the defendant on this application in revision and return the case to the Court of Small Causes for the decision of the remaining points in issue.

Z. K. *Application allowed.*

*Pages of (1922) 2 A. C.—[*Ed.*]

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1559 OF 1921.
May 3, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

JHANDOO MAL-JAGAN NATH—PLAINTIFFS—APPELLANTS

versus

PHUL CHAND-FATEH CHAND—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 39—Repudiation by one party, how long subsists—Anticipatory breach—Intention.

A repudiation of a contract must be deemed subsisting until it is withdrawn, and, until withdrawn, the other party to the contract is entitled at any time before the date for performance to accept it. [p. 120, col. 1.]

Anticipatory breach of a contract is a matter of intention and the intention of one party to break the contract must be acted upon by the other party before the contract can be put an end to. [p. 121, col. 1.]

British and Beningtons Limited v. *North Western Cacher Tea Co.*, (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265, followed.

Bradley v. *Newsum Sons & Co.*, (1919) A. C. 16 at

pp. 51, 54; 88 L. J. K. B. 35; 119 L. T. 238; 24 Com. Cas. 1; 14 Asp. M. C. 340; 34 T. L. R. 613, referred to.

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 30th March 1921.

Mr. *Sardha Ram*, for the Appellants.

Bakhshi *Tek Chand* and Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.

Fforde, J.—This is an appeal from a decree of the Senior Subordinate Judge of Delhi dismissing the plaintiffs' suit brought for damages for non-delivery of goods.

By a contract entered into in the month of December, 1916, the plaintiffs agreed to buy and the defendants to sell 50 cases of white shirting of the office of Messrs. R. J. Wood and Co., the goods to be of the shipments of May 1917 to October 1917 or June 1917 to November 1917. The actual terms of the contract are not material to the question which we have to decide, and, therefore, it is not necessary to refer to them in detail. It is admitted now by both parties that a valid and binding contract was entered into between them on the date in question, and the first question to be decided is whether that contract was put an end to before the arrival of the time fixed for performance. The attitude of the parties to the contract is shown by the correspondence which passed between them from the 28th of April to the 10th of July. On the 28th of April the defendants (the sellers) wrote to the plaintiffs (the buyers) that the goods in question would have to be shiped in bales instead of in cases. To this the plaintiffs replied that they refused to agree to this change, and stated that if the goods were not shipped in cases they would cancel the contract. To this the defendants replied that it was impossible to send the goods otherwise than in bales, as the British Government had prohibited the import of wood and tin for India on account of the scarcity of these materials. On the 1st of May the plaintiffs wrote two letters, in the first of which they stated that as they had not received the acceptance for the goods (meaning the acceptance by Messrs. R. J. Wood and Co.), the contract had been cancelled. In their second letter of the same date the plaintiffs referred to the defendants' letter of the 30th of April in the following terms:—

"We beg to say that we do not agree with your view and we have already cancelled the goods and confirm it again, which kindly take note once for all and oblige."

To these two letters defendants replied on the same date, objecting to the cancellation of the contract and suggesting that the plaintiffs were raising futile objections in order to evade their obligations owing to the fact that the price of the goods had fallen in the market. The correspondence continued on these lines the plaintiffs repudiating the contract on various pretexts and the defendants refusing to accept such repudiation. On the 19th of May the plaintiffs wrote the following letter to the defendants:—

"With reference to your letter of date, we beg to say that the goods in question has (*sic*!) already been cancelled and we have written you so often that it is unnecessary to repeat it again."

To this the defendants replied on the 21st of May, refusing to admit the plaintiffs' right to cancel the contract and insisting upon their liability to take delivery in accordance with its terms. No further correspondence took place between the parties until the 10th of July 1917 when the defendants wrote to the plaintiffs as follows:—

"Please note that we accept yours of the 19th of May 1917."

To this letter no answer appears on the record before us, but it is admitted by Counsel on both sides that the plaintiffs wrote a letter on the 19th of July which reads as follows:—

"With reference to your letter of the 10th instant, we beg to say that we are quite surprised to note the contents contained in your letter. We do not know how you now cancel the goods for which kindly refer to your letter of the 21st of May with us. So please note that you are bound to give us goods on arrival, and the same cannot be cancelled which note once for all and oblige."

Now it is quite clear from the correspondence, and from the evidence on the record, that from April to July the 19th, the plaintiffs had definitely and unequivocally refused to be bound by their contract, and had expressed an unalterable determination not to take delivery of the goods in question. On the 4th of May they had written to say that they had cancelled the goods, and protested against any further correspondence

on the subject. On the 11th they again wrote stating that the contract was cancelled: and on the 19th they reiterated their repudiation, referring to their previous letters of the 4th and 11th and pointing out that it was unnecessary to again repeate that the contract must be regarded as cancelled. In view of this correspondence and the evidence, on the record, I am satisfied that up to the 19th of July there was a continuing repudiation by the plaintiffs of the entire contract. Up to that date they had said in terms: "The contract between us is at an end. Under no circumstances will we take delivery of the goods. This is our unalterable determination. Nothing that you say can change our minds, and it is quite futile of you to continue to write to us protesting against our attitude." The defendants on the other hand had been protesting against this repudiation of the contract by the plaintiffs up to the 21st of May. To their letter of that date there was no reply, and, having regard to the plaintiffs' previous letters, the defendants were entitled to regard the ignoring of this letter as a refusal to continue a correspondence which could have no effect upon the plaintiffs' often expressed view that the contract was at an end. A repudiation expressed as in the present case, must be deemed subsisting until it is withdrawn, and until withdrawn the other party to the contract is entitled at any time before the date for performance to say: "As it is obvious that nothing will make you change your mind and accept delivery of the goods when the time comes, I will now accept your repudiation." This is what the defendants did. Finding on the 10th of July that there was no withdrawal by the plaintiffs of the attituded which they had taken up, the defendants notified them on that date that they would acquiesce in the cancellation of the contract, as insisted upon by the plaintiffs' letter of the 19th of May.

I think it clear from the evidence that there has been an anticipatory breach of the contract by the plaintiffs, which gave the defendants a right to treat the contract as having been wrongfully terminated, and to sue if they thought fit for damages for such breach. The defendants did not desire to sue for damages but were content to treat the contract as cancelled. It is quite clear on the authorities that "anticipatory breach"—that is to say, a breach of the contract before time has arrived for performance—is a matter of intention; and I have no doubt whatsoever that the defendants' intention up to the 10th of July was to perform their legal obligations; and I am equally satisfied that up to that time at least the intention of the plaintiffs was not to perform theirs. Mr. Sardha Ram for the plaintiffs now says that the reasons given by his clients for challenging the validity of the contract were purely dishonest. He says that they were not sincere in the grounds which they put forward for repudiating the contract. He states in other words, that the agreement to deliver the goods in question in bales was a substantial compliance with the sellers' obligations, and that the buyers' insistence upon the goods being supplied in cases was merely for the purpose of enabling them to get out of a bargain which it was not in their interest to perform. He now contends that although his clients persistently repudiated the contract on purely dishonest grounds, they are entitled at any time before the date fixed for completion to change their position, to withdraw their repudiation, and to insist upon the contract being performed in its entirety. He argues, quite rightly, that although the repudiation had the effect of an anticipatory breach, yet the contract could not be put an end to prior to the date fixed for completion unless and until the sellers accepted the repudiation and elected to treat the contract as terminated; and he contends that the letters of the plaintiffs up to and including the letter of the 19th of May, constituted an offer to cancel, and that until there was an acceptance of such offer the contract must be deemed to be subsisting. He further says that the reply of the defendants on the 21st of May was a refusal of the offer to terminate, that that definitely put an end to the offer, and that from and after the 21st of May until the 10th of July both parties must be deemed to be ready and willing to carry out their legal obligations, and that the defendants' letter of the 10th July amounted to an offer from them to terminate the contract, which the plaintiffs refused by their reply of the 19th July.

There is no doubt that if, upon the facts, the parties up to the 10th of July must be regarded as being ready and willing to perform their obligations, the contract must be deemed to have been subsisting at that

date ; but I do not think it possible to take such a view on the facts, and I am satisfied that the plaintiffs did not alter their attitude of repudiation until some days after they had received the defendants' letter of the 10th of July definitely accepting such repudiation.

Anticipatory breach, as Lord Sumner pointed out in *British and Beningtons Ltd.* v. *North Western Cachar Tea Co.* (1) is a matter of intention, and there is, also, no doubt that the intention of one party to break the contract must be acted upon by the other party before the contract can be put an end to.

The law on the subject has been very clearly stated by Lord Wrenbury in *Bradley* v. *Newsum Sons' & Co.* (2). After dealing with the various modes in which a contract may be determined, he says: "Thirdly, if the one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, 'I take you at your word; I accept your repudiation of your promise, and will sue you for breach.' This is really no addition to, but a particular application of, the principle first above stated. The first party has, in fact, made an offer. This offer is: 'I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal.' The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform."

And further in the same judgment he expresses himself as follows:—

"In order to make clear what my view is of the law applicable to such a case I must say something of what is commonly called 'anticipatory breach' of contract. My Lords, the expression is, I think, unfortunate. In *Hochster* v. *De la Tour* (3), the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several times by Lord Esher in *Johnstone* v. *Milling* (4), but not by either of his colleagues. The words used are, of course, immaterial unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L. J.'s words in *Johnstone* v. *Milling* (4) it is 'a wrongful renunciation of the contractual relation into which he has entered.' It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by consensus of the parties, and not by some superior force, that the contract is determined. I cannot see that the doctrine of what is generally called 'anticipatory breach' lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract."

In *Ripley* v. *M. Clure* (5) it was held that if an expression of intention to break a contract remains unretracted when the times arrives for the other party to perform his part of the bargain, this fact will dispense with such performance; and I think it logically follows from this, that so long as the expression of intention remains unretracted the other party may at any time prior to the date fixed for performance acquiesce in the repudiation and by so doing terminate the contract. The gist of these principles of English Law laid down in the authorities which I have cited, and in a number of other cases which have been referred to at the Bar, amongst which may be men-

(1) (1923) A. C. 48; 92 L. J. K. B. 62; 123 L. T. 422; 28 Com. Cas. 265.

(2) (1919) A. C. 16 at pp. 51, 54; 88 L. J. K. B. 35; 119 L. T. 238; 24 Com. Cas. 1; 14 Asp. M. C. 340; 34 T. L. R. 613.

(3) (1853) 2 E. & B. 678; 22 L. J. Q. B. 455; 17 Jur. 972; 1 W. R. 469; 118 E. R. 922; 22 L. T. (o. s.) 171; 95 R. R. 747.

(4) (1886) 16 Q. B. D. 460; 55 L. J. Q. 162; 54 L. T 629; 34 W. R. 238; 50 J. P. 694.

(5) (1849) 4 Ex. 345; 18 L. J. Ex. 419; 154 E. R. 1245; 80 R. R. 593.

tioned *Frost* v. *Knight* (6), *Johnstone* v. *Milling* (4) and *Michael* v. *Hart & Co.* (7) [affirmed in the House of Lords on the facts, *Hart & Co* v. *Michael* (8)] appears to be embodied in s 39 of the Indian Contract Act, which provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. There is no doubt that in the present case there was a distinct and unequivocal refusal by the plaintiffs to perform their contract in its entirety, and there is no doubt that so long as the defendants were continuing to urge or demand compliance with the contract it could not be said to have been terminated ; but it seems equally clear that when the defendants, finding that the plaintiffs' attitude was unalterable, decided to acquiesce in it, and communicated such acquiescence to the plaintiffs, the contract between the parties was put an end to. It seems to me that it would be absurd to hold that a party repudiating may at any time up to the date fixed for performance withdraw such repudiation, provided it has not been accepted; but that the other party, who has been urging compliance, may not change his mind when he sees the futility of continuing to protest, and consent to such repudiation. It is not as though the plaintiffs had made one definite offer to put an end to the contract and that offer had been definitely rejected. That is the position which Mr. Sardha Ram asks us to assume existed in the present case. No doubt if a buyer says to a seller: "Will you agree to cancel this contract between us?" and the seller replies " No, I insist upon its performance " that is a definite refusal leaving the contractual rights between the parties unaffected. I have no doubt in such a case the seller could not several months afterwards cancel the contract by merely writing to the buyer and saying "I now accept the offer to terminate which you made and which I refused." A communication by the seller of that kind and under those circumstances, would amount to a new offer to terminate coming from him, and would require acceptance by the other side before the contract could be put an end to, but in the present case the buyer has not merely offered to cancel a contract, but has definitely expressed an unalterable resolve to refuse to perform it It seems to me perfectly reasonable that the seller, after making every effort to induce the buyer to change his mind and finding such efforts to be in vain, may turn round and say "Very well, as I see it is hopeless trying to persuade you to carry out your obligations, I will accept your repudiation."

Mr. Tek Chand for the defendants has raised an alternative defence to the action. He argues that as the supply of the goods in cases was a material term of the contract, and as the contract in that form became impossible of performance owing to the action of the Government in prohibiting the export of cases, the defendants were absolved from performance. He relies upon the second paragraph of s. 56 of the Contract Act which provides that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Mr. Tek Chand's argument is that the contract to supply the goods in cases became impossible after the contract was made by reason of the Government's prohibition, and that, therefore, the contract itself became void as soon as this event—that is to say, the prohibition by the Government—came into existence. He points out that the plaintiffs themselves repeatedly declared that delivery in cases was an essential condition of the contract, and that unless the goods were so delivered the plaintiffs would not accept them. It is admitted that at the time fixed by the contract for delivery the Government prohibition was still in force, and that, accordingly, at that time the contract was voided by the terms of s. 56 of the Contract Act.

In view, however, of the conclusion which I have arrived at upon the facts of this case which is in agreement with the findings of fact of the Trial Court, namely, that the parties by consent terminated the contract on the 10th of July, 1917, I do not think it necessary to decide Mr. Tek Chand's second point.

Agreeing as I do with the findings of the

(6) (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

(7) (1902) 1 K. B. 482; 71 L. J. K. B. 235; 50 W. R. 308; 86 L. T. 478; 18 T. L. R. 254.

(8) (1904) 89 L. T. 422.

Trial Judge, I am of opinion that this appeal should be dismissed with costs.

Scott-Smith, J.—I concur.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 103 OF 1922.

July 29, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SHIB CHANDRA TALUKDAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

LAKHI PRIYA GUHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Exp. IV —Matter which ought to have been raised—Test—Suit for rent—Ex parte *decree—Subsequent suit*—Res judicata—*Statute, estoppel against.*

The decision in a previous suit for rent, whether *ex parte* or *inter partes*, operates as *res judicata* in a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objections were taken by a party. [p. 125, col. 2.]

Hiranmoy Kumar Saha v. *Ramjan Ali Dewan*, 29 Ind. Cas. 694; 20 C. W. N. 48; 43 C. 170, followed.

Jamadar Singh v. *Serazuddin Ahamad Chaudhuri*, 35 C. 979; 8 C. L. J. 82; 12 C. W. N. 862, referred to.

Kailash Mondul v. *Baroda Sundari Dasi*, 24 C. 711; 1 C. W. N. 565; 12 Ind. Dec. (N. S.) 1143, dissented from.

When a matter which ought to have been raised was not raised, it must be taken to be a matter which also ought to or must have been heard and finally decided in the previous suit. [p. 125, col. 1.]

One of the tests for determining whether a question should be regarded as one that ought to have been raised in the previous suit is whether by raising the question the decree which was passed in the previous suit could have been defeated, varied or in any way affected. [p. 124, col. 1.]

There can be no estoppel against a Statute and what is illegal in law cannot be legalised by operation of the doctrine of *res judicata*. [p. 124, col. 2.]

Appeal against a decree of the Subordinate Judge, Bakargunj, dated the 9th August 1921, modifying that of the Munsif, Seventh Court, at Barisal, dated the 31st May, 1920.

Babus *Brajendra Nath Chatterjee* and *Ramgati Sarkar*, for the Appellants.

Babus *Gunada Charan Sen*, *Biraj Mohan Majumdar* and *Nilkanto Ghose*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—The plaintiffs-appellants brought a suit against the defendants for arrears of rent for the years 1321 to 1324 on the basis of a *pottah* dated the 3rd *Sraban* 1301. The property in respect of whichrent was claimed consisted of 25 *kittas* of lands. Defendants Nos. 3 and 4 only appeared and contended *inter alia* that they held a separate 4 annas *hissya* in the 25 *kittas* and paid rent to the plaintiffs according to their share. They further denied their liability for the entire rent and claimed that a decree in respect of their 4 annas share should be passed against them. The learned Munsif before whom the suit was brought gave a decree to the plaintiffs overruling all the objections of the defendants. The Subordinate Judge of Backergunj on appeal found against the plaintiffs on some points. He first, found that the *pottah* created a tenure not of a composite holding but of several *kittas* of which the land was comprised. He next found that there was *Kharij* of the 4 annas *hissya* of defendants Nos. 3 to 9 and that they were not liable for the entire rent. As a result of his findings he passed a decree to the effect that one-fourth of the claim should be decreed against defendants Nos. 3 to 9 and the remaining three-fourths against defendants Nos. 1, 2 and 10 to 12.

The plaintiffs have appealed and it is contended on their behalf that the view of the learned Judge on the construction of the *pottah* and his finding that the *dakhilas* produced by the defendants prove a division of the tenancy with the consent and knowledge of the landlords are not correct.

With regard to the second point, we are of opinion that it is concluded by the findings of fact arrived at by the Subordinate Judge. He has considered the entire evidence, oral and documentary, and come to the conclusion that it satisfactorily proves that the landlords recognised the separate tenancy of the contending defendants in respect of the 4 annas *hissya* of the property.

But the appellants have raised a point of some nicety in connection with the question of *res judicata*. It appears that the plaintiffs or their predecessors obtained two *ex parte* rent decrees against the defendants one in 1903 and the other in 1914. These decrees were joint decrees against all the defendants in respect of the entire rent. It is argued as a result of these decrees, that the defendants are estopped from setting up the case of a separate tenancy. I have considered this matter carefully and I am

of opinion that this contention ought to prevail. It appears that in the suit of 1914 these defendants did enter appearance but were absent on the day the case was heard and it was decided *ex parte*. I have looked into the plaint in that suit and it appears that the claim of the plaintiffs was in respect of the entire rent, and the first prayer in the plaint was that a decree might be passed for the amount claimed against the defendants. A decree was accordingly passed. We are not aware as to what plea the defendants raised in that case, but in the present suit they maintain that they are entitled to object to a joint decree on the ground that their tenancies are separate from those of the other defendants. The question that really arises is as to how far the *ex parte* decrees would operate as *res judicata* as regards the present contention of the defendants. It is maintained by them that the question of separate tenancy was not a question which might and ought to have been raised in the previous suit within the meaning of Explanation IV of s. 11, C. P. C. In my judgment it is a question which should have been raised in defence in the previous suit. It is difficult to lay down hard and fast rules as to what questions should be regarded as questions that ought to have been raised in the previous suit. But there are several tests which have been applied from time to time when such questions have come up for decisions. One of the tests is whether by raising the question the decree which was passed in the previous suit could have been defeated, varied or in any way affected. If the question is of such a nature, it must be deemed to be a question which ought to have been raised in the previous suit. Reliance has been placed by the respondents on the case of *Madhusudan Shaha Mundul* v. *Brae* (1). In that case, which was decided by a Full Court, it was held that a mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex parte* decree has been obtained is not a statement as to which it must be held that it raised an issue between the parties within the meaning of s. 13 of the old C. P. C. The ground of that decision is that if the plaintiff claims a certain amount as representing the rent which is due to him and in the plaint gives an account of the amount claimed according to certain rate of rent and in the prayer claims a decree for the amount claimed by him, the *ex parte* decree should not operate as *res judicata* with regard to the rate of rent unless there is a direct issue on the point and there is a distinct prayer for a declaration of the rate of rent. One of the reasons assigned for the view taken by the Court is that the plaintiff may be entitled to the amount claimed on account even though the rate of the rent claimed by him be not correct. I do not think that that case has any bearing on the present question. If it has any, it is in favour of the appellants. It lays down that if it is prayed in the plaint that a certain right on which the suit is brought is to be declared in favour of the plaintiff that may create *res judicata*. In the previous rent suits the prayer in the plaints was that a decree for the rent claimed may be passed against the defendants which means that a joint decree may be passed against all the defendants and the decree passed gave effect to that prayer.

The case which is next relied upon is the case of *Woomesh Chandra Maitra* v. *Barada Das Maitra* (2). In that case in the previous suit rent was decreed at a certain rate which included illegal cesses. It was held that in a subsequent case it is open to the defendant to object to the amount of rent claimed on the ground that it included illegal cesses. That case may be supported on the well-known principle that there can be no estoppel against a Statute and what is illegal in law cannot be legalised by operation of the doctrine of *res judicata*. Though some observations in that case are quite general, the *ratio* of that decision is the finding that the illegal cesses were never made part of the rent. The learned Judges rely upon the decision of Mr. Justice Banerjee in the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (3), which is said to hold that the subject-matter of two rent suits for different periods being different, the law of *res judicata* will not apply. By the expression "the subject-matter of the two suits being different," I understand it was meant that the rent claimed for two different period must be taken to be two different matters. In the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (3), the plaintiff had obtained a

(1) 16 C. 300; 8 Ind. Dec. (N. S.) 197 (F. B.).

(2) 28 C. 17.

(3) 24 C. 711; 1 C. W. N. 565; 12 Ind. Dec. (N. S.) 1143.

decree for rent against the defendant who had raised various pleas but not the plea which he raised in the second case, namely, that the plaintiff was a *benamidar*. The learned Chief Justice (Sir Francis Maclean) on these facts held that the decision in the previous suit would not operate as *res judicata* and one of the grounds he gave was this :—"It is possible that the matter he (the defendant) now desires to set up may not have been within the knowledge of the defendant in 1878. Can we say then that he (the defendant) is debarred from going into those matters now? I think not." The learned Chief Justice further observed that the previous proceedings were not placed before the Court and so the Court could not say whether that point was raised in it or not. Mr. Justice Banerjee no doubt used certain expressions which are capable of supporting the view that in rent suits the subject-matters must *ex necessitate* be different. I am unable to agree in this view of the law if that case really expresses it. If it is adopted, it would mean that the principle of *res judicata* can never apply to rent suits because in all rent suits the period for which rent is claimed must be different—a view in conflict with accepted conceptions of law. This case, however, has been cited with disapproval in *Jamadar Singh* v. *Serazuddin Ahamad Chaudhuri* (4). In my opinion, the view taken in this case seems to be the correct interpretation of s. 11, C. P. C. On another point Mr. Justice Banerjee's decision in the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (3), has been dissented from by the Acting Chief Justice in the case of *Jamadar Singh* v. *Serazuddin Ahamad Chaudhuri* (4). Mr. Justice Banerjee had put a too narrow construction upon the words of Explanation II to s. 13 of the old Code, to the effect that a matter may be one which might and ought to have been raised in the former suit; but if it is not decided in that suit it would not operate as *res judicata*. I think that the correct view is that when a matter which ought to have been raised was not raised it must be taken to be a matter which also ought to or must have been heard and finally decided in the previous suit. Reference may also be made in this connection to the case of *Hiranmoy Kumar Saha* v. *Ramjan Ali Dewan* (5). It was held in that case that a decree for rent passed *ex parte* is not merely an item of evidence but is conclusive as to the relationship between the parties. According to the dicta in the cases of *Woomesh Chandra Maitra* v. *Baroda Das Maitra* (2), and *Kailash Mondul* v. *Baroda Sundari Dasi* (3), to which I have referred, the subject-matters of two different rent suits being different, the decision in the former suit will not operate as *res judicata* in the subsequent suit for any purpose with the result that all the points decided in the previous case will be open for discussion in the subsequent case. But according to the decision in the case of *Hiranmoy Kumar Saha* v. *Ramjan Ali Dewan* (5), the question as to the relationship of landlord and tenant must be taken to be *res judicata* in the subsequent suit. It, therefore, follows that the decision in a previous suit for rent, whether *ex parte* or *inter partes*, operates as *res judicata* in a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objections were taken by a party. In this view I hold that the plea of *res judicata* ought to prevail and the defendants are estopped from now contending that they hold a separate tenancy under the plaintiffs.

The result of the foregoing conclusion is that this appeal succeeds, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs.

Duval, J.—I agree, but I would simply decide this appeal on the third point, namely, *res judicata*. It appears to me that in the previous suits the appellants clearly brought the suits on the assumption that all the defendants were jointly and severally liable for the whole rent. Before that, it is said, according to the defendants, that the plaintiffs' predecessors admitted a separate 4-annas share as belonging to these two defendants. It is not necessary to decide whether this was so or not if the case is decided on the basis on which I would decide it, namely, on the question of *res judicata*. In the previous suits of 1903 and 1914, as I have said, the plaintiffs made their claim against all the defendants jointly and severally. These defendants did not appear at all in the first suit. In the second suit they appeared but put in no defence and then withdrew and if they wished to set up the point they now urge,

(4) 35 C. 979; 8 C. L. J. 82; 12 C. W. N. 862.
(5) 20 Ind. Cas. 694; 20 C. W. N. 48; 43 C. 170.

they could obviously have done so and their not having done so under s. 11, C. P. C. their claim to have that matter re-opened is barred by the principle of *res judicata*. I, therefore, agree with the order which my learned brother proposes to pass.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 2599 OF 1923.

March 31, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

SRI RAM, LIQUIDATOR, NATIONAL WEAVING & MOTOR WORKS, DELHI—APPELLANT

versus

NUR MUHAMMAD—RESPONDENT.

Companies Act (VII of 1913), s. 235, scope of—Contract of tenancy between Company and Director—Arrears of rent, whether recoverable.

Section 235 of the Companies Act is intended to provide a summary procedure for the recovery of money or property misapplied or retained by a Director or other Officer of the Company or money or property which such Officer or Director has become liable for by misfeasance or breach of trust in relation to the Company. It is not in terms meant to be applied for the purpose of enforcing sums due under contracts between the Company and other persons, whether such persons happen to be Directors or not. [p. 126, col. 2]

In re Kingston Cotton Mill Co. (No. 2), (1896) 2 Ch. 279, referred to.

Therefore, the provisions of s. 235 of the Companies Act cannot be invoked for the purpose of enforcing payment for the arrears of rent due by a Director to a Company. [*ibid.*]

Miscellaneous first appeal from an order of the District Judge, Delhi, dated the 1st September 1923.

Mr. *M. L. Puri*, for the Appellant.

Mr. *Aziz Ahmad*, for the Respondent.

JUDGMENT.

Fforde, J.—The sole question to be determined in this appeal is whether the provisions of s. 235 of the Indian Companies Act, apply to the circumstances of this particular case. The respondent admitted that he was a Director of the Company which is in the process of voluntary liquidation, the appellant being the liquidator. But it is also admitted that the contract of tenancy which he entered into with the Company in respect of the premises in question, was not entered into by him by virtue of his position as such Director, but that he took these premises precisely as any other private person unconnected with the Company could have taken them. The application in respect of which this appeal arises was an application by the liquidator to recover arrears of rent due on foot of this contract. The Court below has held that the provisions of s. 235 cannot be invoked for the purpose of enforcing payment for the arrears of rent. With this finding I agree. The terms of s. 235 show that that section is intended to provide a summary procedure for the recovery of money or property misapplied or retained by a Director or other officer of the Company or money or property which such officer or Director has become liable for by misfeasance or breach of trust in relation to the Company. It is not in terms meant to be applied for the purpose of enforcing sums due under contracts between the Company and other persons, whether such persons happen to be Directors or not. The operative part of the section makes this clear. The terms of it are as follows:—

"The Court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to re-pay or restore the money or property or any part thereof respectively with interest," and so forth.

This shows that the section may be invoked for the purpose of compelling the persons enumerated in that section to re-pay or restore sums which have come into their hands by virtue of their position as there defined. I find it hard to see how a debt due by a Director to the Company upon foot of an ordinary contract, and which he has failed to pay, can be held to be money of the Company. A person clearly cannot be compelled to re-pay or restore money which he never received. The present application is brought to compel a former Director to pay money for the Company which is alleged to be due on a contract, not to re-pay or restore money which has come into his hands and which he refuses to account for. The scope of the section seems to be clearly defined in the judgment of Lindley, L. J., *In re Kingston Cotton Mill Co.* (*No.* 2) (1). The material part of the judgment in question is given at page 283 and is as follows:—

"The object of that section (namely, s. 10 of the Companies Winding up Act of 1890)

(1) (1896) 2 Ch. 279.

is the same as that of s. 165 of the Companies Act, 1862 (which is identical with s. 215, English Companies Act, and which again is in the same terms as s. 235, Indian Companies Act), which it has replaced. That object was to facilitate the recovery by the liquidator of assets of a Company improperly dealt with by its promoters, Directors or other officers. The section applies to breaches of trust and to misfeasances by such persons. I agree that the section does not apply to all cases in which actions will lie by the Company for the recovery of damages against the persons named; it is easy to imagine cases of breach of contract, trespasses, negligences, or other wrongs to which the section is inapplicable, and some such have been the subject of judicial decision; but I am not aware of any authority to the effect that the section does not apply to the case of an officer who has committed a breach of his duty to the Company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible by an action at law or in equity."

Lopes, L. J., expresses much the same view:—

"The learned Judge in the Court below held that misfeasance covered any misconduct by an officer of the Company as such for which such officer might have been sued apart from the section. In my judgment this is too wide. It would cover any act of negligence—any actionable wrong by an officer of a Company which did not involve any misapplication of the assets of the Company. The object of this section of the Act is to enable the liquidator to recover any assets of the Company improperly dealt with by any officer of the Company, and must be interpreted bearing that object in view. It doubtless covers any breach of duty by an officer of the Company in his capacity of officer resulting in any improper misapplication of the assets or property of the Company."

No authority has been cited by Mr. Mukand Lal Puri, who appears for the liquidator, to show that s. 235 has ever been applied in a case like the present.

For the reasons given above, I am of opinion that the present appeal must fail and should be dismissed with costs.

Scott-Smith J.—I agree.

K. S. D *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 946 OF 1922.

August 13, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

NIBARAN CHANDRA ROY AND OTHERS —DEFENDANTS—APPELLANTS

versus

NABIN CHANDRA ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 15, 16—Co-sharer landlord—Rent suit.

A co-sharer landlord may, in the presence of the other co-sharers, who are incompetent to realise their rent, sue for his rent and recover it although there has been no separate collection before. [p. 128, cols 1 & 2.]

Nepal Chandra Ghose v. *Mohendra Nath Roy Chowdhury*, 31 C. 707, distinguished.

Appeal against a decree of the Subordinate Judge, Second Court, Tipperah, dated the 19th January, 1922, modifying that of the Munsif, First Court, at Comilla, dated the 13th June, 1921.

Babu *Gopal Chandra Das*, for the Appellants.

Babu *Bepin Chandra Bose*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendants and arises out of suit brought by the four plaintiffs, the owners of an one-sixth share of a *taluq*. The other co-sharers were also joined as defendants and the plaintiffs prayed for a decree for the entire rent in the presence of the other co-sharers. The defence of the defendants was that the suit so far as the entire rent was claimed was not maintainable because the plaintiffs' co-sharers, the *pro forma* defendants in the suit, were not registered in the landlord's *sherista* and that so far as they are concerned ss. 15 and 16 of the Bengal Tenancy Act would be a bar to their claim. The next contention of the defendants was that the rents for the years 1323 and 1324 were barred because some of the co-sharer defendants were brought on the record at a time when the claim for rent for those two years would be barred. The Munsif gave effect to this contention and dismissed the suit. Before the learned Subordinate Judge the plaintiffs in the presence of their co-sharers prayed for a decree to the extent of their one-sixth share only. The lower Appellate Court has given them a decree but has allowed costs to the plaintiffs in full on the full amount claimed. Against that decree and judgment the

defendants have appealed and the learned Vakil who appears for them has raised three points in support of the appeal. The first point is that the plaintiffs as owners of an one-sixth share were not entitled to a decree as there was no separate collection of that share before the suit was brought. The second contention was that so far as the rents for the years 1323 and 1324 were concerned they were barred by limitation and the third point is that the plaintiffs ought not to have obtained costs for the entire rents.

As to the first point the learned Vakil relied upon the case of *Nepal Chandra Ghose* v. *Mohendra Nath Roy Chowdhury* (1). A reference to that case shows that in that case the suit for one-fourth share of the plaintiff was dismissed on the ground that the plaintiff in that suit claimed as an owner of the entire 16 annas share when his interest was found to be 4 annas and that he wanted a decree to the extent of his share although the other co-sharers owning the remaining 12 annas share were no parties to the suit and Sir Francis Maclean points out at page 709 of the report: "It is argued that the plaintiff sued originally for the whole 16-annas share, but is found entitled only to a 4-anna share of the rent, that his co-sharer landlords are not co-plaintiffs nor defendants, that there is no allegation or proof of any arrangement between the landlords and the tenants that the tenants should pay each co-sharer his proportionate share of the entire rent and that, in the absence of any such arrangement, the suit is not maintainable." Here the circumstances are somewhat peculiar. The plaintiffs have got their names registered in the landlord's books. Therefore, so far as they are concerned they are not barred by the provisions of ss. 15 and 16 of the Bengal Tenancy Act but so far as the owners of the five-sixth share are concerned their names are not so registered and, therefore, they are debarred from suing for rent. Under those circumstances the plaintiffs in the presence of those co-sharers should be entitled, after proving in the presence of their co-sharers that they are owners of the one-sixth share of the *taluq*, to recover rent to the extent of their share. I can see no objection on principle that a co-sharer landlord may not in the presence of the other co-sharers who are incompetent to realise their rent sue for his rent and recover it although there had been no separate collection before. It cannot be denied that the co-sharers may at any time start separate collection of their rent without any reference to the tenants and that when a suit is brought for a share of the rent making all the co-sharers parties and the plaintiffs' share in the property is established, I see no reason why the plaintiffs in a suit properly framed, should not get their shares of rent. In the present case the denial of the plaintiffs' right to recover their share of rent separately would be a total denial of their right to recover their share of the rent. We think that this contention is not tenable.

The next contention is based on a misapprehension that so far as the owners of the one-sixth share were concered all the plaintiffs were parties when the suit was originally brought. Therefore, so far as the one-sixth share is concerned the claim for no portion of the rent is barred. With regard to the third contention, however, we think that the defendants have a just cause for complaint. The plaintiffs have succeeded to the extent of their one-sixth share and there is no reason why the ordinary rule as to costs should not prevail and why the parties should not get their costs according to their success or otherwise in the litigation.

The result, therefore, is that the decree of the learned Subordinate Judge is modified as to costs and we direct that the plaintiffs do recover costs of the two Courts below according to their success and that the defendants do get costs to the extent of the dismissal of the plaintiffs' claim.

In the circumstances, we make no order as to costs in this appeal.

Greaves, J.—I agree.

K. S. D. *Decree modified*

(1) 31 C. 707.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 527 OF 1924.

August 14, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

SURESH CHANDRA GUPTA—COMPLAINANT—PETITIONER

versus

ABDUL JABBAR—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 250, 537—Order of compensation, when should be made—Defect, whether curable.

An order directing the complainant to pay compensation to the accused under s. 250 of the Cr.P. C. should be made at the same time as the order discharging the accused. The failure to do so is not a defect curable by s. 537 of the Code. [p. 129, col. 2; p. 130, col. 1.]

Rule against an order of the Third Presidency Magistrate, Calcutta, dated the 2nd June 1924.

Babu *Satindra Nath Mukerjee*, for the Petitioner.

Babu *Harendra Nath Sarbadhikari*, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This is a Rule granted by my learned brothers Mr. Justice Newbould and Mr. Justice Mukerji calling upon the Chief Presidency Magistrate and upon the opposite party Abdul Jabbar to show cause why the order directing the payment of Rs. 25 as compensation to Abdul Jabbar should not be set aside on the ground that the Magistrate did not proceed in compliance with s. 250 of the Cr. P. C.

The Rule was obtained by the complainant. He made a complaint against Sheik Yusuf and Abdul Jabbar, alleging that an offence of simple hurt had been committed by these two accused.

The case was heard by the learned Third Presidency Magistrate and after hearing some witnesses called on behalf of the complainant, the learned Magistrate discharged the second accused, *viz.*, Abdul Jabbar on the 23rd of May 1924.

The case, as far as the first accused Sheik Yusuf was concerned, was adjourned and was finally disposed of by the learned Magistrate on the 2nd of June 1924, when he acquitted the first accused.

The learned Magistrate on the 2nd of June called upon the complainant to show cause why he should not pay compensation to the two accused under the provisions of s. 250 of the Cr. P. C. The complainant apparently was in Court that day: and, after hearing the complainant, the learned Magistrate directed him to pay Rs. 25 to each of the accused under s. 250 of the Cr. P. C.

Then an application for a Rule was made, and this Rule was granted. It is to be noted that the Rule was limited to the case of the second accused Abdul Jabbar.

The argument of the learned Vakil who appeared for the complainant was to the effect that the order directing the complainant to show cause why he should not pay compensation to Abdul Jabbar was not made in accordance with the provisions of s. 250, inasmuch as the accused Abdul Jabbar was discharged on the 23rd of May, and the order with regard to compensation was made on the 2nd of June. Section 250 has been amended by the recent amending Act and now runs as follows:—

"(1) If, in any case instituted upon complaint. . . . to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid." It appears to me that in this case the Magistrate did not follow the provisions of that section. It is clear that on the 23rd of May Abdul Jabbar was discharged: and, as far as he was concerned the proceedings were at an end. If the Magistrate had desired to call upon the complainant to show cause why he should not pay compensation to Abdul Jabbar he should have made the order at the same time as he made the order of discharge, that is to say, if the complainant was present in Court at the time. There is no doubt in this case that the complainant was present in Court on the 23rd of May 1924; and, consequently, the order calling upon the complainant to show cause why he should not pay compensation to Abdul

Jabbar should have been made on the 23rd of May.

It was argued by the learned Vakil, who appeared on behalf of Abdul Jabbar to show cause, that the order was in accordance with the provisions of the section, because the proceedings in the case were not finally determined until the 2nd of June 1924, when Sheik Yusuf was acquitted. In my opinion that argument cannot be accepted. It disregards altogether the words of the section to which I have already referred: and, it also disregards the fact that on the 23rd of May 1924 the proceedings were entirely at an end so far as Abdul Jabbar was concerned.

The further argument by the learned Vakil who appeared to show cause, was that although the provisions of s. 250 were not complied with, this Court should apply the provisions of s. 537 of the Cr. P. C. He argued that no prejudice had been caused to the complainant, and there would be no failure of justice if this order were allowed to stand. I do not understand why s. 250 was amended and enacted in the precise words which are now to be found in it, unless it was intended that its provisions should be observed and carried out by the Subordinate Court. I think, it is desirable that we should make it clear that the provisions of the Criminal Procedure Code should be observed by the Magistrates in subordinate Courts.

For these reasons, in my judgment, this Rule should be made absolute, and the order, directing compensation to be paid to Abdul Jabbar, should be set aside. The compensation, if paid, will be refunded.

Chotzner, J.—I agree.

K. S. D. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 532 OF 1924.

September 11, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

TULLI AND ANOTHER—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 288—Previous statements of witnesses, whether admissible—Value for purposes of conviction—Penal Code (Act XLV of 1860), s. 114—Persons giving moral support to offence, liability of.

Previous statements of witnesses made before the Committing Magistrate are admissible in evidence, and if the High Court is satisfied that they are true while the statements made subsequently before the Sessions Judge are false, it is open to the Court to rely upon the previous statements for the purpose of upholding the conviction. [p. 133, col. 2.]

Queen-Empress v. *Jeochi*, 21 A. 111; A. W. N. (1898) 196; 9 Ind. Dec. (N. S.) 780, *Queen-Empress* v. *Nirmal Das*, 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. S.) 1334 and *Emperor* v. *Dwarka Kurmi*, 28 A. 683; A. W. N. (1906) 187; 3 A. L. J. 852; 4 Cr. L. J. 61, referred to.

Persons who are present at the time of a murder and have given their moral support to, and abetted, the deed, even if they did not take part in the actual murder, are under s. 114 of the Penal Code deemed to have committed the offence. [p. 134, col. 1.]

Criminal appeal from an order of the Sessions Judge of Mainpuri, dated the 23rd of May 1924.

St. *C. Thompson*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a criminal appeal from a judgment convicting the accused persons under s. 302 of the Indian Penal Code of the murder of one *Musammat* Saraswati and sentencing them to transportation for life. In the opening portion of his judgment the learned Judge says:—

"The facts of this case disclose what might be termed a tragedy ending in the death of a helpless and unprotected widow at the hands of her own brother-in-law in a most savage and brutal manner in order to possess the property left by her husband."

In spite of this he refrained from inflicting, as he put it, the extreme penalty of law on the accused persons, whom he found guilty of the murder and he sentenced them to transportation for life. A notice was accordingly sent to the appellants to show cause why, in the event of their conviction being upheld, the sentence passed on them should not be altered to one of death.

Musammat Saraswati was admittedly murdered on the night between the 25th and the 26th of February 1924 in the house of Man Singh, her brother-in-law. At 8 A. M. in the morning, a report was made by Laturi *chaukidar* to the effect that Jhandu Singh had told Pirthi Singh and Dwarka Singh that in the previous night at about 2 o'clock Man Singh, Tulli and Badri had murdered *Musammat* Saraswati.

The prosecution case is that *Musammat* Saraswati was the widow of the deceased brother of Man Singh. During the lifetime of Zor Singh, her deceased husband, there was an ill-feeling between the brothers

and Zor Singh left the ancestral village Tindauli and went over and began to live in Mahgawan. He died about July 1923. An application for mutation of names was made on behalf of *Musammat* Saraswati, but it was opposed by Man Singh on the allegation, among others, that his son had been adopted by the deceased and was the rightful heir. It is an admitted fact that in these proceedings *Musammat* Saraswati was supported by Dwarka Singh, a cousin of Zor Singh. Sometime, while the revenue case was pending, *Musammat* Saraswati left Mahgawan and came to Tindauli and instead of going to Man Singh's house she stopped in Dwarka Singh's house for some months. As to whether it was Dwarka Singh who had brought her over to Tindauli or it was Man Singh who had brought her over, but on the way *Musammat* Saraswati went to Dwarka Singh's house, is not a point which need be considered. Man Singh apparently did not like the idea of *Musammat* Saraswati staying in Dwarka Singh's house, and while Dawarka Singh was absent from his house, Man Singh and his friends forcibly brought her over and kept her in his own house. Dwarka Singh returned on the 25th of February and naturally took umbrage over the forcible abduction of *Musammat* Saraswati. It was rumoured that she had not taken any food for some time, and to satisfy Dwarka Singh a note was sent to him supposed to have been written by the lady to the effect that she had taken some food. On that date, however, Dwarka Singh got a report made at the Police station regarding the abduction. Dwarka Singh's son, Thakur Harnath Singh, who is a Deputy Collector, arrived the same evening and an attempt was made to settle the dispute by means of a *panchayat*. A *panchayat* was called consisting of some eight men, among whom the present accused Tuli and Badri were present, and it lasted till about midnight. It appears that Man Singh was not willing that *Musammat* Saraswati should live in Dwarka Singh's house and was agreeable to her going away to live in Mahgawan. It was settled by the *panchayat* that next morning she should go for an hour to Dwarka Singh's house and thence go on to Mahgawan. The *panchayat* dispersed; but soon after the *panchayat* had dispersed the murder took place. The prosecution case is that Man Singh sent for Jhandu Singh and actually told him that he had committed the murder and requested him to look after his family. Jhandu Singh informed the *mukhia*, Pirthi Singh, who went over to Dwarka Singh and informed him about this murder. It was after this that the *chaukidar* was sent and a report made at the Police station. The Sub-Inspector arrived next morning and found that the dead body was lying in a room inside Man Singh's house. The neck had been cut and there were several wounds on the body.

As to the actual murder, there can be no doubt that *Musammat* Saraswati was murdered on the night in question.

It is also an admitted fact that Man Singh has been absconding from his house ever since that date and has not yet been arrested.

His wife *Musammat* Betia, a maid-servant *Musammat* Gayasi and his cousion Jhandu Singh, who lives next door to him, were examined under s. 164 of the Cr. P. C. on the 28th of February 1924. In her statement which *Musammat* Betia made then, she clearly stated that, after midnight when people had fallen asleep she was awakened by the report of a gun. She saw her husband Man Singh, Tulli and Badri coming out of the door where her *jethani* was lying. Man Singh had a chopper in his hand which was besmeared with blood. Man Singh said openly in the courtyard that he had killed his brother's wife. After this Badri and Tulli ran away. *Musammat* Gayasi in her statement said that after midnight all the three persons, *viz.*, Man Singh, Badri and Tulli woke her while she was sleeping in the adjoining room. They asked her to go out. She sat outside the threshold and after about half an hour all the three persons came out of the room in which the Thakurani of Mahgawan was sleeping. Man Singh had a chopper in his hand. It was besmeared with blood. Some drops of blood fell down from the chopper on her clothes. Man Singh asked Badri to bring Jhandu Singh with him, and asked her to bring some water for washing his mouth which she did. Jhandu Singh stated that after the *panchayat* was over at about 4 in the morning Badri came to his house and called out to him saying that Man Singh wanted to see him. He opened his door and saw Badri and Tulli running away. He then went to Man Singh and found him coming out of the house. He said that he had killed his brother's wife. The witness then went in and saw her lying

dead. He admitted that he had made a report to Pirthi Singh *mukhia* that Badri, Tulli and Man Singh had murdered the *Musammat* and run away. When the accused were before the Committing Magistrate, these witnesses were again examined and they stuck to their story substantially. *Musammat* Betia again repeated that Tulli, Badri, Man Singh, herself, her *jethani*, her maid-servant Gayasi and three children slept in the house on that night, that Tulli, Badri and Man Singh slept in the *dahliz*, though Tulli and Badri never slept at her house before. She woke up by a thump of the foot. As she got up, she saw Badri, Tulli and her husband come out of the room in which her *jethani* slept. Man Singh had a *gandasa* in his hand besmeared with blood. Man Singh asked Badri to call Jhandu Singh and began to wash his hands and feet after taking water from Gayasi. As he was going out Jhandu Singh came in and Man Singh told him that he had killed his brother's wife. Badri and Tulli, however, did not return after they were bidden to fetch Jandu Singh. *Musammat* Gayasi similarly again admitted that she was awakened by Man Singh and was told to go out. Man Singh, Tulli and Badri entered the room in which Thakurani was sleeping and she saw Tulli, Badri and Man Singh coming out of the room after some time. Man Singh had a *gandasa* in his hand which was besmeared with blood. He asked Badri to go and bring Jhandu and she herself followed Badri. Jhandu Singh again admitted that it was Badri who called him and that when he opened the door and came out he saw Badri and Tulli going away. He said distinctly that as he opened the door he saw Tulli and Badri fleeing towards their village and referring to the accused in the dock he said that they were the same. He said that he had named Tulli, Badri and Man Singh to Pirthi Singh as the murderers and that he saw Tulli and Badri running as also Man Singh. In addition to these witnesses, Rajendra Narain aged only 8 years, the son of Man Singh, was also examined and he stated that he had seen Tulli and Badri sleeping with his father, that he got up from the noise of the shoe and saw Tulli, Badri and his father coming out from the '*madha*' where his aunt slept. His father had a *gandasa* in his hand and the *gandasa* was besmeared with blood. There was other evidence, more or less corroborative and to show the motive underlying the alleged murder. When the accused were committed to the Sessions Court and the prosecution witnesses were re-called they went back on their former statements. They absolutely denied that they saw Badri and Tulli going into the room occupied by *Musammat* Saraswati or coming out of that room. They even went so far as to deny that he was seen in the courtyard when Man Singh came out with a *gandasa*. *Musammat* Betia even added that she did not see Man Singh since the note alleged to have been written by *Musammat* Saraswati had been obtained from her. When confronted by her previous statements she admitted that she had made those statements, but said that she had done so because she had been forced and frightened to state so. She said that Atal Behari a servant of Dwarka Singh and the *thanedar* had forced her to make the statement which she had made before the Deputy Magistrate. She suggested that she had a fear that she would be insulted if she did not make the statement. When cross-examined by the Government Pleader as a hostile witness she said that she was tutored by the Sub-Inspector outside the Court before she went into the Court room. It has to be remembered that *Musammat* Betia is a respectable *pardanashin* lady belonging to a respectable family. It is highly inconceivable that she would be threatened or tutored by the Sub-Inspector, or even by a servant of Dwarka Singh, a dead enemy of her husband, who apparently would not have access to her, and would be persuaded by them to implicate her own husband Man Singh to the extent to which she did. It is much more conceivable that, having found that the dead body was lying in the house and Man Singh having openly admitted his guilt, it occurred to her that there was no getting away from the fact that he had committed the murder and that it was no use concealing. Similarly it is altogether inconceivable that the son of Man Singh would implicate his father in such a definite way because he was forced and threatened to do so by the Sub-Inspector. On the other hand it is easy to imagine how these witnesses might have been persuaded to go back on their statements at a late stage in the case either at the instance of the persons interested in the appellants or interested in Man Singh.

If the story told by these two witnesses before the Committing Magistrate was a false one it would have been a most unnatural statement to make. On the other hand if it was true then it was not unnatural that they should go back upon it. There is evidence of some influence having been exercised on these witnesses because even Jhandu Singh who is a grown up person aged 38 years and a relation of Man Singh also went back upon his former statement. He has tried to minimise the effect of his previous evidence by suggesting that he did not really recognise Tulli and Badri and has even gone so far as to suggest that he was not sure whether he saw Man Singh coming out of the house and was the man who had stated that his sister-in-law had been murdered and the witness should look after the family. We have compared the statements made by these witnesses before the Sessions Judge with the statements made previously and we have come to the conclusion that there is not the slightest doubt that the statements which they made before the Judge were false and the previous statements were true. We may only refer to one or two passages as showing that the last statements were deliberately false. Jhandu Singh had previously stated that he had seen Badri and Tulli running away, that when he went near Man Singh's house he saw Man Singh coming out of his house and that the latter told him that he had killed his sister-in-law. Jhandu Singh, before the Sessions Judge, admitted that he had made that statement. He was asked whether it was correct. He first replied that it was correct. Then said he did not state it in that manner, but told the Deputy Magistrate when asked by him "did Tulli, Badri and Man Singh abscond after murdering the *Musammat*?" that he could not say whether they ran away after killing her. The Deputy Magistrate then told him that though he did not see it yet they must have done so. The witness then simply replied that it must have been they who did so. It is apparent that the witness was deliberately lying and attributing to the Committing Magistrate questions which could not possibly have been put by him. When questioned as to whether he made the statement of the 20th March 1924—Ex. III—which was read over to him, he denied ever having made such a statement. Similar statements can be picked out from the depositions of the other witnesses. It is important to note that *Musammat* Betia, *Musammat* Gayasi and Rajendar had no ill-feeling whatsoever against the appellants, and it is inconceivable that they would have named them falsely. Their names were not dragged in to minimise the guilt of Man Singh, for the witnesses in their statements threw the greater part of the responsibility on Man Singh himself.

We may also mention that the previous statements of the witnesses are greatly corroborated by the evidence of Pirthi Singh, Dwarka Singh and Harnath Singh as well as by the first information report made early in the morning. It has been strongly contended on behalf of the appellants that the statements of the witnesses who have resiled from their former statements, though admissible, are not satisfactory proof of the accuseds' complicity. Reliance has been placed on three cases reported as *Queen-Empress* v. *Jeochi* (1), *Queen-Empress* v. *Nirmal Das* (2) and *Emperor* v. *Dwarka Kurmi* (3). It was conceded in all those cases that previous statements of the witnesses made before the Committing Magistrate were admissible though of course ordinarily they should not be acted upon if the witnesses have gone back upon them and there is no evidence to corroborate them. It was nowhere laid down that such statements are not evidence and can never be acted upon. We may also point out that in the amended Cr. P. C., s. 288 now stands as follows :—

"The evidence of a witness duly recorded in the presence of the accused under Ch. XVIII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act.*" The words underlined (italicised) have been newly added. It is quite clear that if we are satisfied that the previous statements, made by the witnesses, are the true statements and the statements made subsequently are false then it is open to us to rely upon the previous statements for the purpose of upholding the conviction of the appellants.

(1) 21 A. 111; A. W. N. (1898) 193; 9 Ind. Dec (N. S.) 780.

(2) 22 A. 445; A. W. N. (1900) 169; 9 Ind Dec. (N. S.) 1334.

(3) 28 A. 683; A. W. N. (1906) 187; 3 A. L. J. 852; 4 Cr. L. J. 61.

Having regard to the state of evidence and the opinion already expressed, we have no doubt in our mind that Badri and Tulli who were partners in the cultivation of Man Singh and who, on our finding, were in the house that night did go inside the room where *Musammat* Saraswati was sleeping and came out with Man Singh who had a *gandasa* in his hand. The murder was obviously committed during that interval.

It is next to be seen whether on this finding it is possible to convict the appellants under s. 302. It has been urged that there is really no evidence that they took part in the murder. It is also urged that in some of the previous statements of the witnesses it was said that Man Singh admitted that he himself had killed the deceased. We are prepared to assume that there is no direct evidence on the record to suggest that the accused physically assisted Man Singh in murdering the deceased. One cannot, however, get over the fact that they did go in with Man Singh and awakened *Musammat* Gayasi and asked her to go out. They never used to sleep in the house and had stayed there for the night. They were, undoubtedly, present at the time when and at the place where the murder was actually committed. Even if they did not actively assist Man Singh by, for instance, holding *Musammat* Saraswati, they must have, by their very presence, given moral support and abetted. It is impossible now to find out what actually happened inside the room, as Man Singh is absconding and the only other person who could have given evidence against the appellants is now dead. But having regard to the circumstances mentioned, we are satisfied that it must be held that the accused were guilty of the murder just as much as Man Singh was. Even if they did not take part in the actual murder, they would, under s. 114 of the Indian Penal Code, be deemed to have committed such act or offence.

As we have already remarked, the murder was a cold-blooded and altogether an unjustified one and was carried out in a most brutal manner. We are accordingly of opinion that the accused persons must be convicted under s. 302 and sentenced to death.

We accordingly dismiss the appeal and uphold the conviction of the appellants under s. 302 of the Indian Penal Code, but enhance the sentence to one of death and we order that both the accused be hanged by the neck till they are dead and that this order be carried out according to law.

K. S. D. *Appeal dismissed; Sentence enhanced.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 373 OF 1924.

September 24, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

MOHAMED ROSHAN—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 362—Trial before Presidency Magistrate—Record of evidence, when necessary.

Under s. 362 of the Cr. P. C., it is the duty of the Presidency Magistrate to keep a record of the evidence in a case in which the sentence inflicted upon the accused exceeds six months. [p. 134, col. 2.]

Even in cases falling under sub-s. (4) of s. 362, Cr. P. C., the discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably. [p. 135, col. 1.]

Emperor v. *Harischandra Talcherkar*, 10 Bom. L. R. 201; 7 Cr. L. J. 194, followed.

Appeal from conviction and sentence passed by the Additional Presidency Magistrate, Bombay.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Fawcett, J.—This is an appeal against a conviction under s. 457, read with s. 511, Indian Penal Code, by the Additional Presidency Magistrate, Mr. Thacker, who sentenced the appellant to one year's imprisonment. In the appeal it is alleged that the appellant was decoyed by a stranger to the place where he was arrested and wrongly accused of house-breaking and theft.

There is no record of the statements of the witnesses at the trial. Their names only are given, with an indication that they gave evidence and were cross-examined. The Magistrate has thus failed to comply with the provisions of sub-ss. (1) and (2) of s. 362, read with s. 411, Cr. P. C., for the sentence inflicted upon the appellant exceeded six months.

The learned Magistrate was asked why evidence had not been properly recorded as required by s. 362, Cr. P. C., and his explanation is that he was misled by the analogy of sending juvenile offenders to Reformatory Institutions for three years or

more into thinking that the sending of a boy to the Dharwar Juvenile Jail is not strictly speaking a sentence of imprisonment but of detention in a reformatory. He refers to the Government Rules which require a minimum sentence of twelve months' rigorous imprisonment in such a case and accordingly he had to impose one year's imprisonment, but treated it as merely nominal. This explanation is not quite satisfactory because obviously the very description of the Dharwar Juvenile Jail as a *Jail*, and fact that a sentence of imprisonment has to be passed, clearly distinguishes the case from one in which a sentence of detention in a reformatory is passed under the Reformatory Schools Act. It may also be pointed out to the learned Magistrate that even in cases falling under sub-s. (4) of s. 362, the discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably, as has been pointed out by this Court in *Emperor* v. *Harischandra Talcherkar* (1).

I make this remark, because in several cases I have noticed that this Presidency Magistrate does not follow the example of other Presidency Magistrates, who give at least a general indication of the nature of the evidence of the witnesses regarding any serious crime not falling under the description of an ordinary "morning case."

In the present instance, in our opinion, there has been a serious irregularity in the Magistrate failing to comply with the provisions of sub-s. (1) of s. 362, Cr. P. C. This irregularity obviously prejudices the accused, as we cannot consider the appeal on its merits. We have no knowledge of the exact allegations that were made in evidence, nor of the exact reasons on which the Magistrate based his conviction. In our opinion this occasions a failure of justice, which prevents the irregularity being waived under s. 537, Cr. P. C.

The learned Government Pleader, who has appeared at the direction of the Court, does not dispute that under the circumstances of the case an order for a re-trial is the proper one to be made.

We, therefore, quash the conviction and sentence recorded against the accused, and direct that he should be re-tried before a Presidency Magistrate other than the one who has already expressed an opinion in the case, to be nominated by the Chief Presidency Magistrate, and we hope that in future the learned Magistrate will comply more strictly with the provisions of s. 362, Cr. P. C.

Marten, J.—I agree. I would only add that the materials before us on the present record, including the learned Magistrate's judgment, are so scanty that it is impossible to check any detail whatever in connection with the offence, or even to know what it was exactly that the accused did which led to this charge against him of an attempt to commit house-breaking by night.

K. S. D. *Conviction and sentence set aside.*

(1) 19 Bom. L. R. 201; 7 Cr. L. J. 194.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 797 OF 1924.
November 3, 1924.
Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

BAHADUR MOLLA AND OTHERS—PETITIONERS
versus
EMPEROR THROUGH ISMAIL AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 415A, 562—Order of release on probation of good conduct—Appeal, whether lies—Non-appealable sentence—Convicts, when can appeal.

An appeal lies on behalf of a convicted person against whom an order, under s. 562 (1) of the Cr. P. C., has been passed. [p. 137, col. 2.]

Mi Shwe Nyun v. *King-Emperor*, 1 Cr. L. J. 543; 10 Bur. L. R. 321; 1 U. B. R. (1904-06) 7, Cr. P. C., *King-Emperor* v. *Manohar Das*, 24 P. R. 1904 Cr.; 1 Cr. L. J. 1038, *Hayata* v. *Emperor*, 38 Ind. Cas. 961; 18 Cr. L. J. 401; 20 P. R. 1917 Cr.; 18 P. W. R. 1917 Cr. and *Emperor* v. *Ghasita*, 26 Ind. Cas. 635; 37 A. 31 at p. 33; 12 A. L. J. 1244; 16 Cr. L. J. 43, referred to.

By operation of s. 415A of the Cr. P. C., a right of appeal is also conferred on those who are jointly tried with a person against whom an order under s. 562 (1), Cr. P. C., has been passed, and having been convicted, are given non-appealable sentences. [*ibid.*]

Rule against an order of the Sessions Judge, Jessore, dated the 16th August 1924.

Babu *Bhudar Haldar*, for the Petitioners.

Babus *Probodh Chandra Chatterjee* and *Nanda Gopal Banerjee*, for the Opposite Party.

JUDGMENT.

Mukerji, J.—The question involved in this Rule is whether a convicted person has a right of appeal, generally speaking, from an order passed against him under s. 562, Cr. P. C.

As far as we have been able to discover there is no reported decision of this Court

on the point. The point was considered by the Court of the Judicial Commissioner of Upper Burma in the case of *Mi Shwe Nyun* v. *King-Emperor* (1) and the Chief Court of the Punjab in the case of *King-Emperor* v. *Manohar Das* (2), which latter decision has been afterwards followed by the same Court in the case of *Hayata* v. *Emperor* (3). The Allahabad High Court appears to have followed the ruling of the Punjab Chief Court, see the case of *Emperor* v. *Ghasita* (4).

All the above decisions are in favour of the view that an appeal does lie from an order passed under s. 562, Cr. P. C.

From a consideration of the provisions of Ch. XXXI of the Code which were framed long before s. 562 was enacted it is difficult to evolve a complete scheme; and in this respect the present case is perhaps more unsatisfactory than its predecessor.

Section 404, Cr. P. C., seeks to classify appeals into appeals from judgments and appeals from orders, though judgments and orders are not necessarily contrasted terms. Assuming, however, that judgments stand for final orders of conviction or acquittal—though to accept this meaning also there may be some difficulty—ss. 406 and 406A speak of appeals against orders, while ss. 407 and 408 speak of appeals against orders and sentences by convicted persons; ss. 410, 411, 412, 413 and 414 speak of appeals by convicted persons only; the Explanations to s. 413 and s. 415 speak of appeals from or against sentences. Section 415A speaks of an appealable judgment or order, though the word judgment does not occur in any of the other sections. Moreover s. 417 speaks of an order of acquittal. Section 423 mentions an appeal from an order of acquittal, appeal from a conviction and an appeal from any other order. In s. 425 the expression "finding, sentence or order appealed against" occurs. Under the Indian Limitation Act for the purpose of a criminal appeal time runs from date of the sentence or order appealed against, indicating that orders of acquittal are orders and not judgments: so also an order of conviction is an order unless followed by a sentence. Travelling outside Ch. XXXI, further difficulties are in the way, *e. g.*, in s. 307 occurs the expression judgment of acquittal or of conviction, and s. 349 speaks of judgment, sentence or order. It is unnecessary to proceed further with an examination of the other sections of the Code, for, as I have said, no consistency has been attempted to be maintained in the meaning and import of the words and expressions referred to above.

Marginal notes are not parts of the sections, but there is no reason why they should not be consistent with the sections themselves. As an instance if we take s. 407, Cr. P. C., the section speaks of an appeal by a person convicted on a trial held by a Magistrate of the Second or Third Class, or any person sentenced under s. 349 or in respect of whom an order has been made or a sentence has been passed under s. 380, Cr. P. C., by a Sub-Divisional Magistrate of the Second Class. The marginal notes to the sections only speak of an appeal from sentence of Magistrate of the Second or Third Class, ignoring the distinction between orders and sentences indicated in the body of the section and are thus inapposite. It is not profitable to multiply instances.

Examining the relevant provisions of the Chapter for a solution of the question that we have to decide it would appear that the question is not altogether free from difficulty and the learned Judges who had to deal with the question under the Code of 1898 felt it in no small measure. Under the present Code the difficulty remains the same, if it has not become greater.

On the one hand, no provision as to appeal has been expressly made in respect of an order under s. 562 and s. 404 says that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. Section 407, however, which deals with appeals by persons convicted on trials held by Magistrates of the Second or the Third Class, gives a right of appeal from a sentence of a Sub-Divisional Magistrate of the Second Class and also against an order (which is not a sentence) passed by a Sub-Divisional Magistrate of the Second Class under s. 380, Cr. P. C. An order under s. 562 (1) may be passed by the Sub-Divisional Magistrate under the provisions of s. 380 according to the proviso to s. 562 (1). Such an order

(1) 1 Cr. L. J. 543; 10 Bur. L. R. 321; 1 U. B. R. (1904-06) 7, Cr. P. C.
(2) 24 P. R. 1904 Cr.; 1 Cr. L. J. 1098.
(3) 38 Ind. Cas. 961; 18 Cr. L. J. 401; 20 P. R. 1917 Cr.; 18 P. W. R. 1917 Cr.
(4) 26 Ind. Cas. 635; 37 A. 31 at p. 33; 12 A. L. J. 1244; 16 Cr. L. J. 43.

if passed by him, would be clearly appealable under s. 407, Cr. P. C. Then turning to s. 408, it gives a right of appeal to a person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or a Magistrate of the First Class, and from a sentence passed under s. 349 by a Magistrate of the First Class or an order (which is not a sentence) passed by a Magistrate of the First Class under s. 380, Cr. P. C. Such an order, as I have already said, may include an order, under s. 562 (1). This section is controlled by two sub-sections, *viz.*, (*b*) and (*c*), sub-s. (*a*) having been deleted from the Code of 1898. These two sub-sections contained in the proviso do not, in my opinion, curtail the right of appeal given by the section itself, but make exceptions as to the venue of the appeal which ordinarily lies to the Court of Session, in cases specifically mentioned in the provisos (*b*) and (*c*). The rights conferred by ss. 407 and 408 are only restricted by the reservation contained in ss. 412, 413 and 414 and subject to the provisions of s. 415 which is a proviso to ss. 413 and 414.

Upon a plain reading of the Statute, I am disposed to put upon it the interpretation which I have indicated above. I am aware that this interpretation lead to certain anomalies, but a contrary view, in my opinion, leads us into absurdities of not less serious nature.

If this interpretation is adopted a person against whom an order under s. 562, cl. (1) has been passed will have one appeal in the first instance and possibly a second one when an order is passed sentencing him under s. 563, cl. (2). What effect the dismissal of the first appeal or the non-preferring of it within time will have on the second one is not a matter which I need discuss here. According to this interpretation also there would be no appeals in certain petty cases such as those mentioned in s. 413 or summary convictions such as are mentioned in s. 414, while in cases where there is no sentence at all but only an order under s. 562, cl. (1), appeals will lie. This result in view of the policy of ss. 413 and 414 seems somewhat strange. The statutory deprivation of a general right of appeal, however, must always be construed strictly.

I am further confirmed in my view by certain other considerations as well. In the first place the general tendency of the Amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of accused persons. By that Act several orders which were not formerly appealable have been made so; right to appeal to a higher Court has been conferred by s. 406, an order refusing to accept or rejecting a surety has been made appealable by s. 406A, the immunities enjoyed by certain sentences under ss. 413 and 414 have now been taken away, special right of appeal has been created in certain cases under ss. 415A and 418 (2): and it is also interesting to note that in the matter of refusal to accept or of rejecting sureties offered in compliance with an order under s. 562 (1), the provisions as to right of appeal have been made applicable by sub-s. (4) of s. 562. Furthermore, the cases to which I have already referred are the decisions of High Courts within the meaning of the Cr. P. C. They are decisions of Superior Courts in this country and the Legislature must be presumed to have been aware of their existence when they proceeded to amend the Code. If with the knowledge of these decisions they only amended Ch. XXXI in this respect not by making any reference to s. 562 at all, but on the other hand by introducing into ss. 407 and 408 the words, "or in respect of whom an order has been made or a sentence passed under s. 380" the words, the omission of which from the Code of 1898 was commented on in one of the cases referred to above the conclusion irresistibly follows that they never intended to make a change in the law by the curtailment of a right which the accused must be taken to have enjoyed all this time.

In the present case, therefore, an appeal lay to the Court below on behalf of the convicted persons against whom the order under s. 562 (1) was made and by the operation of s. 415A, there was a right of appeal in the other convicted persons as well. The order of the Court below complained of in this Rule should, therefore, be set aside and the said appeal should now be heard and disposed of in accordance with law.

The Rule, in my opinion, should be made absolute.

Suhrawardy, J.—I agree.

K. S. D. *Rule made absolute.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION No. 294 OF 1924.

October 14, 1924.

Present :—Mr. Justice Marten and Mr. Justice Fawcett.

In re JAGERDEO RAMSUMER TEWARI—APPLICANTS.

Foreigners Act (III of 1864), s. 3-A—Foreigner, apprehension of, by Commissioner of Police—Report to Government, when to be made—Burden of proof—Order of Government not obtained—Detention, whether legal—Criminal Procedure Code (Act V of 1898), s. 491.

It is incumbent on the Commissioner of Police to report the case to the Local Government at the same time as he issues a warrant for the apprehension of an alleged foreigner. [p. 139, col. 2.]

The onus is on the apprehended person to prove that he is not a foreigner. [p. 140, col. 1.]

Where after the apprehension of an alleged foreigner no orders have been obtained from the Government under s. 3 of the Foreigners Act, the continued detention of the person apprehended is an illegal or improper detention within the meaning of s. 491 (1) (*b*) of the Cr. P. C., or, in the alternative, the person apprehended is not being dealt with according to law within the meaning of s. 491 (1) (*a*). [p. 141, col. 1.]

The executive powers of deportation of the Government must be exercised without delay on the receipt of the report from the Commissioner of Police. [*ibid.*]

Per *Fawcett, J.*—The provision of sub-s. (5) of s. 3-A, Foreigners Act, about the orders being given without delay is mandatory, and sub-s. (4) of that section must be read as if the words "pending the orders of the Local Government" were qualified by the words "such orders being obtained within a reasonable time," for "without delay" means this. [p. 142, col. 1.]

Application under s. 491, Cr. P. C.

JUDGMENT.

Marten, J.—This is an application in the nature of *habeas corpus* under s. 491, Cr. P. C., raising the question whether the arrests and detention in custody of the three petitioners are justified under the Foreigners Act, 1864, as amended by the Foreigners (Amendment) Act, 1915. The petitioners allege that they and their father before them were natural born British subjects, having been born in British territory in British India, and that the fact that the territory was subsequently ceded to the Rajah of Benares does not make the petitioners foreigners within the amended definition in s. 2 of the Foreigners (Amendment) Act, 1915.

But there is a technical point at the outset which is irrestpective of the above question. That arises under s. 3-A (1) of the Act, which has been inserted as an amendment by s. 3 of the 1915 Act. It runs:—

"Whenever in a Presidency Town the Commissioner of Police, or elsewhere the Magistrate of the District, considers that the Local Government should be moved to issue an order under s. 3 in respect of any foreigner who is within the limits of such Presidency Town or of the jurisdiction of such Magistrate, he may report the case to the Local Government and at the same time issue a warrant for the apprehension of such foreigner."

Now, in the present case, what the Commissioner of Police did was first to arrest the petitioners on September 17, 1924, but he did not report the case to the Local Government for orders until September 23, 1924. It is accordingly submitted that the arrest was illegal under the Act inasmuch as the difference of six days between the date of arrest and the date of the report to Government could not possibly be maintained to be " at the same time." The Advocate General under the circumstances does not propose to support the actual arrests that were made.

On the other hand, Counsel for the petitioners recognises this is merely a technical point, and that it would be no bar to the petitioners being released and at once re-arrested under new warrants under the Act. What the parties want to do is to get the point of substance decided, and not to rely on any mere technicality which would only lead to further proceedings being taken at once.

On the other hand we have to remember that these are in the nature of criminal proceedings affecting the liberty of the subject. Accordingly we cannot, I think, with prudence treat the proceedings as if they were civil proceedings, and as if this or that could be done merely by the consent of the parties.

Further, on the merits of the case, both sides really want an adjournment for the purpose of collecting better evidence on the points in dispute than are at present before the Court. In that respect the onus rests on the petitioners under the special provisions of the Act to prove that they are not foreigners. On the other hand, the present affidavit of the Deputy Commissioner of Police is, on some material points, based on information and belief, *viz.*, information given to him by the Police Superintendent at Benares, and is, therefore, merely hear-

say evidence. Nor are the terms of the cession of the territory to the Rajah of Benares before us.

Under these circumstances we think the proper course to adopt will be as follows:—

The petitioners will *pro forma* be released from their present custody, but they will be re-arrested on a new warrant. Then *pro forma* a supplemental petition in quite a short form can be submitted by Counsel for the petitioners, and can refer to the original petition and to the affidavit in support and ask for leave to read the same as evidence in this new petition. There must also *pro forma* be a supplemental report by the Commissioner of Police to the Local Government, so that the provisions of sub-s. (1) of s. 3-A may be satisfied, *viz.*, a report to Government and a warrant at the same time.

Then on the question of bail, there is express power under sub-s. (4) of s. 3-A for the Police Officer who issues the warrant to grant bail. We think that on the re-arrest, as regards petitioners Nos. 2 and 3, the Police Officer should release them on bail, *viz.*, on their own recognizance of Rs. 1,000 each and two sureties of Rs. 500 each. It is, therefore, unnecessary for us to make any order for bail under s. 16 of the 1864 Act or otherwise, even if we have the power to do so. But, of course, if the Police Officer in question is not prepared to grant such bail then the petitioners Nos. 2 and 3 can come again to us, and we will again consider the question of bail subject to any further objections that may rightly be raised.

But to avoid any misunderstanding, I wish to point out that as regards petitioners Nos. 2 and 3 the learned Advocate General on instructions does not oppose bail being granted. As regards petitioner No. 1 he stands on a different position, having regard to the statements made in the affidavit of Mr. Sharp, and on the present materials we should not be prepared to grant him bail even if we had the power.

Then as regards the question as to when the new petition is to be heard, both parties agree that October 9 next will be a convenient date. The interval will enable them to get the necessary evidence and to consider the present position. Accordingly we will direct that that petition be heard on October 9 next.

Pro forma we will pass our present orders at 3-30 to-day after the petitioners have been released, and re-arrested, and the new petition has been presented as above indicated.

Fawcett, J.—I concur.

Kazi *Kabiruddin* (with him Mr. *Y. V. Bhandarkar*), for the Applicants.

Mr. *Kanga*, Advocate-General (with him Mr. *S. S. Patkar*, Government Pleader), for the Crown.

Marten, J.—This is an application under s. 491 of the Cr. P. C., in the nature of *habeas corpus*. The accused who are three brothers complained originally to us that they were illegally arrested by the Police on September 17, 1924; that it was not till several days afterwards they were told what the charge against them was; that they were then informed they were charged with being undesirable foreigners whom it was intended to deport; and that the case was being reported to Government for orders.

Accordingly, on September 23, a Rule *nisi* was obtained from this Court, and on the same day it appears that the Police reported the matter to Government.

The Rule came before us for hearning on September 26, when it was pointed out by the Court that having regard to the Act under which the authorities were proceeding, *viz.*, s. 3-A of the Foreigners Act III of 1864 which has been inserted in that Act by s. 3 of Act III of 1915, it was incumbent on the Commissioner of Police to report the case to the Local Government at the same time as he issued a warrant for the apprehension of the alleged foreigner. Consequently as the arrest was on the 17th, and the case was not reported to Government till September 23, it could not be said, haveing regard to that period of six days, that the Commissioner had complied with sub-s. (1) of s. 3-A.

But that was recognized at the time as being a technical objection. The parties, if possible, wanted to have the matter determined on the merits, *viz.*, as to whether the accused were foreigners or not, and accordingly on the suggestion, I think, of the Court the accused were *pro forma* released and then re-arrested. There was also to be a new report to Government so as to comply with sub-s. (1). Then the prosecution agreed that accused Nos. 2 and 3 should be released on bail by the Police under sub-s. (4) but accused No. 1 was to remain in cus-

tody. Then there was to be a supplemental petition under s. 491 of the Cr. P. C., to this High Court which was to be brought on for hearing with the original application on October 9.

This intervening period from September 26 to October 9 was to meet the convenience of the parties. The onus of proving that they were not foreigners fell upon the applicants. They wanted to produce further evidence to show that they were not foreigners. On the other hand it was stated by the Advocate-General that the Crown wanted to get further information as regards the treaty under which the territory in question was alleged to have been ceded by Government to the Rajah of Benares. Further, there was certain other statement made in the then affidavit of Deputy Commissioner of Police which really repeated hearsay matters as having been reported to him by one of the Police Superintendents in Benares. Accordingly on the facts the Crown also wanted this adjournment. At that time this was considered a reasonable period in which both parties would get their case in order so as to enable it to be disposed of at the next hearing.

Accordingly on October 9, this case came again before the Court. So far as the prosecution was concerned, it was in very much the same state as it had been on the preceding September 26. There was no order from Government as required by the Act, nor was there any evidence about the terms of the cession of the territory to the Rajah of Benares.

I should explain that the importance of that point is this. It is common ground that the accused were all originally British subjects, that is to say, that the father of the three accused was born in British territory and further that all these three accused were also at the date of their birth born in British territory. But what has happened subsequently is that their native village has, it is said, been ceded by Government to the Rajah of Benares. It was accordingly said that these men have lost their original British nationality and have acquired the status of subjects of a Native State. It was also alleged that being subjects of a Native State, they are now foreigners within the meaning of the Foreigners Acts. That, if necessary, would be a point to be argued, and also it would have to be shown that Government had the power to cede this territory to the Rajah of Benares and also that there was nothing in the treaty which would preserve the original national rights as British subjects of any persons in the position of the accused.

On the other hand the accused have alleged that their father was carrying on business in Bombay for some forty years in connection with buffaloes and the sale of milk, and that they themselves have been in Bombay for a large number of years. The first petitioner claims to have come to Bombay in 1909; the second petitioner, in 1909 and again in 1914; and the third petitioner, in 1916. They say they have a large business in Bombay; that they own a large number of buffaloes; and that their assets are worth half a lac of rupees and over; and that accordingly it is a great hardship on them that they should suddenly be arrested and their animals be left to the tender mercy of others.

That then is how the facts stood on October 9, when we granted a further adjournment till to-day. We also directed that any further affidavit which the prosecution wished to put in should be put in by October 13 peremptorily. Clear intimation was also given to the Advocate-General by the Bench that unless the requisite order from Government for deportation, or alternatively for discharge, was not obtained by to-day, then the natural and probable consequence would be that we should direct the accused to be discharged.

An affidavit has since been put in by the prosecution but in effect it carries the case no further. Substantially nothing further has been done by the prosecution. We are still without the treaty, but what is more important we are still without any order from Government. The order that I have made such frequent reference to is that contained in sub-s. (1), *viz*: "Whenever in a Presidency Town the Commissioner of Police or elsewhere the Magistrate of the District, considers that the Local Government should be moved to issue an order under s. 3 in respect of any foreigner who is within the limits of such Presidency Town or of the jurisdiction of such Magistrate, he may report the case to the Local Government and at the same time issue a warrant for the apprehension of such foreigner." Then sub-s. (5) provides that:—

"Any officer, who has in accordance with the provisions of sub-s. (4), ordered a foreigner to be detained or released on his executing a bond shall forthwith report the

fact to the Local Government. On the receipt of a report under this sub-section the Local Government shall without delay either direct that the foreigner be discharged or make an order for the removal of such foreigner in accordance with the provisions of s. 3."

Then turning to the main Act, s. 3 provides that:—

"The Governor-General of India in Council may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government."

It will be seen, therefore, that in this class of case every thing depends upon the order of Government. The Commissioner of Police has no power to deport anybody under this Act. It is not like cases under the Bombay Police Act where a certain discretion—and a wide discretion—is given to the Commissioner of Police to deport certain people who are believed to be the associates of thieves and so on.

What power then is there to retain accused No. 1 any longer in custody, and what power is there to impose the conditions of bail on accused Nos. 2 and 3 as the price of their retaining an ostensible liberty? In my opinion the case to-day has reached a point where, without an order from Government of deportation under s. 3 of the Act, any such continued detention or any such continued bail is an illegal or an improper detention within the meaning of s. 491 (1) (*b*) of the Cr. P. C., or alternatively these particular accused are not being dealt with according to law within the meaning of s. 491 (1) (*a*).

In my judgment it is incumbent on Government under s. 3-A, sub-s. (5), of the Foreigners Act, to give their orders for the discharge of the foreigner, or else for his removal under sub-s. (5) without delay. I quite recognise that a reasonable time must be allowed in such cases, and that naturally, owing to the conditions under which Government Departments must work, one cannot expect that matters of this sort can be dealt with with the same speed as if it was merely a case of making an application direct at once to some single individual who had complete power to dispose of the matter there and then.

But I do feel this strongly. We are dealing here with the liberty of the subject. Shortly stated, this man, accused No. 1, has been under arrest and in the custody of the Police from September 17 up to to-day. That is nearly a month. The original action taken by the Commissioner of Police in not reporting the matter to Government forthwith after the arrest was, in my opinion, illegal. That matter was put straight on September 23. But even then a whole fortnight has elapsed and even still, as I have already stated, there is no order from Government.

As far as I can see here, a wrong procedure has been adopted. The matter should have been investigated first, and the arrest made afterwards. Then there would have been no difficulty in obtaining the orders of Government soon after the arrest. But it does not rest with the Commissioner to deport alleged foreigners under the Foreigners Acts. That is a matter for the Government and solely for the Government. But there the Act, as I have explained, puts a restriction on the executive powers of Government of deportation, *viz.*, that they must be exercised without delay on the receipt of the report from the Commissioner of Police.

In my opinion the time that has elapsed here does constitute such delay. Further, in my opinion, it would be unfair on the petitioners to postpone the present hearing of this Rule *nisi* any longer. This is the third time on which it has come up for hearing. To-day there is no order of Government as to these men's deportation. Accordingly, in my opinion, this Rule *nisi* ought to be made absolute and all three men discharged from custody or detention.

Under these circumstances it is unnecessary for this Court to say anything on the point whether these men are foreigners within the meaning of the Act. There being, in my judgment, a clear ground on which this Rule should be made absolute I do not see the necessity or the desirability of embarking on a discussion of a point which, in my judgment, is not necessary for our decision on the main point of the case, which after all is whether these men should be set at liberty or whether they should any longer be detained in the custody of the Police.

Fawcett, J.—I agree in making the Rule absolute on the ground that these three persons are being improperly detained.

Pending the proceedings two of them have been released on bail, but in effect they are in detention under special arrangements for their temporary liberty.

The authority vested in the Commissioner of Police to arrest a person, who he thinks is a foreigner, under sub-s. (1) of s. 3-A is one that he can, in my opinion, exercise by himself, and I do not think that his power is restricted to a case where he can simultaneously obtain orders from Government for the removal of such foreigner. But undoubtedly sub-s. (5) requires that after the Commissioner of Police has reported that he has ordered the foreigner to be detained or released on bail, the Local Government is to take action without delay. Accordingly when sub-s. (4) of the same s. 3-A authorises the Commissioner of Police to direct a foreignor to be detained in custody pending the orders of the Local Government, this must obviously be read with the direction in sub-s. (5) that I have already mentioned, requiring these orders to be given without delay. That is to say, it cannot be contended that the Commissioner of Police could direct a foreigner to be detained in custody for an unreasonable length of time pending the orders of the Local Government, *e. g.*, for six months.

In my opinion the provision of sub-s. (5) about the orders being given without delay is mandatory, and sub-s. (4) must be read as if the words "pending the orders of the Local Government" were qualified by the words "such orders being obtained within a reasonable time," for "without delay" means this.

I agree with my learned brother that the fortnight or more that has expired since the proceedings when these persons were re-arrested on September 23 has given ample time for obtaining the orders of the Local Government, and that the delay renders the further detention of these persons improper. I do not mean to lay down any general rule that an order must always be obtained within a fortnight after the report of the Commissioner of Police. But in view of the warning we gave and the other circumstances, especially the legitimate doubt that arises whether these people are really foreigners, it is a case where this Court is justified in exercising the powers given it by s. 491 of the Cr. P. C.

Marten, J.—As regards the question of costs, r. 5 of the Appellate Side Rules, 1920, provides that: "In disposing of any such Rule, the Court may, in its discretion, make an order for the payment by one side or the other of the costs of the Rule." We think in this case that the costs of the Rule should be paid by the respondent. As regards the mode in which these costs are to be ascertained the applicant appears here by Counsel Mr. Kazi Kabiruddin instructed by a High Court Pleader Mr. Bhandarkar. It was suggested to us that we should make an order that the costs be taxed as on the Original Side. I am aware that this is a form of order which is sometimes made in an appropriate case in certain branches of this Court. But speaking generally costs on the Original Side are matters between Solicitor and client and are not between Pleader and client. Consequently I do not think it would be proper in this present case to direct the costs to be taxed as on the Original Side.

On the other hand there is a suggestion by the Government Pleader that the petitioners should be content with Rs. 30 for the whole of these hearings, and that they are not to be allowed even the costs of their Counsel. This contention appears to me to be wrong. The Crown appeared here by the Advocate-General and the Government Pleader, and, in my opinion, having regard to the importance and to the difficulty of the case it was quite right and proper that the petitioners should wish to have Counsel to oppose the Advocate-General.

Under these circumstances, we think the proper order will be to direct the Registrar to assess the petitioners' costs of this Rule, and that in doing so he do allow reasonable costs of Counsel and also reasonable costs of the affidavits which have been filed in support of the applications. The costs as so assessed to be paid by the respondent.

Fawcett, J.—I concur.

K. S. D. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 888 OF 1924.

July 18, 1924.

Present:—Mr. Justice Fforde.

AMAR NATH—PETITIONER

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 165—Evidence in Court, whether can be tested by extraneous matter—Judge, duty of.

A Judge has no right to test evidence given in Court by material which has not legally been made evidence. He has the right and the duty to test a witness's evidence by putting questions to him for the purpose of clearing up any matters which may be ambiguous or doubtful. But before he is justified in commenting adversely upon a witness's evidence, he must establish the particular fact warranting such cricitism by proper evidence in Court and not by reference to documents which are not properly on the record.

Application for revision of an order of the Sessions Judge, Shahpur, at Sargodha, dated the 10th January 1924.

Mr. *Ram Lal*, for the Petitioner.

Mr. *Jai Lal*, Government Advocate, for the Respondent.

JUDGMENT.—This is a petition by Pandit Amar Nath, Sub-Inspector of Police at Sahiwal Police Station, in the District of Shahpur, praying that certain remarks of the Sessions Judge of Shahpur appearing in his judgment in the case of *Muhammad Ishaq* v. *The Crown*, should be expunged from the record. The words complained of are as follows:—

"The Public Prosecutor laid great stress on the evidence of Pandit Amar Nath, but I am afraid the Police Officer is clearly guilty of perjury. He made the District Magistrate believe, as appears from his statements before him and from the judgment, that he was present at Sial Sharif from 4th to 6th and that he heard the speeches made on these two nights. His first report, Ex. C-1, made me suspect that he was not present at least during the previous night at Sial Sharif, and hence I sent for his *roznamcha*, Ex. C-2, which shows beyond all doubt that Pandit Amar Nath was not at Sial Sharif but at Sahiwal on the night of the 5th-6th October, and, therefore, he could not have heard the speeches the said *Maulvi* made on the evening of the 5th. The *roznamcha* of the 5th-6th shows that he arrived back at the Police Station Sahiwal, at about 7 P. M. on the 5th and left again on the morning of the 6th at 6 A. M. This Sub-Inspector's testimony, therefore, could not be relied on and it is a fit case, I think, in which the District Magistrate may call upon him to explain why he made such a false statement." The Sub-Inspector in giving his evidence before the District Magistrate states, according to the English record, that he was present at Sial Sharif from 4th to 6th October 1923 during the gathering connected with the *Urs* of Khawaja Shams-ud-Din, and further on in his evidence he states that "On the night between the 5th and 6th accused again made an abusive speech against the Golra Pir."

The learned Sessions Judge concluded from this evidence that the petitioner was intending to convey that he was at this *Urs* continuously from the 4th to 6th October, inclusive, and also that he himself heard the speech made on the night of the 5th-6th. There was no cross-examination of this witness to clear up the question as to whether or not he was speaking of his own knowledge with regard to these speeches and other matters, and whether or not he was present at the *Urs* for the whole period between the 4th and 6th October. Nor did the learned Sessions Judge question him on these matters, but it appears that the learned Sessions Judge sent for the *roznamcha* of the petitioner's Police Station and from it ascertained that from 7 P. M. on the 5th of October until 6 A. M. on the 6th the petitioner was at his Police Station, and, therefore, could not have been present on the occasion of the speech of the night of the 5th-6th.

Now, if the learned Sessions Judge had come to the conclusion that the petitioner intended to convey that he was in fact present on the night of the 5th-6th, he should, on ascertaining that this was not the case, have given him an opportunity of explaining how it was he came to make such a statement. Instead of doing this the Sessions Judge proceeded, as a result of a comparison of the Police report with the petitioner's evidence given in Court, to stigmatize him as a perjurer. Such conduct on the part of the Sessions Judge was obviously highly improper. A Judge has no right to test evidence given in Court by material which has not legally been made evidence. He has the right and the duty to test a witness's evidence by putting questions to him for the purpose of clearing up

any matters which may be ambiguous or doubtful. But before he is justified in commenting adversely upon a witness's evidence, he must establish the particular fact warranting such criticism by proper evidence in Court and not by reference to documents which are not properly on the record. The learned Sessions Judge had no right whatsoever to put the *roznamcha* referred to in his judgment, which he describes as Ex. C-2, upon the record of the proceedings. Such a procedure on his part is not only highly irregular but is entirely illegal, and may, as has happened in the present case, lead to grave injustice being done to the reputation and character of a witness. It is admitted by the petitioner that he was at his Police Station between 7 P. M. on the 5th and 6 A. M. on the 6th and was not present when the speech made on the night of the 5th or early morning of the 6th was uttered. Had the learned Sessions Judge come to the conclusion that this was the case, he should have asked the witness for an explanation before charging him with the crime of perjury.

It is an elementary principle of justice that no person should be condemned without being given an opportunity of being heard in his own defence.

In the present case there is no doubt that the learned Sessions Judge was justified in coming to the conclusion that the petitioner did purport to speak of his own personal knowledge, but as soon as the learned Sessions Judge had occasion to believe that this was not so, he should have given the petitioner the opportunity of explaining the matter. As already stated the impropriety of the learned Sessions Judge consists in condemning the witness upon the strength of a document which was not in evidence, and which could not be made evidence; and without giving him an opportunity of explaining the matter. I am satisfied that the petitioner had no intention to mislead the Court and the *Urdu* record, which is somewhat at variance with the English translation, gives support to this view. In the *Urdu* record the petitioner stated "I went to the *Urs* Sial Sharif for the purpose of making arrangements there, which *Urs* is from the 4th October onwards." He did not state, nor did he mean to state, that he was present at this gathering continuously from the 4th to the 6th of October inclusively. Had he been cross-examined by Counsel for the defence, or questioned by the Judge in the Trial Court, the matter would have been cleared up at once. The evidence of the petitioner appeared before the Sessions Judge on paper. He was not himself present and he had no opportunity to explain any ambiguities which might appear in his evidence. Nor did the Sessions Judge give him any opportunity at any subsequent time to explain matters. I am satisfied that very serious injustice has been done to the petitioner and that the remarks complained of are entirely unwarranted. I accordingly order that the words objected to; namely, "But I am afraid this Police Officer is clearly guilty of perjury. He made the District Magistrate believe, as appears from his statements before him and from the judgment, that he was present at Sial Sharif from 4th to 6th and that he heard the speeches made on these two nights," and the words "This Sub-Inspector's testimony, therefore, could not be relied on and it is a fit case, I think, in which the District Magistrate may call upon him to explain why he made such a false statement," and the passage towards the conclusion of his judgment, "As I find that the only independent witness had made a false statement in Court," be expunged from the record.

K. S. D. *Revision accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 551 OF 1923.

(CRIMINAL REVISION PETITION No. 439 OF 1923).

August 22, 1924.

Present:—Mr. Justice Madhavan Nair.

KUMARAGURUDASA SWAMIGAL—PETITIONER

versus

KRISHNASWAMY MUDALIAR AND OTHERS—ACCUSED Nos. 1 TO 5—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 500—Defamation—Religious controversy—Violent expressions—Personal character not assailed—Offence.

A book was written by the accused, in reply to one written by the complainant, on highly controversial religious matters, in which the accused used most violent expressions against the complainant and his work, without, however, assailing his personal character and respectability:

Held, that the language used when taken with the context was not defamatory. [p. 145, col. 2; p. 146, col. 1.]

Petition, under s. 439 of the Cr. P. C., 1898, praying the High Court to revise the order of discharge dated the 10th November 1922 and the order of acquittal dated the 19th March 1922 of the Court of the Chief Presidency Magistrate, Egmore, in C. C. No. 11471 of 1922.

FACTS.—The complainant, a Siva ascetic and religious teacher, published a controversial work the "Siva Samya Sarabham" in which he attacked Vaishnavism, its founders, disciples and followers in gross and vituperative terms. In reply the accused wrote a rejoinder "Parabrahma Tattva Vilakkam" in which he indulged in similar language but ran the attack against the complainant personally.

The accused was charged with the offence of defamation under s. 500, Indian Penal Code. The following are the more important of the alleged offending passages:—

"We have come forward to establish that the Srimad Parama Vaidika Sudha Satwa Visishtavaita is the only true religion, ...to publicly expose his (complainant's) falsehoods to condemn and destroy his cruel and egotistical words.....because he is a wretch who goes about abusing by means of falsehoods, misinterpretations, and egotistical, cruel words,...because his book is a mere string of abuses."

"Is this man named Kumara Guru Dasan (complainant) to swallow the other portions of the Sruti ? or did he omit to refer to them by his ignorance (literally blindness)? or without understanding the Sruti, and knowing only a little portion thereof, he has come forward to unscrupulously utter lies, believing that no one knows the Sruti better than he."

"We boldly condemn this man who can be aptly compared to an ignoramus and his works."

"The blithering nonsense of Kumara Guru Dasan in his book of ignorance has been condemned."

"This man and his books will be praised only by atheistic, Pandara wretches, like crows which are fond of corpses. Those who excel in the knowledge of the Sastras will touch neither him nor his books ?"

"This Kumara Guru Dasan is one of those Pashandas who go about abusing and condemning and who are the reincarnations in this Kaliyuga, in the form of men, of those Asuras, Rakshasas and Paisachas who could not bear to hear the praises of our Lord and died like Hiranya, Ravana, Duryodhana, Kamsa, Dantavarka, Sisupala etc."

"Although we have not condemned the other perverse arguments, the abuses, the contemptuous statements, the nonsense and the falsehoods contained in his books, we have sent out this book, even as Sri Rama sent Hanuman to kill Ravana and other Rakshasas."

"He has the egotistical pride to say he has written an Upanishad. Hence we have called him a fool publicly."

"We have said at page 86 of this book that Hiranya and Ravana and such like alone can be compared to this Kumara Guru Dasan."

"Now, who is an Asura ?

"An Asura is he who out of desires for heavenly pleasures illtreats the soul within and who always has wicked desires, hatred, pain and vain gloriousness."

"There is no difficulty in saying that the complainant is an Asura. On the basis on this Sruti alone, we have compared him to an Asura."

The Chief Presidency Magistrate, Madras, held that although the language used was vituperative, it was provoked by equally abusive language of the complainant, and that the accused had given reasons for holding that the complainant had misconstrued or misused texts. "Milder words might have been used but the words used amount to nothing more than a flat contradiction of the complainant's affirmation coupled with an expression of opinion on the complainant's character and mentality as revealed by the complainant's polemical methods." The language, however, violent expression of sectarian views, was held not defamatory and the accused was acquitted.

Against the said order of acquittal, the complainant preferred a criminal revision petition.

Messrs. *V. L. Ethiraj* and *V. Viswanatha Sastry*, for the Petitioner.

Mr. *F. S. Vaz*, for the Respondents.

ORDER.—This is an application to revise an order of acquittal passed by the Presidency Magistrate. A book was written by the 1st accused as a reply to a book written by the complainant. Both the books deal with highly controversial religious matters. In expressing his opinion, the 1st accused has no doubt used violent expressions, but taking them along with

the context in which they appear, I agree with the Magistrate that they cannot be considered defamatory. I do not think that the personal character or respectability of the complainant is in any way assailed by the use of the expressions complained of.

I dismiss this application.

Petition dismissed.

V. N. V.
Z. K.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 90 OF 1924.
October 1, 1924.
Present:—Mr. Justice Marten and Mr. Justice Fawcett.

NAMDEO LAKMAN—ACCUSED—APPLICANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 263 (h), 537—Non-appealable case—Omission to record reasons for finding—Defect, whether fatal.

Where in a non-appealable case there is clear evidence to justify the conviction, the omission on the part of the Court to comply with the provisions of cl. (*h*) of s. 263, Cr. P. C., merely amounts to an irregularity which can be cured under s. 537 of the Code.

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61; 3 Bom. L. R. 540; 11 M. L. J. 233; 28 I. A. 257; 5 C. W. N. 866; 2 Weir. 271; 8 Sar. P. C. J. 160 (P. C.), distinguished.

Queen-Empress v. *Shidgauda*, 18 B. 97; 9 Ind. Dec. (N. S.) 573, not followed.

Emperor v. *Bankatram Lachiram*, 28 B. 533; 6 Bom. L. R. 379; 1 Cr. L. J. 390, referred to.

Reference made by the Sessions Judge, Poona.

JUDGMENT.

Marten, J.—This is a Reference by the Acting Sessions Judge of Poona with respect to the conviction of accused Nos. 1 and 2 for voluntarily causing hurt under s. 323, Indian Penal Code. The ground on which the learned Judge recommends to us that the conviction and sentence should be quashed is that the Magistrates recorded evidence at some length, but omitted to record any statement of their reasons for such conviction as required by s. 263, Cr. P. C. Then the letter of reference says that there was delay in lodging the complaint; that the excuse that the complainant could not make the complaint earlier was false; that she alleged that she was an in-door patient, whereas her injuries were slight and she was treated as an out-door patient only; and that certain discrepancies in the evidence rendered the above defect more than a formal defect.

The dispute in this case was a family squabble. The complainant is the mother-in-law and accused No. 1 is her son-in-law. The remaining accused were relations of the son-in-law. The Magistrates heard the case, and took down a considerable body of evidence for the prosecution. The defence Pleader said he had no evidence to call on behalf of the defence. The order was: "Accused Nos. 1 and 2 are convicted and sentenced to pay a fine of Rs. 15 each, or in default to suffer simple imprisonment for ten days. Section 323, Indian Penal Code. Benefit of doubt is given to accused Nos. 3 and 4, and they are, therefore, acquitted." In effect the Magistrates were chivalrous enough to give the benefit of the doubt to the two ladies accused Nos. 3 and 4, and to impose on the men accused Nos. 1 and 2 a small fine.

We have read the evidence, and there is, undoubtedly, ample evidence to justify the finding that the complainant, the mother-in-law, was attacked and injured by accused Nos. 1 and 2. The trouble arose apparently over an alleged right of way which the accused's party were trying to block up. We fully recognise the importance of the directions in s. 263, Cr. P. C., and that the Magistrates should strictly adhere to them. We also think that it was quite proper of the learned Sessions Judge to draw our attention in this particular case to the omission by the Magistrates to comply strictly with the directions in that section.

But, on the othar hand, there is another section to be considered, namely, s. 537, Cr. P. C., which gives us a discretion not to interfere in revision, even where there is an error, omission or irregularity in the order or judgment or other proceedings, unless it has in fact occasioned a failure of justice. I have no mind to whittle away any past decisions of this Court, which have held that in those particular cases the omission did amount to a failure of justice. But, in the present case, we are satisfied that no failure of justice has been caused, and that the omission to state in an additional line or two the reasons for the finding, is really in the nature of a technical omission, and not one of a

grave nature in the present case. In other, words, we have no doubt that the accused Nos. 1 and 2 were rightly convicted.

Further, this is an application in revision, and not an appeal, and this also is a discretionary remedy. So really here we have a double discretion to exercise.

Under all the circumstances of the case, therefore, we think that to send this family squabble back again to the Police Court for a re-hearing or for the matter of that, to quash the conviction altogether, would really not be a course, which would be suitable to adopt in the present case. Under those circumstances, we are not disposed to interfere in revision and we will direct the papers to be returned.

Fawcett, J.—I concur. The omission to comply with cl. (*h*) of s. 263, Cr. P. C. on the part of the Bench Magistrates, in my opinion, merely amounts to an irregularity which can be cured under s. 537, Cr. P. C., inasmuch as the case was a non-appealable one, and there was clear evidence justifying the conviction. It can, therefore, be assumed that the conviction was based on the Magistrates' belief of that evidence; and it is an omission which has not in fact occasioned failure of justice. It is not a case of a direct contravention of some provisions as to the mode of trial like that referred to in *Subrahmania Ayyar* v. *King-Emperor* (1). The mere fact that this Court in the case of *Queen-Empress* v. *Shidgauda* (2) or in other cases, has set aside the conviction for a similar omission, is not, in my opinion, sufficient ground for holding that in every such case the Court should set aside the conviction That would be contrary to what has been laid down in very clear terms by Sir Lawrence Jenkins as to the discretionary power which the High Court exercises in revision. In his judgment in *Emperor* v. *Bankatram Lachiram* (3) he says (at page 566):—

"This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them."

Here I think our discretion should obviously be exercised in favour of upholding the conviction rather than upsetting it because of a technical error.

K. S. D. *Papers returned.*

(1) 25 M. 61; 3 Bom. L. R. 540; 11 M. L. J. 233; 28 I. A. 257; 5 C. W. N. 866; 2 Weir. 271; 8 Sar. P. C. J. 160 (P. C.).

(2) 18 B. 97; 9 Ind. Dec. (N. S.) 573.

(3) 28 B. 533; 6 Bom. L. R. 379; 1 Cr. L. J. 390

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 189 OF 1924.

July 23, 1924.

Present :—Justice Sir Hugh Walmsley, Kt., and Mr. Justice Mukerji.

SURENDRA LAL DAS AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 239—Penal Code (Act XLV of 1860), ss. 148, 201, 304—Rioting and culpable homicide—Causing disappearance of dead body—Joint trial, whether legal.

Where a riot results in the death of a person, and thereafter one of the rioters takes away the dead body and causes its disappearance, a joint trial of that rioter for an offence under s. 201, Penal Code, along with a trial of all the rioters for offences under ss. 148 and 304 of the Code is illegal, as the offence under s. 201 cannot be said to have been committed in the same transaction in which the other offences were committed.

Criminal appeal against an order of the Sessions Judge, Sylhet, dated the 29th February, 1924.

Babus *Narendra Kumar Basu* and *Birendra Coomar De*, for the Appellants.

Babu *Jatis Chunder Guha*, for the Crown.

JUDGMENT.

Mukerji, J.—The appellants who are five in number were tried along with another person named Abudas by the learned Sessions Judge of Sylhet with the aid of a Jury. The charges on which the accused were tried were as follows : There was a charge against all the accused persons under s. 148, Indian Penal Code, and another charge under s. 304 read with s. 149, Indian Penal Code, for causing the death of one Bodhi Namasut. As against the appellants Nos. 1, 2 and 3, there was a further charge under s. 304 read with s. 34, Indian Penal Code, and as against the appellant No. 5

there was also a charge under s. 201, Indian Penal Code. Against the appellant No. 4, there was a further charge under s. 326, Indian Penal Code, for causing grievous hurt to one Jnan Namasat.

The Jury were unanimous in their verdict. So far as Abudas was concerned, they unanimously found him not guilty of the offences with which he was charged and the learned Sessions Judge agreeing with and accepting their verdict as regards him acquitted him. With regard to the present appellants, the Jury found them all guilty under s. 148, Indian Penal Code, with regard to appellants Nos. 1, 2 and 3, they found them also guilty under s. 304 read with s. 34, Indian Penal Code. As to appellant No. 4, they further found him guilty under s. 323, Indian Penal Code, and as to appellant No. 5, under s. 201, Indian Penal Code.

The learned Sessions Judge agreed with the unanimous verdict of the Jury in so far as they found the appellants Nos. 1 and 4 guilty under s. 148, Indian Penal Code, and the appellants Nos. 1, 2 and 3 guilty under s. 304 read with s. 34, Indian Penal Code. But he was of opinion that the appellants Nos. 2, 3 and 5 should have been convicted under s. 147, Indian Penal Code, rather than under s. 148, Indian Penal Code, and that the appellant No. 4 should have been convicted under s. 326, Indian Penal Code, rather than under s. 323, Indian Penal Code, and not being willing to differ from the unanimous verdict of the Jury, he accepted the same and convicted the present appellants of the offences in respect of which the Jury found them guilty and sentenced appellant No. 1 under s. 304 read with s. 34, Indian Penal Code, to seven years' rigorous imprisonment and appellants Nos. 2 and 3 to five years' rigorous imprisonment each under the same section—no separate sentence being passed on these three accused persons under s. 148, Indian Penal Code. The appellant No. 4 was sentended to two years' rigorous imprisonment under s. 148, Indian Penal Code—no separate sentence being passed on him under section 323, Indian Penal Code, and appellant No. 5 was sentenced to rigorous imprisonment for two years under s. 201, Indian Penal Code—no separate sentence being passed on him for the offence under s. 148, Indian Penal Code.

The first and the principal objection that has been taken on behalf of the appellants to their convictions as aforesaid relates to the joinder of the charge under s. 201, Indian Penal Code, with the other charges upon which the appellants other than the appellant No. 5 have been tried. It appears that the case for the prosecution was that the riot took place over a dispute relating to a *go-pat* and that in the course of the riot one Jnan Namasut was wounded with a bamboo-staff at his knee and one Bodhi Namasat was also assaulted—the result of which was that he died on the spot and that thereafter the appellant No. 5 Munshi along with one other person named Lakhidas who was not on his trial before the learned Judge took away the dead body and the corpse was not recovered since then. Upon this view of the facts it is difficult to hold that the offence under s. 201, Indian Penal Code, alleged to have been committed by the appellant No. 5 Munshi was committed in the course of the same transaction in which the other offences were committed. It is quite clear that, so far as the offence of rioting is concerned, that must have ended with the serious injury inflicted upon Bodhi Namasat and the offences that were committed in the course of the riot had all been completed before the offence under s. 201, Indian Penal Code with which the appellant No. 5 was charged had come into existence. I, therefore, hold that there was no justification for the trial of appellant No. 5 on the charge under s. 201, Indian Penal Code, along with the other offences for which the appellants were tried by the learned Sessions Judge and that the whole trial was vitiated by mis-joinder of charges.

One other objection was taken on behalf of the appellants and it was this: so far as the appellants Nos. 1, 2 and 3 are concerned, there was a charge against them under s. 304 read with s. 149, Indian Penal Code, and also another charge under s. 304 read with s. 34, Indian Penal Code. These charges as they stand were not in the alternative but were substantive charges against these appellants. Although under the law, there cannot be any objection to these charges being put forward against the accused persons at one and the same trial, it is obvious that in some instances they may cause embarrassment to them inasmuch as they proceed npon an assumption of facts which may not be identical so far as the two charges are concerned and it is desirable that, in framing charges with regard to matters of this description, attention should

be paid to the case as put forward on behalf of the prosecution and the matter should then be dealt with strictly in accordance with the allegations which the prosecution desires to prove. In this view of the matter, I think that the convictions and the sentences passed upon the present appellants cannot be sustained. Accordingly, I would set them aside and direct that the five appellants before us be re-tried in accordance with law. These appellants, we are informed, are on bail. They will remain on the same bail pending their re-trial.

Walmsley, J.—I agree.

N. H. *Appeal allowed: Re-trial ordered.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 78 OF 1924.
October 10, 1924.
Present:—Mr. Justice Marten and Mr. Justice Fawcett.
EMPEROR—APPELLANT
versus
MARIA BASAPPA—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 339 (1)—Prosecution of approver—Certificate of Public Prosecutor, necessity of.

It is illegal to institute proceedings against an approver for the offence in respect of which pardon was tendered to him without the certificate of the Public Prosecutor.

Emperor v. *Kothia*, 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346, *Emperor* v. *Gungua*, 29 Ind. Cas. 323; 37 A. 331; 13 A. L. J. 421; 16 Cr. L. J. 483 and *Emperor* v. *Abani Bhushan*, 8 Ind. Cas. 721; 37 C. 845; 11 Cr. L. J. 702, not followed.

Reference made by the District Magistrate, Dharwar.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

The Assistant Public Prosecutor, for the complainant.

JUDGMENT.

Marten, J.—This is a Reference by the District Magistrate of Dharwar recommending that the proceedings now pending against the present accused in the Court of the First Class Magistrate of Gadag on a charge of murder under s. 302 should be quashed on the ground of the illegality of the proceedings.

The accused was admittedly an approver in a murder case in which he was granted a full pardon under s. 337 of the Cr. P. C. That being so, that pardon was a bar to any criminal proceedings being taken against him in respect of his complicity in the murder subject to any other provisions of the Cr. P. C. Those other provisions will be found in s. 339 which provides that where such a pardon has been tendered, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered.

Admittedly here the Public Prosecutor has given no such certificate, but notwithstanding that the learned Sessions Judge of Dharwar at the termination of the trial directed that the approver be put before a Magistrate, and that the Public Prosecutor be authorised to file a complaint against the approver and he ordered that the approver should be discharged and re-arrested and remanded to prison and should be produced before a Magistrate when called upon.

That is the order on which the present complaint before the Magistrate is founded. The letter of reference points out that the very complaint itself is wanting in the necessary condition before it can be enquired into, *viz.*, the certificate of the Public Prosecutor under s. 339. In our opinion that objection is a sound one. The order of the learned Sessions Judge would seem to have been made *per incuriam*, and, in our opinion, it cannot be supported.

If one looks at the matter in principle, there is all the more reason to construe these sections strictly. The accused under one section has been given a pardon. If, therefore, he is subsequently to be tried for his life, it is only fair and proper that the specific directions of the Code which enable that to be done should be strictly complied with. We get here a specific condition, *viz.*, that the Public Prosecutor has to make a certain certificate. This he has not done. How then in common fairness can be accused be now prosecuted for this crime? It seems to me that although there may be other reasons for the insertion of this particular provision, the Public Prosecutor is the proper person to give such a certificate. I take it that in the districts he has very much the same sort of duties to perform in criminal matters as the Advocate-General of Bombay has for the Bombay Presidency as a whole or the Attorney-General has in England. He has

access to all information in the possession of Government in relation to any offence, and consequently he is often in a much better position to say whether a particular prosecution should be withdrawn or proceeded with than the Judge whose duties are solely confined to the evidence before him.

It is conceivable that, on the evidence admissible before him, a particular Trial Judge may come to a particular conclusion. It is equally possible that if it was admissible at a trial to have all possible information placed before him whether it was strictly speaking legal evidence or not, he would have arrived at a different conclusion. However, that may be, to my mind there can be only one construction possible of this section, and that construction is not the one which the Assistant Public Prosecutor of Dharwar who has come here in person to support the learned Sessions Judge's decision has asked us to adopt.

Nor if one turns to earlier decisions before the recent statutory amendment necessitating a certificate from the Public Prosecutor, does it appear that a Sessions Judge in former days could properly have adopted the course which the learned Sessions Judge has taken in the present case. We have been referred to three cases, *viz.*, *Emperor* v. *Kothia* (1), *Emperor* v. *Gangua* (2) and *Emperor* v. *Abani Bhusan* (3). These are all cases before the recent amendment, and they all go to show that the proper person to sanction the prosecution of an approver on the ground that he had broken his pardon is the District Magistrate and not the Sessions Judge. The judgment in *Emperor* v. *Gangua* (2) is particularly clear on that point. However, that is now obsolete law. So we need not go into that nor discuss the case to the opposite effect in *Chanan Singh* v. *Emperor* (4) which the Assistant Public Prosecutor of Dharwar drew our attention to.

In our opinion the proceedings in question here are illegal and the Rule *nisi* should be made absolute. We will also direct that the present complaint be withdrawn and that the approver be discharged from custody.

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(2) 29 Ind. Cas. 323; 37 A. 331; 13 A. L. J. 424; 16 Cr. L. J. 483.
(3) 8 Ind. Cas 721; 37 C. 721; 37 C. 845; 11 Cr. L. J. 702.
(4) 56 Ind. Cas. 774; 1 L. 216; 21 Cr. L. J. 518; 108 P. L. R. 1920.

Fawcett, J.—I concur. It has been urged in support of the learned Sessions Judge's order that he has inherent jurisdiction in spite of the provisions of s. 339, sub-s. (1), to make that order. No doubt it has been laid down by this Court in *In re Ganesh Narain Sethi* (5) that as a general rule it is the right, and in some cases also the the duty, of any person having knowledge of the commission of an offence to set the law in motion, even though he is not personally interested or affected by the offence. But that general rule is of course subject to statutory exceptions, and the present case is, in my opinion, clearly one of them. The pardon that was given to the approver *prima facie* acts as a bar to any prosecution of the approver for the offence in respect of which the pardon was tendered, or in respect of any other offence of which he appears to be guilty in connection with the same matter, except so far as the Legislature may authorise a prosecution in such a case, and the effect of sub-s. (1) of s. 339, as it now stands, is clearly to make the certificate by the Public Prosecutor the sole basis of a prosecution of an approver. It is not suggested that there are other provisions, such as Chap. XXXV of the Cr.P.C., under which a Sessions Judge's order directing a complaint can be justified and the general rule of construction applies, *expressio unius est exclusio alterius.* Therefore, it is only under the conditions specified in sub-s. (1) of s. 339 that the approver can be prosecuted, as the Sessions Judge proposes to prosecute him.

K S. D. *Rule made absolute.*

(5) 13 B. 600; 7 Ind. Dec. (N. S.) 397.

ALLAHABAD HIGH COURT.

CRIMINAL GOVENMENT APPEAL No. 417 OF 1924.

July 2, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice Mr. Justice Ryves and Mr. Justice Daniels.

EMPEROR—COMPLAINANT

versus

CHANDA AND ANOTHER—ACCUSED.

Penal Code (Act XLV of 1860), ss. 107, 304, 323—Constant ill-treatment—Severe beating—Death due to shock—Offence—Omission to prevent beating, whether abetment.

Where the accused who subjected her daughter-in-law to a continuous ill-treatment, gave her a severe beating on the day previous to her death, and the medical evidence showed that the death was due to "shock from several blows on an unnourished girl suffering from chronic lung disease":

Held, (1) that the accused did not intend or contemplate the death of the deceased as a result of the beating that was inflicted on her and was not, therefore, guilty of an offence under s. 304, Penal Code; [p. 156, cols. 1 & 2.]

(2) that under the circumstances of the case the accused was guilty of an offence under s. 323, Penal Code. [p. 158, col. 2.]

To constitute abetment there must be under s. 107 of the Penal Code either (1) instigation, (2) conspiracy or (3) actual aid either by an act or an illegal omission. [p. 158, col. 2; p. 159, col. 1.]

The mere fact that the accused was sitting by when another person was beating a third, and did not interfere, is not sufficient to constitute abetment. [p. 158, col. 2.]

Criminal appeal from an order of acquittal passed by the Sessions Judge, Meerut, dated the 17th March 1924.

The Government Advocate, for the Crown.

Messrs. *Ram Nama Prasad* and *Majid Ali*, for the Accused.

JUDGMENT.

Walsh, A. C. J.—This is an appeal by Government against an acquittal. The charge is under s. 302, but the Government Advocate asked us only for a conviction under s 304. The case belongs to that class in which parents, or persons in *loco parentis*, are charged in a Criminal Court with causing the death of their child, or of the child committed to their charge, not by one act, about which there can be no question, either as to the *factum* or as to its legal character, but by a series of acts, or rather by a continued course of treatment, mainly hidden from the outside world, culminating in a final act which did in fact produce death, because the victim had already, by the previous course of conduct, been reduced to a condition of health which predisposed her to collapse and rendered her unable to resist the culminating act as a normally healthy child might have done.

The case appears to me to raise a question of grave public importance, particularly in view of the treatment to which women generally, and particularly young girls, and old widows, are too often submitted in this country. It has led to unfortunate differences of opinion between the various legal Tribunals, the evidence, which is voluminous, being partly direct and partly circumstantial.

The Committing Magistrate took the view that "the death of *Musammat* Shakuran, a poor and helpless girl, was due to the merciless acts and omission of the two accused in whose care and custody she was for six months, which finally resulted in her death", and he committed both the accused to Sessions under s. 304. I agree with this view, which seems to me the most merciful one open to us. What I mean is that I think the facts would support a conviction under s. 302.

The Sessions Judge himself amended the charge to one under s. 302, and then acquitted the accused of everything. He does not appear to have considered any alternative case, either under s. 304, or under s. 323, or to have invited the opinion of the Assessors upon either of these alternative cases. As he held the accused to be morally responsible for the ill-health of the girl, which the medical evidence proves to have accelerated her death, or to have predisposed her to succumb to the beating, I am unable to follow his reasoning, and I think it right to say that I deprecate a Judge enlarging the charge, and then acquitting, without considering the alternative minor charge upon which the accused has been properly committed, when the facts in both cases are the same.

Unfortunately a difficulty has arisen in the course of the hearing this appeal, inasmuch as while my brother is prepared on the evidence to convict only under s. 323, I am of opinion that a charge under s. 304 is clearly made out, and that a conviction under s. 302 would not be wrong.

The history of the case is painfully clear. The deceased was 14. She went to live with her husband, and with her husband's parents, the two accused. When she left her home, she was according to her father Kallu, as well as to the overwhelming evidence of the accused's neighbours, in good health. She showed no signs of organic disease. She had no fits. The evidence of the neighbours is overwhelming that she was starved, ill-treated and overworked. Ismail, P. W. No. 3, says: "she was fat and fresh", and became rather weak". *Musammat* Bhuria says: "she was well and strong", and "that her physical state has deteriorated". It is superfluous to recite the details of this evidence. The following witnesses speak either to isolated acts of violence, or to constant violence:—Ismail P. W. No. 3, *Musammat* Bhuria P. W. No. 4, *Musammat* Sukhdei P. W. No. 6,

Musammat Alladia P. W. No. 7, Hakimullah P. W. No. 16, Niadar P. W. No. 17. The following speak to the steady decline in her appearance of health, and strength:—The father Kallu P. W. No. 1, Ismail P. W. No. 3, *Musammat* Bhuria P. W. No. 4, *Musammat* Zamurrud, P. W. No. 5, Rahmatullah P. W. No. 14, Niadar P. W. No. 17, and Nanwan P. W. No. 18. It would be difficult to find a more convincing body of evidence, if trustworthy, and while it corresponds generally, it is by no means a series of repetitions suggesting an artificial creation of deliberate invention. The witnesses are said to be hostile to the accused, and I am prepared to assume that they are. This line of attack is often pushed beyond the limits of reason within which scepticism ought to be restrained. There is no reason why the credit due to the prosecution witnesses should be confined to those who are friends of the accused or indifferent, and if this class of case is ever true, witnesses to the truth, if they are possessed of ordinary humanity, can with difficulty restrain their indignation and hostility.

The deceased's father had provided her with ten suits of clothing, but *Musammat* Bhuria says that she had "no cold weather clothes, that she was kept with *taklif* as to food and clothes, and wore dirty clothes which she brought from home". *Musammat* Zamurrud says: "when the girl came from Delhi she was fat, but before she died she was reduced. She was ill-treated by the woman who kept her short of food and clothes. She had to do all the work which is done by several".

The evidence is also overwhelming that the accused were conscious of this inhuman state of things. Muhammad Jan, the brother, who went twice to try and see the girl and bring her home, was refused access to her by the accused. The first time he went he was allowed to see her, after Ismail and several others had interceded. He was not allowed to talk with her. He found the deceased healthy enough. The second time, two months later, he was not allowed to see her. This incident is confirmed by the *Kotwal* a witness who had accepted the defence of the accused and was certainly not unfriendly to the accused. It is not unlikely that he thought they were acting within their rights. The day before her death the deceased was beaten once for a fault about spilling oil, and according to the view of the Judge, almost certainly twice. She stood meekly still and did not run away. I infer from this that she had been reduced to complete submission and defencelessness. Most of the witnesses called, who were neighbours, say that they expostulated in vain and were told to go away and mind their own business,

The beating or beatings took place shortly before death. There was nothing in the beating to cause death, except from shock to an enfeebled system. The Civil Surgeon says that death was due to shock from several blows on an ill-nourished girl suffering from chronic liver disease. After death the lungs were found congested and chronically inflamed, and the abdominal wall was very thin and showed hardly any fat. He says that the condition of the body might have been caused by starvation, exposure and overwork. In my view there is nothing else in the case to account for it.

There is not a shred of evidence to suggest that the girl was wasting before she left home; or that she had already began to suffer from neglect ; or that the six months spent with her mother-in-law were merely the progressive development of an earlier cause. The direct evidence is entirely inconsistent with this theory. The Doctor, it is true, agreed that it might have had a longer history then six months. Of course it might. How could he say less ? The duration of symptoms of such a character must depend on the rapidity with which the cause operates, and on the degree of the neglect and violence which set them up. The medical evidence is in no way inconsistent with the history given by the witnesses, and strongly supports it.

The accused did their best by burying the body and by other means to conceal the cause of death from the father and to propagate in the village and to the *Kotwal* a false account. The man denied any beating and alleged epilepsy. At the trial both made the false and ludicrous suggestion that the deceased was epileptic and met her death by falling down stairs, and they called witesses to support this cock and bull story. The wife denies the beating. The evidence that this denial is untrue, is overwhelming. But curiously enough the Judge seems to think that there was another beating just before the death, and that the one which the witnesses speak of, was not sufficient to cause the death, and does

not correspond with the Doctor's *post mortem* observations.

The Judge holds the accused morally responsible for the ill-health of the girl and probably for her death. I agree with this finding, except that, in my opinion, the medical evidence makes them certainly, and not merely probably, responsible for the death.

I am, therefore, convinced beyond doubt that a case is in fact established against the accused of having submitted an infant girl, for whose support they were responsible, to a continuous, and severe course of ill-treatment and starvation, which could only have one end if persisted in, and would certainly have terminated in her death from natural causes if they had not accelerated it by beating her. They must be taken to have seen and known that they were jeopardizing her life by their calculated neglect, as well as by their active brutality and violence to her young and feeble frame. I cannot accept the view that on such facts, the only crime committed under the Indian Penal Code is an assault under s. 323. By s. 32 an omission is just as illegal as an act, and the combind causes which were responsible for the death in this case, appear to me to be covered, if legislative enactment is necessary to make their criminal effect intelligible, by s. 36 of the Indian Penal Code with the illustration given thereunder. The combined effect of these to sections and the definition of culpable homicide under s. 299, seem to me to cover this case.

There is abundant evidence of motive in the way of pecuniary gain. There is always some pecuniary gain to a parent who starves her child and allows it to die of neglect. Negligence in the view of the law is frequently only economy carried beyond legal limits to the stage when risk to others is incurred. But the annals of crime show that this class of torture of defenceless childern is by no means confined to the poor, or to those who have some paltry pecuniary profit to make out of it. It manifests itself particularly in some women who suffer from a kind of hate-hunger. There is no half-way house. A woman either loves and nurtures a child, or she does neither, and the present case presents all the features of an unreasoning and callous brutality pushed to a degree which could only end either in slow decay or death from excessive violence.

I would convict both accused under s. 304 and sentence each of them to transportation for life.

Alternatively I would agree to the conviction and punishment decided by my brother.

Ryves, J.—Chanda, an oil-man residing in the City of Meerut and his wife *Musammat* Ramzano were committed to the Court of Sessions at Meerut charged of an offence under s. 304 of the Indian Penal Code. The learned Sessions Judge amended this charge by charging the accused of murder under s. 302 instead of s. 304. At the end of a careful trial he in concurrence with the three Assessors found the accused not guilty and ordered their acquittal. He added that he was satisfied that both the accused were "morally responsible for the ill-health of the girl and probably for her death." Government has appealed from this order of acquittal, and we have heard the learned Government Advocate on behalf of the Crown and Mr. Ram Nama Prasad for the accused.

Up to a point there can be no dispute as to the facts. The accused appear to have been considered well-to-do in comparison with their neighbours. They had a son Majid, who as is usual among such people was married while still a child to *Musammat* Shakuran, the daugther of a caste-fellow named Kallu, a resident of Delhi. At the time of the marriage Chanda executed two documents and gave them to Kallu. One was a deed of dower promising to pay *Musammat* Shakuran Rs. 1,000, the other was an agreement binding himself to pay *Musammat* Shakuran Rs. 5 a month, pocket money, until her husband was able to support her. The marriage is said to have taken place some four years ago, and a day or two after the marriage the girl went back to live with her parents in Delhi. Some five or six months before the girl's death, which occurred on the 17th of January 1924, that is somewhere about July 1923, the girl came to live with her husband in his parents' house. There seems to be no doubt that from the time of her arrival she was treated very harshly by her husband's parents.

There can, I think, be no doubt that she was not properly fed or properly clothed or looked after with any maternal care, but was treated simply as a drudge, and was frequently physically ill-treated. The father-in-law was most anxious to get out of his promise

to pay the dower. In August he actually had a document registered which at any rate, purported to have been executed by *Musammat* Shakuran renouncing her claim to dower. In this document she was described as 22 years of age. The document was registered and I cannot help thinking that the Sub-Registrar must have been deceived about the identity of the girl, because it is hard to believe from the Doctor's evidence as to the appearance of the girl, that if she herself was produced before the Registrar he could have been satisfied that she was of age. There is, however, no evidence that the document was executed by the girl herself. Muhammad Afzal Khan who wrote it says that some persons came to him to get it writtan, whom he did not know and whom he cannot identify, that having written it he read it over to the woman who was in a *dooli* and her thumb mark was taken. Ilahi Baksh witnessed the document. What he says is that: "it was written on behalf of Shaukuran, but not in my presence. Chanda the accused brought it to me saying his daughter-in-law had renounced her dower. I signed it at my shop. The woman did not come. I went to the *kutcherry*. Chanda had a *dooli* with him. We come to the Sub-Registrar's office and I identified the woman. I had seen her at Chanda's house 8 or 10 days before. I thought her age was 16 or 17".

This is the only evidence to connect *Musammat* Shakuran with the document and if it were necessary to find as a fact that she had in fact executed the document, I should have difficulty in holding it proved. I do not, however, think the point is really very material. She may have been coerced or cajoled into executing this document and admitting it before the Sub-Registrar. This was in August. It appears that Kallu, the father of the girl, made two or three attempts to get the girl back, but neither he nor his son were allowed to talk to the girl and were only permitted to see her on one occasion owing to the remonstrance of the neighbours. Chanda said that he was afraid that Kallu might take the girl away and he was unwilling that she should leave the house until all claim to her dower was given up.

We now come to the 16th of January. On that day it appears that *Musammat* Shakuran spilt some oil and that her mother-in-law, infuriated by the loss of perhaps a pice worth of oil, seized a stick, which is described by one witness as a yard long and as thick as one's thumb, (another witness describes it by saying the stick was as thick as a thumb and was a twig from a tree) and beat her with it about the head and shoulders and back. There can be no doubt that this was a severe beating, so much as, that the neighbours expostulated. Next morning Rahmat Ullah, a neighbour, whose house is just across the lane says that he saw the girl at 6 A. M. doing her ordinary work, that is to say, she was carrying cowdung cakes to the *zanana*. This shows, as the Judge points out, that the beating on the day before at any rate was not severe enough to incapacitate her. About 8 o'clock the girl seems to have suddenly collapsed and died.

Nanwa a witness for the prosecution says that at 10 o'clock the same morning Chanda came to him and asked him to send a wire to the father of the girl to summon him as the girl was dead. This witness goes on to say that Chanda told him that he would not bury the girl till Kallu came. He says he did not ask Chanda what she had died of and that he had no suspicion then. It seems, however, that the neighbours were not at all satisfied about the death of the girl and disbelieved Chanda when he said that the girl had died in an epileptic fit, because so far as they knew she had never suffered in this way before. What seems to have aroused their suspicion was because it was so sudden and unexpected. It was known that the girl had been habitually harshly treated and it was suspected apparently that there had been some foul play. It seems, however, fairly clear that the death was not attributed at the time to the beating which the girl had received the day before

Niadar, one of the witnesses, says that people were saying that Chanda had killed the girl. A report was made at the Police Station in the course of the day and Kirpa Ram the Sub-Inspector personally made local inquiries and it was not till that afternoon that the body was taken for burial. The father arrived the next day and the District Magistrate had the body exhumed and sent to the Civil Surgeon for examination. The *post mortem* examination was conducted by the Civil Surgeon. He deposes to the finding of bruises on the head, back and arm. In his opinion death was due "to shock from several blows on

an unnourished girl suffering from chronic lung disease."

I think we may take this as proving that the girl died from the effects of the beating which she received on the 16th of January, and I think it is also clear from medical evidence that that beating if administered to an ordinary healthy girl of 15 or 16 years of age would not cause very serious injury and would not be expected by any reasonable person to cause such injury.

The Doctor says that the probable age of the girl was about 15 or 16 years and that the body was very emaciated. He found chornic adhesions of the pleura on both sides and both lungs were congested and chronically inflamed. He found the heart smaller than usual, the abdominal wall very thin showing hardly any fat. The stomach and intestines were empty. The liver was congested, the kidneys were small and one was contracted. No doubt, he says that the disease of the lungs could be caused by starvation, exposure and over work, but he goes on to say that although he could not tell the duration of the lung disease, it was probably more than four or five months. His general opinion as to the smallness of the heart, the contraction of kidneys and the absence of fat in the body was that they were due to ill-nourishment which probably extended for several months and might have extended for a year or more. The Civil Surgeon was not asked whether, assuming the girl was normally healthy six months before he examined her corpse, he would have expected the symptoms which I have just described, to have been caused by ill-nourishment, exposure and over-work within the last six months only.

Reading the evidence as a whole, it seems to me that the girl was in a bad state of health before she came to live in Meerut. It may be that her condition became worse owing to the treatment she received there. But I cannot believe that her condition was entirely due to what she had undergone within the last six months. The father says that when she left Delhi she was not ill and all he says about her condition was that when he saw her body it was rather thinner than when she left home.

It is true no doubt that a number of neighbours tried to make out that when she came she was in excellent health and that she rapidly got worse during her stay in Meeaut, but I am not prepared to take the evidence of these witnesses at its face value. There can be no doubt that some of them at least were prejudiced against the accused. For instance Hakim Ullah whose house adjoins the accused deposes that the girl was very well when she came from her home, but she was thin before she died. In cross-examination he admitted that he had never seen her face and that he had heard that she was thin.

Kirpa Ram, the Sub Inspector, who that very day went to the spot and made inquiries has proved the report which he wrote at 4 p. m He recorded that there was enmity among the *Telis* and that the people of the *mohallah* gave out that the day before yesterday her father-in-law beat her on her spillting oil. Some say that there was a quarrel between the mother-in-law and the daughter-in-law and in the said quarrel the latter received injury and died of it. He says, another witness told him, (as Chanda had) that she had been suffering from epilepsy. At any rate, it was known that she had prepared cowdung cakes on the day on which she died. He said that he had made inquiries from the *Chaudhri* of the butchers and learnt that on account of the bitter enmity amongst the *Telis*, the rumour (*i. e.* of foul play) has been spread. He, therefore, took no further steps.

I have tried to set out the bare facts relating to the death of the girl as dispassionately and coldly as I can.

The learned Judge has come to the conclusion that the evidence does not disclose that the accused had any intention or wish to cause the death of the girl. He goes on to say "they seem to have been hard and unimaginative people who regarded their daughter-in-law as a useful drudge." In this summary of the evidence I agree. I hold it proved that death was due to shock from several blows on an ill-nourished girl suffering from chronic lung disease. I agree with the learned Judge in thinking that neither of the accused had any wish or intention to kill the girl. On the contrary I think they wished the girl to live in order that she might be useful to have in a menial capacity.

I hold it proved that her death was the result of the beating she received from the hands of *Musammat* Ramzano on the 16th of January and that under the circumstances Chanda must be held to have abetted that beating...

I hold, therefore, that they are responsible for the death of the girl. It remains to be seen what offence, if any, they have committed under the Penal Code.

In my opinion no serious question of law arises at all in this case. The law is clearly set out in s. 299 of the Indian Penal Code and is to the effect that "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

I have already held that neither of the accused beat this girl with the intention of causing her death. Having regard to the way in which the beating was inflicted as described by the eye witnesses and the nature of the actual injury caused as disclosed by the *post mortem* examination I hold that it is not proved that their intention in beating this girl was to cause such bodily injury as is likely to cause death.

There remains the last clause of the section. Can it be said that they must be imputed with the knowledge that it was likely that their beating would cause death? This is to my mind a pure question of fact, and must be decided on the evidence just like any other fact. There can be no doubt that both the accused must have known that the girl was in ill-health. That she was delicate and thin must have been apparent to anybody. But taking into consideration the fact that, in my opinion, they did not wish to cause her death and that the beating was administered before a number of witnesses I do not think I can hold that it is proved beyond a reasonable doubt, to which even these miserable inhuman people are entitled, that they knew that what they were doing was likely to cause the unfortunate girl's death. The beating itself was not followed immediately by any serious consequences. It is proved that the next day she was able to do her work, and I am afraid that on more than one occasion before they had probably administered as severe a beating without any very serious consequences. I hold that this particular beating was not a part of a calculated course of ill-treatment which they knew or must be taken to have known to be likely to cause the death of the girl. In that case I would have had no hesitation in holding that the accused were guilty at least of culpable homicide not amounting to murder.

In my opinion this beating was due to the unfortunate fact that the girl had spilt some of their precious oil. I cannot, therefore, hold that the Court and the Assessors were wrong in acquitting the accused of the charge under s. 304 of the Indian Penal Code. In my opinion, however, there is evidence to prove that on the 16th of January *Musammat* Ramzano with the active connivance of Chanda did beat this girl with the result that she died.

I would, therefore, convict both of them under s. 323 and having regard to the fact that the girl was weak and ill, I think that they should be awarded the maximum sentence under that section. I would convict them under s. 323 and sentence them each to one year's rigorous imprisonment.

Daniels, J.—This case has been referred to me under s. 429 of the Cr. P. C. on account of a difference of opinion between two Judges of this Court. The case relates to the death of the girl named *Musammat* Shakuran who was married to the son of the two accused Chanda and *Musammat* Ramzano. The girl came to their house to reside as the wife of their son six or seven months before her death. Her age at the time of her death was 15 or 16 years. At the *post mortem* examination the Civil Surgeon found an absence of fat in the body and other appearances which pointed to ill-nourishment extending over several months. The parties are Muhammadan *Telis*. It is established that on the day before her death, namely, on 17th January last, the deceased had spilt some oil and her mother-in-law, the accused *Musammat* Ramzano, gave her a beating. The thing was done openly at about 8 A. M. in the view of a number of neighbours. The stick used is described as a twig or a branch of a tree. Several of the witnesses, both male and female, describe it as about as thick as their thumbs. The only witnesses who give any details Ismail and *Musammat* Zamurrad, say respectively that the blows were struck on the arms and back and on the back and shoulder. The girl's father-in-law, the accused Chanda, sat by and did not interfere.

No one realised at the time that the girl had received any serious injuries. She is not even said to have fallen down as the result of the beating. Next morning she was up and about fetching cowdung cakes

as usual. About 8 A. M. (the time is given in the telegram sent to the girl's father by Chanda accused) she collapsed and died. The Civil Surgeon's evidence is that death was due to "shock from several blows on an ill-nourished girl suffering from chronic lung disease".

The accused was committed to the Sessions Court on a charge under s. 304 of the Indian Penal Code. The Sessions Judge altered the charge to one under s. 302 but in the end acquitted both accused altogether. The acquittal of *Musammat*, Ramzano is incomprehensible, as on the Judge's own finding an offence under s. 323 of the Indian Penal Code was established against her. The Local Government has appealed, and the learned Government Advocate has pressed for a conviction under s. 304 of the Indian Penal Code, or failing that, for a conviction under s. 323. The learned Acting Chief Justice was of opinion that the evidence established the offence of murder, though in view of the attitude of the Crown, he was content to convict under s. 304 of the Indian Penal Code and to sentence both accused to transportation for life. His view is that the accused subjected the deceased to "a continuous and severe course of ill-treatment and starvation which could only have one end if persisted in, and would certainly have terminated in her death from natural causes if they had not accelerated it by beating her". Mr. Justice Ryves after an elaborate analysis of the evidence came to the conclusion that the accused certainly did not intend to cause the girl's death, and further that it was not proved beyond reasonable doubt that they knew that they were doing what was likely to cause it. He held that both the accused are guilty under s. 323 of the Indian Penal Code (the male accused on the ground that he was present and abetting the offence), and in view of the previous ill-treatment and the fact that death did result in consequence of the beating, he considered that the maximum sentence allowed by the section, namely, one year's rigorous imprisonment, should be imposed.

The case has been re-argued before me, and I have read the entire evidence; and I may say at once that on the evidence it appears to me impossible to hold that the accused either intended or contemplated the death of the deceased as a result of the beating which was inflicted on her. It is clear enough that *Musammat* Ramzano had taken a dislike to her daughter-in-law, that she under fed her, kept her short of clothes, and used at times to beat her. I may note at this point that the evidence as to previous beatings is more scanty than one would expect. Most of the women who appear as witnesses, all of whom live in the vicinity, say that they had not seen the accused beat her before. A woman is more likely to be a witness of these beatings than a man. When, therefore, Hakim Ullah (P. W. No. 16) says that he had seen Ramzano beating the deceased "scores of times" and Niadar (P. W. No. 17) "tens of times," one may suspect a certain exaggeration. That the female accused had beaten the deceased on previous occasions is, however, undoubtedly the fact.

The only motive suggested in argument why the accused should have desired to make away with the girl is that they would thereby get rid of paying the allowance of Rs. 5 a month by way of pin money which they had agreed at her marriage to pay to her. This suggestion will not bear a moment's examination. There is not the slightest evidence that this allowance had ever in fact been paid, and it is most unlikely in the circumstances that it ever had been. The suggestion that the motive may have been "economy carried beyond legal limits" is pure surmise. The probability is that the assistance in the house which the accused got from the deceased was worth more to them than her keep. If they thought she was a burden on them they had only to send her back to her parents, who would have been only too glad to have her. It is highly probable that the refusal to allow her brother to see her on the last occasion when he came was due to a fear that she might run away with him.

The circumstances in which the beating took place formed the strongest evidence that the accused did not realise that it was anything out of the ordinary or might produce serious consequences. If they had thought for a moment that there was any danger of serious consequences ensuing, it would have been easy for them to have taken her into her room and taken steps to stifle her cries. No less than five witnesses outside the family witnessed the beating, and though they say they remonstrated, it is clear that they did not attach

any great importance to it at the time. According to their ideas, it was quite in the ordinary course that a girl who spilt valuable oil should get a beating from that domestic tyrant, her mother-in-law. Then, again, the fact that the accused himself without any delay sent a telegram to the girl's father calling him to the funeral and saying that it was being kept waiting for him, is strongly against the theory that there had been any deliberate attempt to do the girl to death. The witness Nanwan says he suggested to the accused that he should send the telegram, but this does not do away with the inference. It may be argued that the telegram was sent to save appearances, but, if so, one would expect that either a letter would be sent or the telegram would be delayed until it was no longer possible for the girl's father to arrive in time to see the body. Kallu took the singular course of wiring to find out what was the disease of which the girl died, waited for a reply, and only left Delhi for Meerut on the following day, when he arrived after the funeral.

No argument can be based on the fact that the accused put in a false defence. Ramzano had at any rate beaten the deceased severely on the day before her death and thereby committed an offence punishable with imprisonment. The accused knew that they were in for trouble and took the common course of denying every fact which might tell against them. I can find no evidence, medical or other, to support the view that the ill-treatment of the accused would certainly have terminated in her death from natural causes if the accused had not accelerated it by beating her. The local witnesses do not say it; there is nothing in their evidence to show that they regard her life as in any way in danger. There is not a word in the Civil Surgeon's evidence to show that the state of under-nutrition in which he found the body was sufficiently grave to be likely to produce fatal results apart from this particular beating. Had there been any such evidence, there might have been a reasonable case for conviction on the graver charge: without it there is none.

This brings me to the Civil Surgeon's evidence. It is to be regretted that the Civil Surgeon was not re-called in the Sessions Court to clear up one or two points which were left vague in his evidence before the Committing Magistrate. He states that when he examined the body about two days after the death there were no wounds on it, but there were abrasions or bruises three or four days old on the chin, forehead, cheek, breast-bone, back and thighs. The marks on the back were due to a stick, the other marks might be due either to a stick, or a fist. The blow on the forehead must have been struck with considerable force. The body was very emaciated. The heart was unusually small. The kidneys were small and there was hardly any fat in the abdominal wall. These facts indicated ill-nourishment extending over several months, possibly a year or more. Both lungs were congested and chronically inflamed. This might in the Civil Surgeon's opinion have been caused by starvation, exposure and overwork, but he does not state, and apparently was not asked, whether it was likely to have been so caused. Congestion of the lungs may be due to so many causes that it would not be fair to assume that it was due to under-nutrition unless the Civil Surgeon indicates at least a preponderating probability in this direction. As I have already said, the Civil Surgeon does not state that the lack of nutrition had reached a point which was in itself dangerous, or which suggested a deliberate attempt to starve the girl.

I find, therefore, that the evidence does not establish an offence under s. 304, still less under s. 302, against either accused. I agree with Mr. Justice Ryves in convicting *Musammat* Ramzano of an offence under s. 323 of the Indian Penal Code and in imposing the maximum penalty under that section.

Against the male accused I find that no offence is established. He never struck the girl at all. He said nothing to encourage his wife to do so. Indeed, even on the former occasions on which the girl was beaten the witnesses are unanimous that it was always her mother-in-law who struck her and never her father-in-law. The only fact alleged against Chanda is that he was sitting near by when the beating was inflicted and that he did not stop it. This is not sufficient to constitute an abetment. If it were so, every spectator of an assault, unless he actively interfered, would be an accomplice and, therefore, a tainted witness. To constitute abetment there must be under s. 107 of

the Indian Penal Code either (1) instigation, (2) conspiracy or (3) actual aid either by an act or an illegal omission.

Although it may be a moral duty of a person who sees a second person beat a third, to interfere, it is not a legal duty in the sense that the omission to do so is punishable. A private person is entitled to interfere to prevent the commission of an offence, but he is not in general legally bound to do so, and it is only in the case of a non-cognizable and non-bailable offence that he is entitled of his own motion to arrest the offender. I might hesitate to differ from my learned brothers on a point on which they are apparently agreed, but that under s. 429 of the Cr. P. C., the responsibility for the final decision rests with me, and it is obviously impossible for me to convict an accused against whom there is no evidence that he either committed the offence charged or abetted it. In the view taken by the learned Chief Justice the question did not arise, as if there was a conspiracy both accused were equally guilty. In the judgment of Ryves, J., the position of the male accused has not been considered in detail.

I accordingly allow the Government Appeal against *Musammat* Ramzano to this extent that I convict her of an offence under s. 323 of the Indian Penal Code and sentence her to one year's rigorous imprisonment. Against the accused Chanda the appeal is dismissed and he will be set at liberty.

K. S. D. *Appeal partly accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 297 1924.

August 18, 1924.

Present:—Mr. Justice Mukerji.

MUHAMMAD HASAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 19 (f)—Temporary possession of gun without license—Offence, whether complete.

A person found in possession of a gun belonging to his father shooting birds with it is guilty of an offence under s. 19 (*f*) of the Arms Act.

Prabhat Chandra Chowdhry v. *Emperor*, 35 C. 219; 12 C. W. N. 272; 7 C. L. J. 242; 7 Cr. L. J. 112; 3 M. L. T. 190, *Queen-Empress* v. *Tota Ram*, 16 A. 276; A. W. N. (1894) 82; 8 Ind. Dec. (N. S.) 179, distinguished.

Criminal revision from an order of the Sessions Judge, Azamgarh, dated the 7th March 1924.

Mr. *Mukhtar Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by one Muhammad Hasan who has been convicted by a learned Magistrate under s. 19 (*f*) of the Arms Act 1878. He was sentenced to a fine of Rs. 200 by the Magistrate. On appeal the learned Sessions Judge upheld the conviction but reduced the sentence to a fine of Rs. 75.

In appeal it is contended first that the facts found do not make out a case under the section under which the applicant has been convicted and secondly that the sentence is still too severe.

The facts found are these:—The applicant's father holds a license for a gun. The license which has been issued to him does not mention that he is entitled to hand over his gun to any retainer. The applicant took out the gun of his father for the purpose of shooting birds and it appears that he shot at least one. While thus possessing the gun near a pond, he was found out by an officer of the Police and the Tahsildar. It has been urged for the applicant that his possession was a temporary one and was one which was not contemplated by law. Two cases have been cited before me, *viz* the case of *Prabhat Chandra Chowdhry* v. *Emperor*(1) and *Queen Empress* v. *Tota Ram* (2). In the first case the gentleman who was entitled to the use of the gun was away from the country and the gun was in the house. At the actual moment of its use a servant of the owner had in his hands while a mad dog had entered the house. The person charged with the offence in the aforesaid case took the gun from the servant's hand and fired it in order to kill the mad dog. He was convicted of the offence under s. 19 (*f*) of the Arms Act. It is clear that the use of the gun for just a minute or two was held to be no such possession as was contemplat-

(1) 35 C. 219; 12 C. W. N. 272; 7 C. L. J. 242; 7 Cr. L. J. 112; 3 M. L. T. 190.

(2) 16 A. 276; A. W. N. (1894) 82; 8 Ind. Dec. (N. S.) 179.

ed by law. On the facts, that case is clearly distinguishable from the case before me. In the case reported as *Queen Empress* v. *Tota Ram* (2), a servant was taking his master's gun to a gunsmith for repairs. It was held that the possession was not such as was contemplated by law. In this case the applicant had deliberately possessed himself of the gun and had it under his control for the time being. There is no doubt that his possession was temporary, but it depended on the will of the applicant as to how long he would possess the gun. It may be that he intended to be out for shooting with the gun for the whole day. In my opinion there is no escaping from the clear words of the section, *viz*: "Has in his possession or under his control an arm.....in contravention of the provisions....." I think on the whole that the conviction is right.

As regards the sentence, it does appear to me that it is still excessive. The spirit of the law was not contravened but certainly the letter has been contravened. I reduce the sentence to a fine of Rs. 25 only.

K. S. D.

Sentence reduced.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 84 OF 1924.

November 5, 1924.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

AUGUSTIN MANWAL PEREIRA—COMPLAINANT

versus

DUMING PASCOL DEMELLO—ACCUSED

Criminal Procedure Code (Act V of 1898), s. 250 (3)—Order of compensation—Appeal, when competent.

Section 250 (3), Cr. P. C., means that whenever a complainant or informant has been ordered under sub-s. (2) to pay compensation exceeding fifty rupees, the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50.

Criminal reference made by the Sessions Judge, Thana.

Mr. *R. J. Thakor*, for the Complainant.

Mr. *G. N. Thakor*, instucted by Messrs. *Daphtary*, *Farreira* and *Divan*, for the Accused.

JUDGMENT.—In this case the complainant was called upon to show cause why he should not pay compensation to the accused, under s. 250, Cr. P. C. An order was thereafter made that as the complainant was unable to show cause, he should pay Rs. 20 to each of the accused Nos. 1, 2, 3 and 4, Rs. 40 to No. 6 and Rs. 100 to No. 5. An appeal was filed under sub-s. (3) of s. 250. The learned Sessions Judge appears to have been of opinion that the appeal was only competent as regards the Rs. 100 awarded as compensation to accused No. 5, and that he could not deal with the amounts awarded to the other accused because they were under Rs. 50. Accordingly he referred the case to this Court, asking this Court to pass a similar order with regard to the compensation awarded to the other accused as was passed by him in the case of accused No. 5. We think that the Sessions Judge has placed a wrong construction on s. 250, sub-s. (3) as in our opinion that sub-section means that whenever a complainant or informant has been ordered under sub-s. (2) to pay compensation exceeding fifty rupees, the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50. To put the construction suggested by Counsel for the accused on this sub-section would inevitably cause the difficulty which has resulted from the present decision of the Sessions Judge.

We think, therefore, that in a case where the total compensation awarded is over Rs. 50, the complainant is entitled to appeal. The papers can be returned to the Sessions Judge with this expression of our opinion that he has jurisdiction to deal with the whole of the order awarding compensation.

K. S. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 113 OF 1923.

July 21, 1924.

Present: Mr. Justice Sulaiman and Mr. Justice Mukerji.

JWALA PRASAD—DECREE-HOLDER—APPELLANT

versus

Sheikh CHUTTAN AND ANOTHER—OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XI, r. 4—Execution of decree—Order against person not party—Appeal, whether lies—Order against Receiver—Second appeal, whether competent.

No appeal lies against an order passed in execution proceedings against a person who is not a party to those proceedings. [p. 161, col. 2.]

An order passed against a Receiver directing him to pay back the amount realised by him from the sale of the attached property is appealable but no second appeal lies in such a case. [*ibid.*]

Letters Patent appeal against a judgment of Mr. Justice Daniels, in Execution Second Civil Appeal No. 1051 of 1922 dated the 5th April 1923 and reported as 73 Ind. Cas. 602, reversing that of the District Judge, Bareilly dated 13th of May 1922.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a curious case in which much confusion has been caused owing to the circumstance that an execution case as well as a regular suit relating to the same crops were before the same officer.

Originally Jwala Prasad brought a suit against Sewa Singh and others impleading one Chuttan also. He obtained a decree against the other persons, but Chuttan was exempted. He put in an application for attachment of certain crops and the attachment was made and the crops thus came under the custody of the Court. Chuttan instead of taking objections in the execution department filed a regular suit in the same Court for a declaration that the crops did not belong to the judgment-debtor. While that suit was pending, an application was made by Chuttan praying that the crops being perishable property should be handed over to some other person for realisation of their price. It is not quite clear whether this application was made in the execution department or in the regular suit: though it is obvious that it ought to have been made on the execution side. But from what can be gathered from the record it is possible that it was wrongly made in the regular suit. It has been assumed all along that the learned Munsif passed an order—that order itself is untenable—that Kalimuddin, the son of Chuttan, be entrusted with the crops and this fact is admitted by Kalimuddin. He sold the crops. By the time he had realised the amount it appears that Chuttan's suit was decreed by the First Court. On the strength of the First Court's decree he paid half the amount to Chuttan and the other half to the tenants. Subsequently the decree-holder applied to the Court that Kalimuddin be called upon to refund this amount. The Court said that as matters then stood Chuttan had already obtained a decree in his favour and Kalimuddin could not be called upon to refund the amount.

After this Chuttan's suit was dismissed in appeal. Moved by the decree-holder the Execution Court on the 1st of February 1920 ordered that Chuttan and Kalimuddin should pay the sum of Rs. 1,000, which it found to be the value of the crops entrusted to Kalimuddin, in Court and in default the money to be recovered in the way in which execution of a decree takes place.

On appeal to the District Judge this order was affirmed. On the second appeal to the High Court a learned Judge of this Court has allowed the appeal and set aside the order altogether directing that the appellant Jwala Prasad should seek his remedy by a separate suit.

It is necessary to consider the position of the two persons Kalimuddin and Chuttan separately.

So far as Kalimuddin is concerned he was no party to the execution proceedings nor was he a party to the regular suit. If he be treated as altogether a stranger no appeal lay from the order passed by the Munsif directing him to refund the amount. It is possible, however, to treat Kalimuddin as a Receiver appointed by the Court under O. XL of the C. P. C. In that case the order against him to pay back the amount would be an order under O. XL, r. 4 which would be appealable as an order, but even in that view no second appeal would lie to this Court. It is, therefore, quite clear that no appeal lay to the learned Judge of this Court on behalf of Kalimuddin.

As regards Chuttan, there is this thing to be said that he was both a party to the execution proceedings, though exempted from the decree and also in the original suit, but when Kalimuddin was entrusted with the crops he became an officer of the Court. If Kalimuddin wrongly paid any part of the amount to Chuttan the proper person to

make a refund of it is Kalimuddin and not Chuttan. I, therefore, think that the view of the learned Judge of this Court that there should have been no order against Chuttan is quite correct. But the order against Kalimuddin could not have been interfered with in second appeal.

Mukerji, J.—I entirely agree with what has fallen from my learned brother. I would point out only one matter and it is this. Chuttan was a party to the decree although the decree passed was in his favour. Having been exempted from the decree he did not cease to be one of the parties whose remedy in the matter of execution lay in the execution department. His suit, therefore, which was brought in the same Court as was seized of the execution was virtually an application under s. 47 of the C. P. C. An appeal lay from the order of the Court in Chuttan's application or suit and the decision of the District Judge was quite within his jurisdiction. In this view it is really immaterial whether the order which appointed Kalimuddin the Receiver of the property was on the original side or in the execution department. In the eye of the law the whole matter was before the Court in the execution department and the order must be treated as having been passed in the execution department. In this view the remarks of the learned Judge of this Court that a separate suit will be necessary to recover the value of the goods from Kalimuddin lose their force.

By the Court.—We accordingly allow the appeal and modify the decree passed by the learned Judge of this Court and uphold the order passed by the Munsif against Kalimuddin but set it aside so far as it affected Chuttan.

Having regard to the special circumstances of the case we direct that the parties should bear their own costs.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 192 OF 1920.

January 29, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

MANMATHA PAL CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

SURENDRA NATH BOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Excess lands in occupation of tenant—Back rent, claim for.

In respect of excess lands in the occupation of a tenant, the landlord is entitled to recover what is called back rent; in other words, the landlord is entitled in any litigation to have an enquiry as to the exact area in the occupation of the tenant and the rent recoverable in respect thereof for the years in suit. [p. 163, col. 1.]

Assanullah Bahadur v. *Mohini Mohan Das*, 26 C. 739; 13 Ind. Dec. (N. S.) 1072, *Jagannath Manjhi* v. *Jumman Ali Patwari*, 29 C. 247 and *Ejel Mullick* v. *Felai Mullick*, 28 Ind. Cas. 498; 21 C. L. J. 309, followed.

Appeal against a decree of the Subordinate Judge, Nadia, dated the 18th June, 1920.

Babus *Amarendra Nath Bose* and *Rama Prosad Mookerjee*, for the Appellants.

Babu *Pyari Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for arrears of rent. We shall refer briefly to the antecedent history so as to make intelligible the points in controversy between the parties.

On the 22nd August 1913 the plaintiffs sued the defendants for rent of the disputed property for the years 1315 to 1318. That suit was decided by the Subordinate Judge on the 27th of May 1916. The decree was modified on appeal by the District Judge on the 3rd December 1918. On second appeal to this Court the decree was further modified on the 22nd July, 1921. In the meanwhile on the 21st August, 1914, the plaintiffs instituted another suit against the defendants for rent from the *Chaitra* instalment of 1318 to the *Ashar* instalment of 1321. That suit was decreed and the decree was apparently satisfied. Subsequently on the 14th April, 1919, the plaintiffs instituted the present suit for recovery of what is called excess rent in respect of the period covered by the second suit as also the rent which has accrued due from 1322 to 1325. The Subordinate Judge decreed the claim on the 28th June 1920. That decree has been assailed before us substantially on three grounds, namely,

first, that the rent in respect of the period not covered by the previous litigation should be decreed at the rate fixed by the High Court in the first suit; secondly, that the claim in respect of the period covered by the second suit is not maintainable; and thirdly, that cesses have been decreed at a rate higher than that leviable.

As regards the first point, there is clearly no room for serious controversy. In the first suit the plaintiffs invited the Court to adjust the rent payable in respect of the lands in the occupation of the defendants. It was found that land had accreted to the original tenancy and that grounds existed for variation in the rate of rent. The ultimate result was that the rent was fixed at Rs. 917-13-0 by this Court in respect of all the lands in the occupation of the tenants. It is plain that for the period now in suit, that is, from 1322 to 1325 which is subsequent to the time of commencement of the adjusted rate as determined by the decree of this Court, the plaintiffs are entitled to a decree at that rate only. The decree will be varied accordingly.

As regards the second point, the plaintiffs are in a real difficulty. When they instituted the second suit the first suit was already in progress. In the first suit they had prayed for adjustment of rent, that is, rent in respect of the excess land in the occupation of the tenants as also for settlement of rent at a higher rate than that paid before. In the second suit, however, they did not repeat this claim, and satisfied themselves with a demand for rent in respect of the original lands of the tenancy at what is called the old rate. In the plaint they stated expressly that they reserved the right for settlement of rent of the excess quantity of land, and, we gather, also for recovery of rent at the enhanced rate. No order, however, allowing such reservation was made by the Court. Consequently, the question arises, whether the plaintiffs are entitled to claim, in respect of the period covered by the second suit, a sum in addition to what they recovered in that litigation. We are clearly of opinion that the claim is barred. It is now well-settled, that in respect of excess lands in the occupation of a tenant, the landlord is entitled to recover what is called back rent; in other words, the landlord is entitled in any litigation to have an enquiry as to the exact area in the occupation of the tenant and the rent recoverable in respect thereof for the years in suit. This was decided by this Court in the cases of *Assanullah Bahadur* v. *Mohini Mohan Das* (1), and *Jagannath Manjhi* v. *Jumman Ali Patwari* (2) and was re-affirmed in *Ejel Mullick* v. *Felai Mullick* (3). Consequently, in respect of the excess land, the plaintiffs were competent to put forward a claim in the second suit. This they omitted to do. They might also have claimed rent, in respect as well of the original land as the additional land, at the higher rate, in the same way as they had done in the first suit. The decree in the second suit would then have been dependent upon the result of the first litigation. We are accordingly of opinion that the claim in respect of excess land and the claim at the enhanced rate for the period covered by the second suit is not maintainable. In this view, it is not necessary to consider the question of limitation which has been raised by the appellant and sought to be supported by the decision of the Judicial Committee in *Huro Pershad Roy* v. *Gopal Das Dutt* (4), as explained in *Hurro Kumar Ghose* v. *Kali Krishna Thakur* (5). Nor need we consider the precise effect of the decision of the Judicial Committee in *Hem Chandra Chowdhury* v. *Kali Prosanna Bhaduri* (6); but this much is incontrovertible that during the pendency of the first suit where a claim was made for adjustment of rent in respect of additional land, the claim for assessment of rent at the enhanced rate could not possibly be taken to have suspended the assertion of a similar claim in respect of the subsequent period covered by the second suit.

As regards the third point, we find that there are no materials on the record which can enable the Court to hold that cesses cannot be recovered at the rate claimed in the plaint. In view of the comparatively small sum in controversy, we do not think it desirable to remand the case for further enquiry into this point. The decree will consequently stand in respect of cesses for the period from 1322 to 1325 as allowed by the Subordinate Judge. But this will not be taken to preclude an investigation into

(1) 26 C. 739; 13 Ind. Dec. (N. S.) 1072.
(2) 29 C. 247.
(3) 28 Ind. Cas. 498; 21 C. L. J. 309.
(4) 9 I. A. 82; 9 C 255; 12 C. L. R. 129; 6 Ind. Jur. 546; 4 Sar. P. C. J. 363; 4 Ind. Dec. (N. S.) 820 (P. C.).
(5) 17 C. 251; 8 Ind. Dec. (N. S.) 705.
(6) 30 C. 1033; 8 C. W. N. 1; 30 I; A. 177; 8 Sar. P. C. J. 529 (P. C.)

the question of the rate of cesses recoverable in respect of any subsequent period.

The appellants are entitled to their costs in this Court. We assess the hearing fee at three gold *mohurs*.

K. S. D. *Appeal allowed.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE NO. 58 OF 1924.

November 14, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

SIR *Saiyid* ALI IMAM—PETITIONER

versus

EMPEROR THROUGH THE INCOME TAX OFFICER—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 4—Receipt of income in British India, what amounts to—British subject employed in Native State—Salary, whether taxable—Salary paid into Bank in Native State and subsequently transferred to British India, whether assessable.

Salary earned by a British subject outside British India is not ordinarily chargeable with income tax under the Income Tax Act. [p. 165, col. 2.]

The receipt of income referred to in s. 4 (1) of the Income Tax Act refers to the first occasion on which the recipient gets the money under his own control, and where such first receipt is not within British India the money cannot be said to have been received within British India. [p. 166, col. 2.]

The Income Tax Act contemplates that income accruing outside British India shall not be taxable unless (1) it is received in British India or is deemed to accrue or arise or to be received in British India, or (2) unless it constitutes the profits and gains of a business received or brought into British India within the meaning of s. 4 (2) of the Act. [p. 167, col. 2; p. 168, col. 1.]

The assessee was employed by H. E. H. the Nizam of Hyderabad at a fixed salary for a period of five years. Before the expiry of the period, however, the assessee resigned his post and returned to British India. Under the orders of H. E. H. the Nizam the balance of his salary for the remaining period of five years was directed to be paid to him through the Imperial Bank of India. The Manager of the Bank at Hyderabad instructed the Manager of another branch of the Bank in British India to pay a certain sum to the assessee in British India and to obtain formal receipts from him. The latter Bank obtained the necessary receipts from the asseessee, who instructed the Bank to the effect that the money may be paid into his account with the branch of the Bank at Hyderabad subject to further instructions. The money was paid by the Government of H. E. H the Niazm into the assessee's account with the Imperial Bank of India at Hyderabad and was some time afterwards transferred to the assessee's account with another branch of the Bank in British India under his instructions:

Held, that the money had been received by the assessee within the meaning of s. 4 (1) of the Income Tax Act at Hyderabad and not in British India and was not, therefore, liable to assessment under the Act. [p. 167, col. 2.]

Case-law discussed.

Reference made under section 66 (1) of the Income Tax Act by the Commissioner of Income Tax.

Mr. *K. P. Jayaswal*, for the Petitioner.

Government Pleader, for the Crown.

JUDGMENT.

Miller, C. J.—This matter comes before us on a Reference made by the Commissioner of Income-tax under s. 66 (1) of the Income Tax Act, 1922. The question for our decision, as stated by the Commissioner, is "Whether, when an assessee was appointed to a salaried post for five years (though without any contract or agreement) and was allowed to resign before the expiry of five years and was granted an honorarium in a lump sum equal to the salary which he would have drawn if he had served for the whole five years, this sum is liable to taxation". The question thus stated in somewhat general terms must be answered with reference to the particular facts found in the case. Two points were argued on behalf of the assessee, *first*, that the sum so paid was not salary within the meaning of s. 7 (1) of the Income Tax Act, 1922, and *secondly*, if this should be decided against him, that the sum which was directed by the employer to be paid to the assessee through the Patna branch of the Imperial Bank of India, but was first paid to the Hyderabad branch of that Bank and from there transferred to the assessee's account at Patna is to be regarded as having been received at Hyderabad and not in British India. It will be convenient to deal with the second point first.

The assessee, Sir Ali Imam, according to the facts found was offered and accepted the post of President of the Executive Council of H. E. H. the Nizam of Hyderabad for five years on a salary of Rs. 7,000 per month. His employment began on the 20th August 1919. After serving for just over three years, namely, on the 4th September 1922, he resigned his office. His resignation was accepted and he made over charge of his office on September 6th 1922 to his successor. Subsequently on the same day the Nizam issued a *firman* in the following words:—"As owing to certain reasons Sir Ali Imam has asked to be relieved of his duties I have accepted his resignation. I take this occasion to express my appreciation of the loyal devotion with which he has performed the duties of his high office

during the past three years." He then directs Sir Faridoon Mulk to act as his successor until permanent arrangements are made for filling up the appointment. The document then continues as follows "I also hereby order that payment should be made to Sir Ali Imam through the Imperial Bank of India of the honorarium at the rate of seven thousand B. G. rupees per mensem due to him for the two years which will remain to be completed out of his term of office of five years and a formal receipt obtained". Then follow certain directions as to minor arrangements connected with the President's office, which are not material, and the document ends thus:—Ordered that this my *firman* be read out by Sir Faridoon Mulk on Thursday the 14th of the present month of *Moharram* in the Executive Council in the presence of the members, and that it should be published immediately by notification in a *Jarida* Extraordinary". On the evening of the 6th September Sir Ali Imam left Hyderabad for Patna where he arrived a day or two later. On the 8th September the Finance Member of the Nizam's Government asked the Agent of Hyderabad branch of the Imperial Bank to arrange to pay the sum in question, which amounted to 1,63,333-5-4 to Sir Ali Imam through their Patna branch and to take a formal acknowledgment from him. On the 9th September the Agent of the Hyderabad branch wrote to the Agent of the Patna branch of the Bank enclosing duplicate receipts to be signed by Sir Ali Imam and requesting him to pay the amount named to Sir Ali Imam and return the receipts signed in duplicate. On the 13th September the Patna branch sent the receipts to Sir Ali Imam who was at that time in Patna requesting him to sign and return the same. The receipts were in the following form "Received from the Imperial Bank of India the sum of Rupees one lac sixty three thousand three hundred and thirty three, annas five and pies four only, being amount placed at my disposal by Imperial Bank of India Hyderabad Deccan under instructions from the Finance Member, H. E. H. the Nizam's Government, *vide* their letter No. 555, dated 8th September, 1922, being my pay for the unexpired portion of my term." The receipts were duly signed by Sir Ali Imam who on the 16th September enclosed them with a letter to the Patna branch of the Bank requesting them to instruct the Hyderabad branch to place the money to his credit at the Hyderabadbranch until further instructions. On the same day the Patna branch wrote to Hyderabad forwarding a copy of the letter received requesting the money to be placed to the assessee's credit with the Hyderabad branch of the Bank. They added in that letter that no entry had been passed at the Patna branch which I take to mean that the money had not been credited to Sir Ali Imam by any book entry at the Patna branch. About a fortnight later on the 30th September 1922 Sir Ali Imam wrote to the agent of the Imperial Bank of India at Hyderabad to transfer the balance standing to his credit at their branch to his account with the Patna branch. On the 4th October the Hyderabad branch instructod the Patna branch to place the sum in question to Sir Ali Imam's credit in Patna which was accordingly done. It is conceded by the Government Pleader on behalf of the Commissioner of Income-tax that salaries earned by a British subject outside British India are not ordinarily chargeable under the Indian Income Tax Act and it is not contended that the income earned by Sir Ali Imam as President of the Nizam's Executive Council before his resignation was taxable. Section 1 of the Act which limits the area to which the act applies provides in sub-section (2) as follows:—"It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the dominions of Princes and Chiefs in India in alliance with his Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor General in Council in that behalf, and to all other servants of His Majesty in those dominions." It appears, therefore, that although the Act extends to certain classes of persons within the dominions of the Ruling Princes and Chiefs in India, the assessee was not one of the persons named in the sub-section. He was neither in the service of the Government of India or of the local authority there mentioned nor was he a servant of His Majesty in those dominions. It was the opinion, however of the Commissioner of Income-tax that, in the circumstances which I have already referred to, the sum in question must be taken as having been received by

the assessee in British India within the meaning of s. 4 (1) of the Act. That section provides as follows:—'Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in s. 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India." There are two cases and only two referred to in the Act where profits received outside British India are deemed to have been received in British India. The first appears in s. 4 (2) and relates to the profits and gains of a business accruing without British India to a person resident within, where such profits or gains are brought in within three years of receipt. The second appears in section 11 which provides that professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be professional earnings which are taxable under s. 6. Neither of these provisions apply to the present case nor was it so contended. The sum in question in the present case was neither the profits of a business nor professional fees. The question for determination, therefore, is whether in the circumstances stated the sum in question can be said to have been received in British India within the meaning of s. 4 sub-s. (1). It should be stated, as would appear from the correspondence which has been printed with the record, and indeed it is not disputed, that at all material times the assessee as well as the Nizam had an account with the Hyderabad branch of the Imperial Bank of India although this fact is not specifically mentioned in the statement of the case. The opinion of the Commissioners of Incom tax is expressed thus: "In my opinion the sum is taxable, because it was really received by the assessee in British India on September 16th. The instructions of the Finance Member show the intention of the employer and the assessee's acknowledgment, signed at Patna, constitutes a receipt in British India. The effect of his instructions of September 16th was to transfer the amount back to Hyderabad, if he had not given these instructions, the amount would clearly have remained at Patna." This passage quoted from the case submitted is merely an expression of opinion. It is not conclusive as a finding of fact. The fact found in the earlier part of the case is that the sum was first paid to the Hyderabad branch and from there transferred to the assessee's account at the Patna branch. The question for our decision is as to the meaning which should be given to the word "received" in s. 4 of the Act and it is still open to us to consider that question notwithstanding that in the opinion of the Income Tax Commissioner the money was received in British India on September 16th. It is true that the money was eventually received by the assessee in British India in the sense that it was transferred from his account at Hyderabad to his account at Patna but the receipt of the income referred to in s. 4 must, in my opinion, refer to the first occasion upon which the receipient got the money under his own control. This question was considered by the Full Bench of the Lahore High Court in 1922, See *Sundar Das* v. *Collector of Gujrat* (1) where it was held, under the Income Tax Act of 1918, s. 3 sub-s. (1), that income earned and received in British Baluchistan (which at that time was exempt from the operation of the Act except as to salaries paid by Government) and subsequently brought into or transmitted into the Punjab was not liable to be assessed to income-tax, not having been received in the Punjab within the meaning of sub-s. (1) of s. 3 of the Act of 1918 which is similar in terms to s. 4, sub-s. (1) of the Act of 1922. The same view was also taken by a Special Bench of the Madras High Court in the following year in the case of *Secretary Board of Revenue (Income Tax) Madras* v. *Ripen Press and Sugar Mills Co.*, (2) where the decision of the Lahore High Court was approved and followed. I entirely agree with the judgments pronounced in those cases.

It remains to consider, however, upon the facts stated at what period of time did the assessee actually receive the money. The Commissioner was of opinion that the instructions of the Finance Member of the Hyderabad State to the Hyderabad branch of the Bank to arrange for payment to the assessee through their Patna branch shewed the intention of the employer, but the question for determination is not what the intention of the employer was but what the actual fact is. Incidentally I may remark that it was of no moment to the emp-

(1) 77 Ind. Cas. 616; 3 L. 349; (1923) A. I. R. (L.) 14.
(2) 77 Ind. Cas. 621; 24 M. 706; 44 M. L. J. 523; 17 L. W. 589; (1923) M. W. N. 321; 32 M. L. J. 306; (1923) A. I. R. (M.) 574.

loyer whether the money was placed to the assessee's credit at Hyderabad or at Patna but the Commissioner further considers that the assessee's acknowledgment signed at Patna constitutes a receipt in British India. The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received but it is not conclusive. Such receipts are frequently demanded before actual payment of the money and there can be no question that in the present instance nothing was credited to the assessee in the books of the Patna branch of the Bank up to the time the acknowledgment was signed on the 16th September or at any subsequent time until after the money had been placed at the credit of the assessee in his account with the Hyderabad branch. The Commissioner had expressed the view that the effect of the instructions given by the assessee to the Patna branch of the Bank on the 16th September was to transfer the amount back to Hyderabad and that otherwise it would have remained at Patna. This argument appears to me, with due respect to the Commissioner, to be fallacious. There was nothing to transfer. The money had not been paid and no credit entry in favour of the assessee had been made in the books of the Patna branch of the Bank. The fact is that sometime in September the money was first credited to the account of Sir Ali Imam in Hyderabad and was subsequently by a letter dated the 4th October transferred from the branch of the Imperial Bank there to the Patna branch. In this state of affairs I have no hesitation in finding that the sum in question which it is sought to charge was received by the assessee at Hayderabad outside British India and that s. 4, sub-s. (1) of the Act has no application.

The further point was also argued by the assessee *viz.* that even if the money was received at Patna it was not taxable as salary within the meaning of s. 7 (1) of the Act. That section provides as follows:—"The tax shall be payable by an assessee under the head 'salaries' in respect of any salary or wages, any annuity, pension or gratuity and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any [illegible] public body or association, or by or [illegible] of any private employer". It was [illegible] on the authority of the English cases of *Turnne*[illegible] v. *Seymour*, *Cowe*[illegible] of *Duncan's Tr*[illegible] case *venue* (5) that [illegible] *Rade* in circumstances such [illegible] to the holder of an office [illegible] reason of his office or employment [illegible] cases were decided under the Income Tax Acts of 1842 and 1853 [illegible] is not similar to that [illegible] the wording [illegible] Income Tax Act of the Indian [illegible] Indian Income [illegible] The section of the [illegible] includes [illegible] is very wide and [illegible] sions, perquisites or profits [illegible] of or in addition to any salary or wages. The question whether the payment made in the present case was made as a gratuity in addition to the assessee's salary or was merely in the nature of a testimonial or mark of affection or respect to the recipient raises points of some difficulty, but in view of the opinion already expressed on the other point it is unnecessary to decide this question for even assuming, without deciding, that the sum received was salary within the meaning of s. 7 (1) of the Act, it was not received in British India within the meaning s. 4 (1) and is, therefore, not chargeable to income tax.

The answer to the question upon which our decision is asked should, in my opinion, be in the negative with reference to the facts found in the case. The petitioner is entitled to his costs including the costs incidental to printing the paper-book. The hearing fee is assessed at Rs. 300.

Mullick, J.—I agree. I think the reference must be decided in favour of the petitioner on the ground that the income was neither received in British India nor such as can be deemed to have been so received. If it be urged that it is sufficient that the money was brought into British India, the reply is that it is not permissible to base an argument on the English Acts and on the case of *Gresham Life Assurance Society* v. *Bishop* (6). The Indian Act seems clearly to contemplate that income accruing outside British India shall not be taxable unless (1) it is received in British India or is deemed to accrue or arise or to

(3) (1889) 22 Q. B. D. 150; 58 L. J. Q. B. 131; 60 L. T. 332; 37 W. R. 254; 53 J. P. 148.

(4) (1920) 1 K. B. 500; 89 L. J. K. B. 459; 122 L. T. 465; 64 S. J. 259; 36 T. L. R. 155.

(5) (1909) S. C. 1212.

(6) (1902) A. C. 287; 71 L. J. K. B. 618; 66 J. P. 755; 50 W. R. 593; 86 L. T. 693; 19 T. L. R. 626.

(8) 9 [illegible]

(9) 34 [illegible]

(10) 54 Ind. [illegible]

the assessee in British India, or (2) unless meaning of s. 4 (1) of a profits and gains or tion provides as follows: brought into British after provided, the meaning of s. 4, cl. (2) all income, however the English Law may or comprised subject I think the Indian Act derived, that the income earned by the in British Hyderabad should have been visions received in British India and think it is clear that it was not be received nor is there any provision in two cases s. 11 by which it Act where to have been received in India are deemed to be a reason of which it can be deemed. The fee been received in British India to the other not being profits and gains arising from business it was not sufficient merely to bring in the money after receipt.

With regard to the question whether the income was derived from salaries, I agree that it is unnessary to decide the point.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 36 OF 1922.

January 29, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

NIRODE CHANDRA BANERJEE AND OTHERS—*Pro forma* DEFENDANTS--APPELLANTS

versus

PROFULLA CHANDRA BANERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96 (3), O. I, r. 10—Compromise decree—Appeal, when competent—Addition of parties—Court, discretion of.

When a consent decree has been made as between some of the parties to a suit, the other parties, who have not assented to the compromise, are entitled to appeal against the decree, provided they have been prejudicially affected thereby. [p. 169, col. 1.]

Nityamoni Dasi v. *Gokul Chandra Sen*, 9 Ind. Cas. 210; 13 C. L. J. 16, *Gobind Chandra Sardar* v. *Bhagabat Sardar*, 27 Ind. Cas. 242, *Loke Nath Singh* v. *Gaju Singh*, 31 Ind. Cas. 426: 22 C. L. J. 333; 20 C. W. N. 178, *Bradish* v. *Gee*, (1754) 1 Kenyon 73; 1 Ambler 229; 96 E. R. 920, *Asad Reza* v. *Whaidunnessa Begum*, 57 Ind. Cas. 70; 30 C. L. J. 231, *Biraj Mohini Dasi* v. *Srimati Chinta Moni*, 5 C. W. N. 877, *Radha Kissen Khetry* v. *Lakshmi Chand Jhawar*, 56 Ind. Cas. 541; 31 C. L. J. 283; 24 C. W. N. 454, and *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*, 9 C. W. N. 584, referred to.

The Court has very wide powers, under the C. P. C., in respect of addition or transfer of parties This discretionary power must be exercised in such a way as to achieve the ends of substantial justice. [*ibid*]

Brojendra Kumar Das v. *Gobinda Mohan Das*, 34 Ind. Cas. 185; 20 C. W. N. 752, and *Debendra Narayan Singh* v. *Narendra Narayan Singh*, 54 Ind. Cas. 636; 30 C. L. J. 417; 24 C. W. N. 110, followed.

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 28th September, 1921.

Babus *Mahendra Nath Ray* and *Jyotis Chandra Sircar*, for the Appellants.

Babus *Dwarka Nath Chakrabutty*, *Ram Charan Mitra* and *Ram Chandra Majumdar*, Dr. *Dwarka Nath Miter*, Babus *Chamendra Nath Sen* and *Sarat Kumar Mitter*, for the Respondents.

JUDGMENT.—This is an appeal by the *pro forma* defendants against what purports to be a consent decree in a suit to set aside a sale held under Regulation VIII of 1819. On the 21st May 1920 the plaintiffs instituted the suit against the *zemindars*, the auction-purchaser, and two other persons, their co-sharers whom they described as *pro forma* defendants. On the 30th June 1921 the *pro forma* defendants, who were infants represented by their mother as their certificated guardian, applied to be transferred from the category of defendants to that of plaintiffs. No order was passed on this application. On the 27th September 1921 the case was settled as between the plaintiffs and the auction-purchaser. At that stage the *pro forma* defendants renewed their application to be made co-plaintiffs. The Court refused the application and made a decree on the basis of the compromise between the plaintiffs and the auction-purchaser. As a result of the decree so made, the suit was no doubt nominally dismissed as against the *pro forma* defendants; but there can be no question that their position was seriously affected thereby, because they had the same interest in the cancellation of the *putni* sale as their co-sharers, the plaintiffs, who by reason of the arrangement with the auction-purchaser decided to abide by the sale. The present appeal is directed against the consent decree.

A preliminary objection has been taken that the appeal is barred under s. 96 (3) of the C. P. C. 1908, which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. There is no force in this contention, because, as explained in *Nityamoni Dasi* v. *Gokul Chandra Sen* (1), *Gobind Chandra Sardar* v. *Bhagabat Sardar* (2), and *Loke Nath Singh* v. *Gaju Singh* (3), a person who is

(1) 9 Ind. Cas. 210; 13 C. L. J. 16.
(2) 27 Ind. Cas. 242.
(3) 31 Ind. Cas. 426; 22 C. L. J. 3[illegible] J. 306; (1923) A. 178.

not a party to the compromise, though a party to the suit, can appeal against the compromise decree which binds only those who are parties to the compromise. The bar applies only when the appellant has, by himself or through Counsel, consented in the Trial Court to the decree he seeks to impeach before the superior Tribunal: *Bradish* v. *Gee* (4), *Asad Reza* v. *Wahidunnessa Begum* (5), *Biraj Mohini Dasi* v. *Srimati Chimta Moni* (6), *Radha Kissen Khetry* v. *Lukhmi Chand Jhawar* (7). We hold accordingly that when a decree has been made as between some of the parties to a suit, the other parties who have not assented to the compromise are entitled to appeal against the decree, provided they have been prejudicially affected thereby. We may re-call in this connection that the case of *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (8), shows that even a defendant may appeal against a decree which nominally dismisses the suit against him but really prejudices his position. The preliminary objection must consequently be overruled.

As regards the merits, we are clearly of opinion that the application of the *pro forma* defendants to be made co-plaintiffs should not have been refused. As pointed out in the cases of *Brojendra Kumar Das* v. *Gobinda Mohan Das* (9) and *Debendra Naryan Singh* v. *Narendra Narayan Singh* (10), where the relevant authorities will be found reviewed, the Court has very wide powers, under the present Code, in respect of addition or transfer of parties. This discretionary power must be exercised in such a way as to achieve the ends of substantial justice. In the case before us if the order of refusal is allowed to stand, the only result will be that the *pro forma* defendants will be driven to a separate suit.

The result is that this appeal is allowed and the decree of the Court below dismissing the suit as against the *pro forma* defendants set aside. We direct that the *pro forma* defendants, the present appellants, be transferred to the category of plaintiffs with liberty to prosecute the suit on their own behalf. The appellants are entitled to their costs of this appeal.

K. S. D. *Appeal allowed.*

(4) (1754) 1 Kenyon 73; 1 Ambler 229; 93 E R. 920.
(5) 57 Ind. Cas. 70; 30 C. L. J. 231.
(6) 5 C. W. N. 877.
(7) 56 Ind. Cas. 541; 31 C. L. J. 233; 24 C. W. N. 451.
(8) 9 C. W. N. 584.
(9) 34 Ind. Cas. 186; 20 C. W. N. 752.
(10) 54 Ind. Cas. 636; 30 C. L. J. 417; 24 C. W. N. 110.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 78 OF 1921.
April 16, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

SRI RAM—PLAINTIFF—APPELLANT
versus
NAND KISHORE AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Parda nashin *lady—Gift, validity of—Onus* probandi.

When a person relies upon a deed of gift executed by a *parda nashin* lady, who is such in the true meaning of the term, that party must prove not only that the transaction is free from any pressure exercised to procure the making of the gift, but also that the donor thoroughly understood the nature and the effect of her action. [p. 171, col 1.]

Kamawati v. *Digbijai Singh*, 64 Ind. Cas. 559; 43 A. 525 at p. 530; 15 L. W. 1; 30 M. L. T. 47; 42 M. L. J. 87; 26 C. W. N. 490; 24 Bom. L. R. 626; 4 U. P. L. R. (P. C) 27; (1922) A. I. R. (P C.) 14; (1922) M. W. N. 3 6; 48 I. A. 381 (P C), followed.

Sajjad Hussain v. *Wazir Ali Khan*, 16 Ind. Cas. 197; 43 A. 455; 16 C. W. N 889; 23 M. L. J. 210; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom. L. R. 1055; 12 M. L. T. 361; (1912) M. W. N. 976; 15 O. C. 271; 39 I. A. 156 (P. C.), referred to.

A lady who is accustomed to transact business, is capable of carrying out monetary transactions and has no hesitation in appearing before comparative strangers cannot be called a *parda nashin* lady in the real sense of the term. [p. 171, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 4th October 1920.

Messrs. *Dalip Singh*, *N. C. Pandit* and *Badri Das*, for the Appellant.

Bakhshi *Tek Chand* Messrs. *Har Gopal* and *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.

Fforde, J.—This is an appeal from a judgment and decree of the Senior Subordinate Judge of Delhi dismissing the plaintiff's suit which was brought to set aside a voluntary deed of gift executed by one *Musammat* Bhagwan Devi in favour of the defendant Prem Nath, a minor son of her younger brother, Madho Ram. The deed, which was executed on the 6th of September 1915, is a clear and simple document, the material parts of which are as follows:—

"The *kothi* is owned and possessed by me, the executant, without the partnership of anybody else. It has been up till now in my proprietary possession and occupation All rights in respect of alienations of every description of the *kothi* are vested in me under the deed of gift, dated the 21st August 1893, which was registered on the same date, and which was executed by Rai Sahib Lala Narain Das in my favour. I, while in the enjoyment of sound health and in possession of right intellectual powers and while in the enjoyment of full senses, and without coercion and compulsion on the part of anybody else, have of my own accord gifted and given away the property having the boundaries given above, valued at Rs. 30,000, along with all internal and external rights, to Prem Nath, minor son of Lala Madho Ram (deceased), caste Arora, now residing at Basti Jadid, Lahori Gate, near the city wall, my nephew, who at present lives with me. His father was brought up by me and his marriage ceremony was also performed by me, and his wife too lives with me and renders me services as son's wife. I am responsible for the bringing up of the said minor, looking after him, providing him with food and clothing, and imparting him education and meeting all his other expenses. As the donee is young and minor, his mother, *Musammat* Lachhmi, is his natural guardian. I have taken the gifted property out of my proprietary possession and made over the same to the guardian of the donee, along with the previous title-deed, and thus put the said donee in possession of the property. Now, I, the donor myself during my life-time and after my death, my grandsons and great-grandsons and their near and remote relatives, and also my representatives and successors, have been left no claim and right in respect of the property gifted to the donee, nor will they have any in future.

"The donee as owner shall have all the rights of construction and improvement, and of location and removal of tenants, and also in regard to all sorts of alienations, such as sale, mortgage, etc., which were vested in me, the donor, without interference by anybody. If in future any co-partner or co-sharer or any other person brings forward any claim in respect of the gifted property against the donee, his claim shall be false and unfounded, by virtue of this deed of gift.

"*Musammat* Lachhmi, mother of donee, minor, has accepted of her own accord to take over the gifted property for him. The contract of gift has been made between the parties; and there is now no condition as to its revocation. Hence I have written these few words in the form of a deed of absolute gift, so that it may serve as an authority and be of use in time of need."

The suit to set aside the deed was instituted on the 20th of October 1917 by the donor herself. In February 1919 the plaintiff died, and by an order, dated the 22nd of July 1919, the present plaintiff, Rai Sahib Lala Sri Ram Poplai, was substituted in her stead. This plaintiff, who is the appellant in the present appeal, is the grandson of Rai Sahib Narain Das, through his first wife, his second wife being *Musammat* Bhagwan Devi, who acquired the property in dispute by gift from her husband. The grounds upon which the deed is impugned are that the donor at the time of executing the document was an ignorant and *pardanashin* lady, 63 years of age, "suffering from weak intellect on account of facial paralysis;" that the donor in making the gift was acting under the influence of *Musammat* Lachhmi, the mother of the donee; that the gift was the result of undue pressure exercised by *Musammat* Lachhmi; and that the donor when making it did not consider the future effect of this disposition of that portion of her property. It may be mentioned at the outset that the house in question was not the sole property of *Musammat* Bhagwan Devi, as she owned, in addition, the house in which she lived, a portion of which was let and produced a certain rental.

The suit was commenced before Mr. Tapp, the former Senior Subordinate Judge of Delhi, who framed the issue between the parties as follows:—

"Whether the gift of the property in suit was made under undue influence and is revocable?"

The onus of proving the issue was placed upon the plaintiff. Plaintiff's Counsel objected to the onus being so placed and asked that it be laid on the defendants. This application was refused. Counsel for the appellant has strongly urged that the onus was wrongly placed as the person bringing the suit was a *parda nashin* lady, and that when as such she comes into Court to set aside a deed whereby she has dispossessed herself of a considerable portion of

her property, the onus lies upon the person claiming under that deed of proving in the most complete manner that the lady in parting with the property did so voluntarily and with a full knowledge and appreciation of her act and all its consequences.

Thers is no doubt that when a person relies upon a deed of gift executed by a *parda nashin* lady, who is such in the true meaning of the term, that party must prove not only that the transaction is free from any pressure exercised to procure the making of the gift, but also that the donor thoroughly understood the nature and the effect of her action. The rule has been repeated as recently as 1921 in a judgment of the Privy Council in *Kamawuti* v. *Digbijai Singh* (1). In that case the deed was executed by a *parda nashin* lady practically without any consideration, whereby she parted with her entire property in favour of a donee who, or whose representatives, tendered to her the prepared document and obtained her signature to it within the *parda*. The following observations of Lord Shaw, who delivered the judgment of the Board, appear at page 530*:—

"It is the established law of India in these circumstances that the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bona fide* one, and fully understood by the lady whose property is dealt with. The cases upon the subject were discussed and the law as thus cited was repeated in *Sajjad Hussain* v. *Wazir Ali Khan* (2)" in these terms.

"When, however, the law is that the lady must fully understand the transaction, this is but a secondary way of saying that it is the obligation of the donee in any transaction proceeding from her to see that she does so understand it. The relations of parties demand that this duty be performed, and when Courts of Law declare that the onus rests upon the donee of showing that he did so, that, of course, is founded upon the fundamental fact that it was his duty to do it. If accordingly this obligation thus arising out of the relations of the parties be not fulfilled, the case for rescission and consequent remedy is clear."

In the present case the circumstances are very different from those which obtained in that case. Here the donor though described as a *parda* lady of rank, did not observe *parda* within the strict meaning of the term. The Court below has held—and having examined the evidence I entirely agree with the finding—that one cannot call her a *parda nashin* in the real sense of the term. She was accustomed to transact business, she was capable of carrying out monetary transactions and it is clear, as the learned Senior Subordinate Judge has found, that she had no hesitation in appearing even before comparative strangers. But even if it be assumed that *Musammat* Bhagwan Devi was a *parda nashin* lady within the meaning of the rule laid down by their Lordships of the Privy Council, her case has in no way suffered by reason of the onus of proof having been laid upon her. The case was not decided against her upon her failure to discharge the onus, but was decided upon the affirmative proof produced by the defendants. Their evidence shows that this lady thoroughly understood what she was doing when she gifted this property to her nephew. Although she does not appear to have had any independent advice in the transaction, it is clear that she would not have acted otherwise even if she had been represented by an independent legal adviser. The deed was executed before the Sub-Registrar and was witnessed by two medical men. Dr. A. K. Bose, L.M.S., a private practitioner of Delhi, and Major Corrie of the Indian Medical Service. Major Corrie was in England when the case was tried and was not able to appear as a witness, but Dr. Bose was called by the defendants and proved that though the lady was suffering from paralysis of the right side and could not articulate all her words properly, her mental faculties were unimpaired and she was quite capable of devising her property. This witness also stated that the Sub-Registrar read over and explained the deed to the lady and that she acknowledged the contents to be true. It must be borne in mind that the gift was a natural one. *Musammat* Bhagwan Devi was strongly attached to this nephew of

(1) 64 Ind. Cas. 559; 43 A. 525 at p. 530; 15 L. W. 1; 30 M. L. T. 47; 42 M. L. J. 87; 26 C. W. N. 490; 24 Bom. L. R. 626; 4 U. P. L. R. (P. C.) 27 (1922) A. I. R (P. C.) 14; (1922) M. W. N. 336; 43 I. A. 381 (P. C).

(2) 16 Ind. Cas. 197; 43 A. 455; 16 C. W. N. 889; 23 M. L. J 210; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom. L. R. 1055; 12 M. L. T 361; (1912) M. W. N. 976; 15 O. C. 271; 39 I. A. 156 (P. C.).

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hers. The boy's father had lived with *Musammat* Bhagwan Devi for a number of years and had died in her house, and after his death the boy's mother *Musammat* Lachhmi and the boy lived with her as members of her family. There is no doubt that *Musammat* Bhagwan Devi was devoted to her deceased brother and to his children. When the boy's mother died at Muttra, where she had gone for the performance of the *janeo* ceremony of the boy, *Musammat* Bhagwan Devi went there herself and brought the child back to her house. She had no children of her own and there is no doubt that she looked upon this boy, as though he were her own son.

It has not been alleged that *Musammat* Bhagwan Devi was left in an impecunious state as the result of depriving herself of this portion of her property. A number of witnesses were called by the plaintiff, but except the statement of one witness that she pawned certain ornaments for the sum of Rs. 1,450 some 4 or 4½ years prior to July 192), there is no evidence of any value that she was in any straitened circumstances up to the time of her death. On the whole of the evidence, I am in entire agreement with the Senior Subordinate Judge that *Musammat* Bhagwan Devi was perfectly aware of the nature and consequences of her act when she executed the deed in question, that the act was in no way an improvident one, and that it was a gift made on her own initiative and without any pressure being exercised by any person whatsoever.

I would accordingly dismiss the appeal with costs.

Scott-Smith, J.—I concur.

K. S. D. *Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1523 OF 1921.
November 12, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RAGHUNANDAN SAHAY AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SUNDER PRASAD—PLAINTIFF AND NARSINGH SAHAY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 148, 149, O. VII, r. 11—Court fee payable on plaint, deficiency in—Time allowed for making up deficiency, whether can be extended—Deficiency made up after expiry of period allowed, effect of—Discretion of Court—Appellate Court, interference by—Landlord and tenant—Manhunda rent, what is.

Where a plaintiff has been given time to make up the deficiency in the Court-fee payable on his plaint, but fails to do so, the Court has jurisdiction to extend the time for payment fixed by its original order. [p. 174, col. 1.]

Where after the expiry of the period originally allowed to a plaintiff for making up a deficiency in the Court-fee leviable on the plaint, the deficiency is made up by the plaintiff and the Court accepts the payment and directs that the plaint should be registered, it must be presumed that the Court acted regularly, and in the exercise of its discretion extended the time originally allowed for payment of the deficiency. [p 176, col. 1.]

Where, however, the order of the Court is not carried out and no further extension of time is granted, the Court must reject the plaint irrespective of the fact whether the claim made in the plaint or any portion of it has or has not become barred by time. [p. 174, col. 2.]

It is of the utmost importance that questions such as the one arising under s. 149 of the C. P. C. should be left to the discretion of the Court which has to determine them in the first instance, and the exercise of that discretion should not be interfered with by an Appellate Court unless a very strong case for interference is made out. [p. 175 col. 1.]

Manhunda rent is a fixed amount not depending upon the total out-turn of the crop grown. [p. 173, col. 1.]

(Case-law discussed.)

Appeal from a decision of the Subordinate Judge, Second Court, Arrah, dated the 8th August, 1921, modifying that of the Munsif, Third Court, Arrah, dated the 7th October 1920.

Messrs *Mahabir Prasad* and *S. Saran*, for the Appellants.

Mr. *S. Dayal*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decree of the Subordinate Judge of Arrah modifying the decree of the Trial Court. It arises out of a suit for recovery of arrears of *manhunda* rent for the years 1323 to 1326 *F. S.* The first three defendants in the suit are the appellants. There is also a cross-appeal by the plaintiff.

The plaintiff claimed rent for the years in suit at 38 maunds 2 seers of grain per annum in respect to the holding which measures 15 *bigha* 6 *cottahs* of land. Damages were also claimed.

The plaintiff's case was that the market rate of the crop was 20 *kutcha* seers to the rupee for the years 1323 to 1325 and 10 *kutcha* seers to the rupee for the year 1326. The defence was that the rent was a money rent of Rs. 2-11-0 per *bigha* and not a *raibundi manhunda* rent as claimed.

The market rate and the kinds of crops grown were also disputed and it was pleaded that the claim was time-barred in respect of the year 1323.

The Munsif found that the rent was a produce rent and not a money rent but that it was 35 maunds 15 seers as recorded in the survey *khatian* which was rather less than the plaintiff claimed and that the plaintiff was not entitled to more although the area of the holding had slightly increased. It was found that certain crops were grown on the holding and as the market rate claimed was the rate of the cheapest crop, the Munsif allowed the claim at that rate amounting to Rs. 424-2-6 together with damages at 12½ per cent. He also decided the issue of limitation in the plaintiff's favour.

On appeal by the defendants the Subordinate Judge affirmed the decision of the Munsif except on the question of limitation. He was of opinion that the claim was time-barred for the year 1323. He accordingly varied the decree of the Trial Court by disallowing the claim for the first year's rent. From this decision the defendants Nos. 1 to 3 have appealed and the plaintiff has entered a cross-appeal against that part of the decree which disallowed the claim for the year 1323.

In so far as the appeal is concerned there is very little to be said. The matter would appear to be concluded by the findings of fact of the lower Appellate Court. It was contended that there was no evidence adduced by the plaintiff to show the nature and quantity of the crops grown in each year and that he was, therefore, not entitled to any rent as there was no basis of calculation possible, and, secondly, that the Subordinate Judge erred in failing to consider the Commissioner's report which showed that no crops could grow on about 9 *bighas* of the land in suit. It must be remembered, however, that *manhunda* rent as the Subordinate Judge points out is a fixed amount not depending upon the total out-turn of the crop grown. Further the plaint alleged that five kinds of crops were grown and the evidence of the defendants' own witnesses as well as the Commissioner's report shows that such crops were in fact grown. There was, therefore, a basis upon which a money equivalent of the produce rent could be calculated and as the money equivalent claimed is based upon the market rate of the cheapest crop grown it cannot be contended either that there was no basis of calculation or that the amount allowed was excessive. There appears to me to be no ground whatever for interfering with the decision of the lower Court upon this part of the case and the appeal, therefore, fails and is dismissed with costs.

With regard to the cross-appeal the matter stands thus:—The plaint was filed on the 11th September 1919. This was admittedly in time to save limitation even for the first year's rent. The Court-fee paid with the plaint was, however, deficient and grossly deficient. On the 19th September, upon an application to the Court, the Munsif allowed one week's time to pay the deficiency in the Court-fee. On the 23rd September, before the week expired the Court closed for the vacation and re-opened again on the 27th October when the deficiency ought to have been made good. It was not, however, tendered in Court until the 29th October. It appears that it was accepted on that day without further order and subsequently in November the plaint was ordered to be registered. Sometime between the 11th September and the date when the deficit fee was paid the claim to the first year's rent became barred and the question for determination is whether in the circumstances stated s. 149 of the C. P. C. applies so as to give the plaint the same force and effect as if the fee had been paid in the first instance. Section 149 reads as follows: "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance." In connection with this may be read s. 148 which provides: "Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired." Section 148 deals with the extension of the time granted by the Court for doing any act prescribed or allowed by the Code

whereas s. 149 deals with cases of non-payment of fees prescribed for documents by the Court-Fees Act and would apply to the fee payable on the plaint. In the former case the Court may extend the time originally granted by its own order; in the latter case the Court may allow the fee to be paid at any stage with the result that the defect in the plaint or other document shall upon payment be cured. It was urged that under s. 149 the Court had no power to extend the period for payment beyond the time fixed by its original order. I cannot, however, accept this proposition. The Court may allow the fee to be paid at any stage and even if the argument should hold good with regard to that section I think s. 148 would authorise the Court to enlarge the period originally fixed by its own order. The Court in the present case acting under s. 149 exercised its discretion and passed an order allowing the plaintiff to pay the Court-fee within a week. That order was not complied with. In these circumstances, assuming that the Court, in its discretion, refused to extend the time for carrying out the order then O. VII, r. 11, of the C. P. C., would clearly apply. That rule provides that the plaint shall be rejected in certain cases including the case where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so. Assuming that no further extension of time was granted and that the Trial Court had done its duty it would have rejected the plaint in accordance with the provisions of O. VII r. 11. The Court, however, did not reject the plaint but two days after the period for payment had expired accepted the deficiency in the stamp fee when tendered and ordered the plaint to be registered. The question, therefore, which presents itself is whether the acceptance of the fee although tendered late and the subsequent registration of the plaint must be taken as an exercise of the Court's discretion to allow the deficiency to be paid on the day when it was tendered under s 149 or whether we must presume that the Court was unwilling to accept the fee but nevertheless failed to comply with its duty as prescribed by O. VII, r. 11. Now the rule of law applying to such cases appears to me to be embodied in the maxim *omnia præsumuntur rite esse acta.* We cannot by the application of this maxim presume without any evidence that the Court had allowed the plaintiff to pay the fee at a late date, but the fact that the Court accepted the fee and ordered the plaint to be registered is conclusive evidence that it did allow it and we may, therefore, presume, in the absence of any evidence to the contrary, that it acted regularly and in the exercise of its discretion. The learned Subordinate Judge was of opinion that the registration of the plaint could not be regarded as a condonation of the failure to comply with the original order because he thought that as part of the claim at least was not time-barred the Court had no option but to register the plaint. With respect to the learned Judge, this appears to me to be introducing an element which is extraneous to the question under consideration. It may well be that the Court in exercising its discretion under s. 149 ought to consider the question of limitation but O. VII, r. 11 directs the Court to reject the plaint in certain cases where a previous order has not been complied with and this discretion should be carried out whether limitation has begun to run or not. If the order has not been carried out and no further extension of time has beed granted the Court must reject the plaint even though the period of limitation has not begun to run. To hold otherwise would be to render O. VII, r. 11, cls. (*b*) and (*c*) nugatory in cases where limitation had not begun to run and there is nothing to limit the rule in this way. It cannot be said, therefore, that the Court was bound in the circumstances of this case to register the plaint if in fact the time for paying the deficiency in the stamp fee had not been extended. The claim was for a certain amount and the stamp fee was inadequate to cover that amount. The plaint was, therefore, insufficiently stamped within the meaning of O. VII, r. 11. The real question for determination is, whether the Court, in accepting the fee although paid after the period originally fixed for payment and in ordering the plaint to be registered, was within the meaning of s. 149, allowing the person by whom such fee is payable to pay the whole or part of such fee. If the Court was so acting then the plaint must have the same force and effect as if the fee had been paid in the first instance. The learned

Judge in arriving at his conclusion appears also to have been influenced by the consideration that the deficiency in the first instance was so large that the plaintiff must have been guilty of gross laches. This, however, was a matter for the Trial Court to consider when the matter first came before it. On that occasion the Trial Court, which must be presumed to have considered this question, undoubtedly extended the time for payment to another week and it does not appear to me that this question can be re-agitated after the Trial Court has exercised its discretion in the first instance. The learned Subordinate Judge relied upon two decisions of this Court in support of the view expressed by him. The first was that of *Ram Sahay Ram Pande* v. *Lakshmi Narain Singh* (1) the second was *Dukhno* v. *Muushi Sahu* (2). I agree with every word that was said by Chamier, C. J., in the former case but the question there was whether in the circumstances of that case the Court should exercise its discretion under s. 149 in favour of the appellant by allowing him to make good the deficiency in the stamp fee on his memorandum of appeal which was filed on the last day of limitation. The question was not, as here, whether in accepting a fee paid late and registering the plaint the Court had in fact acted under s. 149. The learned Chief Justice laid down certain principles, which should guide the Court in exercising its discretion, and in the result refused to extend the time and the memorandum of appeal was rejected. The wording of s. 149 is significant. It provides that the Court may, in its discretion, at any stage, allow the deficiency to be made good. If this is done then the document, whether a plaint or any other document covered by the section, becomes as effective as if the proper fee had been paid in the first instance. It is of the utmost importance that questions of this sort should be left to the discretion of the Court which has to determine them in the first instance and although I am not prepared to go to the length of saying that in no case can that discretion be interfered with by an Appellate Court it should require a very strong case to entitle an Appellate Court to interfere. In *Padmanund Singh* v. *Anant Lal Misser* (3), Maclean, C. J., in dealing with a case under the Code of 1882, where the facts were very similar to this case, said: "As a general rule I should hold that when once the Court has admitted and registered a plaint it cannot subsequently reject it. In the present case by the course it adopted the Court must be taken to have extended the time for paying in the Court-fees up to the 9th July, when they were actually paid in and accepted and to have treated this as the time fixed for payment of the deficit. The Court cannot go behind this. To allow it to do so might lead to the gravest injustice." The learned Chief Justice then points out the grave results which would follow from allowing the plaintiff to incur the expense of a trial and at a late stage have the plaint rejected when possibly a fresh suit would be barred by limitation. This, he says, would be a grave injustice attributable to the action of the Court itself which lulled the plaintiff into a sense of false security by admitting and registering his plaint In the result, in that case, notwithstanding, the opinion of the Chief Justice which I have just referred to, the majority of the Bench thought the justice of the case would be met by treating the plaint as having been filed on the 9th July when the deficit was paid with the consequences which ensued as to limitation by so treating it. At that time, however, s. 149 was not on the Statute book and had not to be considered. The only corresponding section in the Code, 1882 was s. 582-A which was applicable only to a memorandum of appeal or an application for review and gave the Court power to allow the deficiency in the stamp to be made good only in cases where the deficiency was due to a mistake.

The second case relied on by the Subordinate Judge, namely, *Dukhno* v. *Munshi Sahu* (2) was a case where clearly no discretion was exercised at all in admitting an application under O. IX, r. 9 of the C. P. C. which was defective in many respects and which had been returned to have the defects made good within a time fixed. Further extensions of time for this purpose were granted but still the defects were not cured. More than two months after the first order was made, although the defects had not been cured, the Munsif, without giving notice to the opposite party and in spite of the fact that the defects were called to his attention by the office, ordered the application to be admitted and eventually allowed

(1) 42 Ind. Cas. 675; 3 P. L. J. 74; 5 P. L. W. 18.
(2) 52 Ind. Cas. 439; 4 P. L. J. 428.
(3) 34 C. 20; 4 C. L. J. 421; 11 C. W. N. 38; 1 M. L. T. 355 (F.B.).

the application and restored the case to the list without once considering whether the application had been filed in time. It was argued that the Court had power to extend the time under s. 148 and must be deemed to have done so. The Court, in the circumstances of that case, did not accede to this argument and indeed a more grossly arbitrary exercise of discretion, if any discretion was exercised at all, could hardly be conceived for even when the application was admitted the defects had not been cured and the Court consisting of Atkinson and Manuk, JJ., very properly, if I may be permitted to say so, set aside the Munsif's order. That case does not appear to me to bear any analogy to the present where the facts are entirely different. In the present case the defect was cured within two days after the period allowed originally and the plaint was admitted and registered. I think a strong presumption arises that if the Court did not intend to extend the time further it would have rejected the plaint as it was bound to do under O. VII, r. 11 unless the time was extended. The only reasonable inference, until the contrary is shown, is that the Court intended to act according to law and that in accepting the deficiency and registering the plaint it did in fact, in its discretion, extend the time. I have referred somewhat at length to the question for determination because, under the earlier Code and before s. 149 was introduced into the Code of 1908, there were many conflicting decisions dealing with questions of this nature and although s. 149 was doubtless meant to set at rest the previous conflict there appears still to arise occasionally some doubt as to the effect of the provisions contained in the present Code. It would, however, be sufficient for the purposes of this case to say that so far as this Court is concerned the question now under discussion arose and was determined in the case of *Pawan Kumar Chand* v. *Dulari Kuar* (4). There the facts were very similar to the facts of this case. The plaint was filed on the 27th May 1916 but there was a deficit in the Court-fee. An order was passed to pay the deficiency within a week. It was not paid and on the 6th June the time was extended for three days more. Still the deficit was not paid by the 9th June. It was, however, paid about a week later and on the 17th June, the fee having been accepted the plaint was registered. In these circumstances the Court assumed that the Trial Court had extended the time from the 9th to the 17th June, for if it had not done so it would have rejected the plaint but this was not done and they held that by accepting the Court-fee on the 17th June it had in fact extended the time for payment up to that date. In my opinion the cross-appeal must succeed and the plaintiff is entitled to his costs here and in the Court below.

(4) 58 I. C. 216; 1 P. L. T. 544.

Mullick, J.—The plaintiff sued for *manhunda* rent for the years 1323 to 1326 *F. S.* at the rate of 38 maunds 2 *paseris* per year. The Munsif relying upon the Survey Record found the rent to be 35 maunds 15 seers and gave the plaintiff a decree for the whole period in suit. He declined to accept the defendants' contention that rent was payable at a *nakdi* rate of Rs. 2-2-11 per *bigha*. It is not disputed that the area of the holding is 15 *bighas* 6 *kathas*.

The defendant appealed on the ground that the rate decreed was excessive. He also contended that the Court should have found what quantity of each kind of crop was grown upon the land and what was the market price of that crop. The Subordinate Judge dismissed the appeal as regards the years 1324, 1325 and 1326. With regard to the year 1323, he found that the plaint filed on the 11th September 1919 was insufficiently stamped and that the full Court-fee upon it was not paid till the 29th October 1919 and that it was not registered till the 13th November 1919. As by that time the claim for 1323 had become barred by limitation the Subordinate Judge dismissed the claim for that year.

It is to be observed that the Munsif who tried the suit was not the Munsif who ordered the plaint to be registered.

Against the Subordinate Judge's decree the defendant appeals and the plaintiff cross-appeals.

As regards the appeal there is no substance in it. The Munsif's judgment shows that the land grows barley, gram, peas, linseed and mustard and one or two other winter crops. He found that the cheapest of these crops sold at an average of 20 *kacha* seers to the rupee during the years in suit and at this rate the price of 35 maunds 10 seers would be Rs. 84-13-6. The Subordinate Judge accepted this rate and the defendant has no ground whatsover for complaint. If each crop had been separately

valued the annual rate would have been higher. The appeal is, therefore, dismissed with costs.

With regard to the cross-appeal it appears that on the 11th September 1919 the plaint bore a Court-fee stamp of only Re. 1-2-0 and the balance of Rs. 40-2-0 was not paid till the Court re-assembled after the Civil Court vacation. On the 1 th September 1919 the Munsif ordered that the deficit Court-fee should be paid within a week. The Court closed for the long vacation before the expiry of the time thus allowed and re-opened on the 27th October 1919. The deficit Court-fee appears to have been received on the 29th October 1919, although no extension of the time of payment was expressly recorded and the Presiding Officer ordered the plaint to be registered on the 13th November 1919.

The learned Subordinate Judge does not find definitely that the Munsif did not extend the time. On the other hand the learned Vakil for the cross-appellant relying on *Budhan Shah* v. *Sita Nath Shah* (5) contends that as no express order extending the time was recorded the payment of the deficit Court-fee on the 29th October and the registration of the plaint on the 13th November cannot serve to validate the plaint with effect from the 11th September. In my opinion the acceptance of the deficit Court-fee after the time fixed for its payment and the registration of the plaint are facts from which it is open to a Court to draw the inference that the Presiding Officer did condone the delay and grant the extension; and it was so held in *Pawan Kumar Chand* v. *Dulari Kuar* (4), an authority which is binding upon this Court. I think, therefore, that there was evidence in the present case upon which the Munsif was competent to come to a finding that an extension of time was granted under ss 148 and 149 of the C. P. C. The learned Subordinate Judge has not in clear terms displaced that finding. He seems rather to be of the opinion that the Munsif did grant an extension but that in doing so he exercised his jurisdiction wrongly. Now the learned Subordinate Judge would certainly have been competent to interfere if the Munsif who accepted the plaint had failed to exercise his discretion judicially, *i. e.*, if he had exercised his discretion arbitrarily or had misdirected himself on any question of law or fact [*Brij Indar Singh* v. *Kanshi Ram*(6)]. Here no such error being disclosed it was not open to any Court to re-open the question of the legality of the plaint.

The result is that the cross-appeal succeeds and is decreed with costs in this Court and the Court below.

Z. K. *Appeal dismissed.*

(5) 7 Ind. Cas. 578; 13 C. L. J. 78.

(6) 42 Ind. Cas. 43; 45 C. 94; 22 C. W. N. 159; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 836; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 47 OF 1923.

August 7, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

BALVANT VISHNU—PLAINTIFF—APPELLANT

versus

MISHRILAL SHIVNARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 30—Contract for sale of cotton—Stipulation to pay profit or loss in case of failure to take delivery—Construction—Intention of parties.

In a suit to recover damages for breach of a contract entered into by the plaintiff with the defendant's father, it appeared that the contract was for the sale of cotton which the plaintiff was in a position to give delivery of, if the defendant was ready to take delivery on the due date, and that certain silver *tolas* were given as earnest for the fulfilment of the contract by the defendant. The contract further provided that if the defendant failed to take delivery he was to pay the loss according to the prevailing market rate and he was to get the profit if the price was above that agreed upon between the parties:

Held, that the contract was not a wagering transaction as there was no intention on the part of the parties not to give or take delivery or to deal in difference only. [p. 179, col. 2.]

In re Gieve, Ex parte Trustee, (1899) 1 Q. B. 794; 68 L. J. Q. B. 500; 47 W. R. 441; 80 L. T 438; 15 T. L. R. 251; 6 Manson 136, distinguished.

Per *Fawcett, J.*—The onus of establishing the plea that the contract sued on is a wagering one falling under s. 30 of the Contract Act is on the defendant. [p. 180, col. 1.]

Where plaintiff's conduct is shown to be otherwise unexceptional the Court should lean towards a construction favouring the validity of the contract rather than its illegality. [p. 180, col. 2.]

Second appeal from a decision of the Assistant Judge at Dhulia, in Appeal No. 336 of 1920, confirming that of the Subordinate Judge at Bhusaval, in Civil Suit No. 669 of 1919.

Mr. *S. R. Bakhale*, for the Appellant.

Mr. *H. C. Coyajee*, (with him Mr. *P. V. Kane*), for the Respondents.

JUDGMENT.

Shah, Actg. C. J.—This appeal arises out of a suit brought by the plaintiff to recover damages for a breach of the contract entered into by the defendants' father, now deceased, with the plaintiff to purchase twenty *khandies* of cotton. The contract was entered into on December 9, 1916, and was in these terms :—

"To Shivnarayan Hajarimal Marwadi, residence Bhusaval, be pleased to read the salutations of Balvant Vishnu Nargundkar, residence Bhusaval. The object of writing this letter is that a contract is made between you and me for cotton, approximately 20 *khandies* of large Malkapur measure, that is of 392 seers, at Rs. 150 for every *khandy*. This contract was made approximately five or six days ago. You can take delivery of the said cotton goods on January 1, 1917, or any time before, by coming here, that is, by coming to our field in village Charthane. I will take the price of the goods immediately after the weighment and delivery of the cotton and on the same day. I have taken to-day for earnest two pairs of silver *todas*, both together 225 rupees in weight. Their price will be computed according to the market rate of to-day. If under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur *peth*. If the price be above Rs. 150 then I will give you the profit."

The plea of the legal representatives of Shivnarayan was that this was really a wagering transaction. The Trial Court accepted that defence, principally on the ground that the last clause in the contract that "if the price be above Rs. 150, then I will give you the profit" was to be read as affording a key to the whole contract, and that the other terms were to be treated as a sort of disguise to conceal the real meaning of the parties, namely, that it was a sort of stake on the question whether the rate of the cotton on a particular date would be over or below Rs. 150. It is one of the defects in the judgment of the Trial Court, to my mind, that though the learned Judge was satisfied that at least the plaintiff intended to carry out the first part of the agreement by giving actual delivery, if the defendant had only chosen to claim it, still he came to the conclusion that it was a wagering transaction. No doubt the learned Judge says that the common intention of both parties was to deal in differences only. He also found that the net damages amounted to Rs. 162 making due allowance for the price of the ornaments which are referred to in the contract. He held that on the due date of the delivery Rs. 130 was the rate per *khandy* and calculated the damages on that footing; but he dismissed the suit with costs.

The plaintiff appealed to the District Court, and the learned Assistant Judge who heard the appeal found on the first issue that the contract was of a wagering nature, and in that view he did not consider it necessary to deal with the question of damages any further.

The plaintiff has appealed to this Court, and the principal question in the case is whether the contract is in the nature of a wager. There is not much of evidence in the case and I may observe that the decisions of the lower Courts are principally based upon the terms of the contract. It is largely a question of construing the contract. I am unable to accept the view taken by the lower Courts. The contract is for a sale of 20 *khandies* of cotton which, there is no dispute in the case, the plaintiff was in a position to give delivery of, if the delivery was demanded, and if the defendant was ready to take delivery on the due date. Then there is the fact that certain silver *todas* were given as earnest for the fulfilment of this contract by the defendant. The last two clauses in the contract are the important clauses, which have induced the lower Courts to come to the conclusion that this must be treated as a wagering transaction. It is provided that "if under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur *peth*." So far it is nothing more than a statement of the consequence of a breach on the part of the defendant. It does not, to my mind, in any sense indicate that the intention was not to give or to take delivery. If the defendant failed to take delivery, which he might in any case even if the contract was a legal transaction, then he was to make up for the loss resulting from his not taking delivery.

The clause that if the price be above Rs. 150 then the plaintiff was to give the

defendant profit appears to have caused a difficulty in the case. It seems to me that it is only a continuation of the statement of the consequences of a breach on either side. If the rate was below the contract rate at the due date, then the defendant would have to pay the loss if he did not take delivery, and if the rate at the due date be above Rs. 150, then the plaintiff would have to pay the difference in case he failed to give delivery. No doubt the words "if I fail to give delivery" are not to be found in this clause. If they had been used, the matter would have been beyond the range of controversy. But taking this to be a contract between two ordinary parties, I am unable to read this clause in any other sense; and the meaning which I put upon it, and which in my opinion it naturally bears, is one which I have just indicated, namely, that if the plaintiff failed to give delivery and the price at the due date was above Rs. 150, then he was to give the profit to the defendant.

It appears that in the cross-examination the defendant's Pleader put this matter to the plaintiff and he answered as follows:—"I was to pay the differences only if I refused to make delivery and the price was against me." It seems to me that the parties in this case have unnecessarily proceeded to provide for the consequences of a breach, namely, that if the market price on the due date went against the purchaser, and if he failed to take delivery, as he might well fail to do on that account, then he was to pay the loss, and if the market went against the vendor, and if he failed to give delivery, then he was to pay the loss. That seems to me to be the true and natural meaning of this contract. If this contract is to be read with a view to give effect to it as far as possible and not with a view to invalidate it, it seems to me that the contract lends itself easily to that interpretation : and that is the view which I take of this contract. It is not necessary to say more on the subject, nor is it necessary to refer to the cases.

In any case, it seems to me that the proof falls far short of what would be necessary to indicate the common intention on the part of both parties to deal in differences only from the beginning. That indication is lacking in the present case. I find it extremely difficult to accept the view taken by the lower Courts. The case of *In re Gieve, Ex parte Trustee* (1) which has been much relied upon, particularly by the Trial Court, was quite a different case. The terms of the contract there were clearly indicative of the fact that no delivery was intended to be given or taken, and if by chance the buyer in that case wanted delivery, then he was to give certain extra price. I do not consider it necessary to set forth the note of contract in that case : but it is enough to point out that that was quite a different case from the present one. In the present case the contract begins with the express intention to give and take delivery, and that in the event of the defendant not taking delivery, he was to pay the loss. As a matter of fact the occasion for applying the clause, upon which so much reliance is placed by the lower Courts on the facts of this case, has not arisen. The price did not go above Rs. 150, nor do I see any indication in the case that the price fixed under the contract was so far above the normal ruling rate at the date of the contract so as to afford some basis for the view that it was a sort of stake upon the ruling rate being Rs. 150 at the due date. The market rate on the due date is found by the lower Court to be Rs. 130, and the fluctuations within certain limits must be taken to be within the contemplation of parties as ordinary incidents of such contracts, and cannot be taken as indicative of any desire to fix up an abnormally high rate with a view to gamble on the possibility of that rate being the ruling rate on the due date.

I am, therefore, of opinion that this contract was not a wagering transaction, but a legal contract, and as admittedly the deceased Shivnarayan failed to carry out the terms of the contract, his heirs are liable in damages.

As regards the amount of damages, though the lower Appellate Court has not recorded any finding, it is conceded before us that the finding of the Trial Court on this point must be accepted. The plaintiff claimed damages on the footing of the difference between the contract price and the price realised by the sale of this cotton long after the due date for the performance of the contract. He is clearly not entitled to damages on this

(1) (1899) 1 Q. B. 794; 68 L. J. Q. B. 509; 47 W. R. 441; 80 L. T. 438; 15 T. L. R. 251; 6 Manson 136.

footing. There is nothing to show that the defendant ever extended the time for the fulfilment of this contract. Therefore, the only basis upon which the plaintiff could claim damages would be the basis of the difference between the contract price and the market-price of the goods on the due date. That has been determined by the Trial Court, and we accept that finding. I would allow this appeal, reverse the decree of the lower Appellate Court, and pass a decree in favour of the plaintiff for Rs. 162. The plaintiff to have his costs throughout on the amount decreed.

Fawcett, J.—The defendant set up a plea that the contract sued upon is a wagering one falling under s. 30 of the Indian Contract. The onus of establishing that plea rests upon him. There must be a common intention, not only on the part of the defendant's father, who entered into the contract, but also on the part of the plaintiff, not to give delivery, but merely to pay differences according as the market-price fell or rose above the figure of Rs. 150. So far as the defendant's father was concerned, the lower Court gave reasons for thinking that his intention was not to do any real business in cotton, the subject-matter of the contract, but merely to speculate on the rise and fall of the market. But the lower Court was more favourable in regard to the plaintiff's intention, and after considering all the circumstances felt satisfied that he at least intended to carry out his part of the agreement by giving actual delivery, if the defendant had only chosen to claim it. The only thing that goes against the plaintiff is the last clause in the agreement that "if the price be above Rs. 150, then I will give you the profit." The two lower Courts have held that that plainly shows that the real agreement between the parties was not a commercial transaction but a wager on the rise and fall of the market. But, in view of the circumstances favourable to the plaintiff that I have already alluded to, before the plaintiff is convicted of an intention to wager, it must be conclusively established that that is the proper interpretation of the contract, because only on this particular construction can this common intention be held proved. I admit that the view taken by the lower Courts is one that naturally arises from the way in which this particular sentence follows upon a sentence contemplating the defendant not taking delivery. And if the contract alone is looked at, it seems quite natural to say that the words "if the price be above Rs. 150 then I will give you the profit" still contemplate the contingency of the defendant not taking delivery. But, on the other hand, that is not a necessary construction, and I think it is, at any rate, a possible construction to say that the parties were contemplating the other position, namely, the possibility of the plaintiff not giving delivery and the price not rising above Rs. 150. In a case of this kind where the plaintiff's conduct is shown to be otherwise unexceptional, I think the Court should lean towards a construction favouring the validity of the contract rather than its illegality. I think we are entitled to give the plaintiff the benefit of this favourable construction, although apparently it was a construction that was not urged on his behalf before the two lower Courts. I agree, therefore, in the order proposed by my learned brother.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 10 OF 1924.

April 9, 1924

Present:—Mr. Justice Daniels.

RAM NARESH SINGH—APPLICANT

versus

JAGAR NATH SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—New evidence, requirements of—Other sufficient cause—Petition for review, whether can be admitted.

Where the new evidence relied on by a petitioner for review does not comply with the requirements of O. XLVII, r. 1 of the C. P C. the petition for review cannot be admitted on the ground of other sufficient reason.

Civil revision against an order of the Munsif, exercising the powers of the Judge of the Court of Small Causes, Ballia.

Mr. *Uma Shankar Bajpai*, for the Applicant.

Mr. *Mukhtar Ahmad*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order granting a review in a Small Cause Court case. But for the suit having been tried by a Small Cause Court an appeal would have lain under O. XLVII, r. 7. The ground of revision is that the Court below had no jurisdiction to allow a review. The suit was one on a

note-of-hand. The learned Munsif originally dismissed the suit on the ground that he was unfavourably impressed with the plaintiff's evidence and that the plaintiff's witness was a chance witness. The defendant in his evidence had asserted that he was illiterate but this fact is not referred to in the judgment. A month afterwards the plaintiffs produced a copy of a *vakalatnama* signed by the defendant and asked for a review on this ground. The learned Munsif admitted it and because he considered that the defendant had lied in saying that he was illiterate he proceeded to decree the claim and to accept the plaintiff's evidence which he had previously disbelieved. The *vakalatnama* and another paper relied on were both filed in a suit to which the plaintiff was a party and there is absolutely nothing to show that this evidence could not, with the exercise of due diligence, have been within his knowledge or have been produced by him at the original trial. He did not at the trial even ask for an adjournment to test the defendant's statement. If the new evidence alleged did not comply with the requirements of O. XLVII, r. 1 the review certainly could not be admitted on the ground of other sufficient reason. In my opinion, the learned Munsif was not legally justified in granting the review.

I accordingly set aside his decree and restore the original decree dismissing the suit. Under the circumstances I make no order as the costs.

K. S. D. *Application accepted.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 482 OF 1923.

August 7, 1924.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice and Mr. Justice Fawcett.

NARAYAN GANESH PATANKAR—APPELLANT

versus

SAGUNABAI GANGADHAR PATANKAR—RESPONDENT.

Hindu Law—Debt—Decree against father—Ancestral property in son's hands, whether liable—Civil Procedure Code (Act V of 1908), s. 53.

A Hindu father can by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt, if the other member of the family happens to be his son. [p. 182, col. 1.]

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 51 I. A. 129 at p. 139; 26 Bom. L. R. 500; 21 A L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 11 O. L. J. 107 (P. C.), followed.

Govind v. *Sakharam*, 28 B. 383 at p. 389; 6 Bom. L. R 314, referred to.

The whole of the ancestral property in the hands of a Hindu son is liable to be sold in execution of a money decree passed against his father. [*ibid.*]

Umed Hathising v. *Goman Bhaiji*, 20 B. 385; 10 Ind. Dec. (N. S.) 820, *Sakharam* v. *Sakharam*, 1 Ind. Cas. 459; 33 B. 39; 10 Bom L. R. 939 and *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari*, 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R. 435, referred to.

Second appeal from the decision of the District Judge, Satara, in Appeal No. 630 of 1921, modifying an order passed by the Subordinate Judge at Wai, in *Darkhast* No. 668 of 1921.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *S. R. Bakhale*, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—In this case a decree was obtained by Sagunabai, the plaintiff, against one Ganesh for Rs. 1,221-11-1. While the appeal was pending in the District Court, Ganesh died, and his son the present appellant Narayan, was brought on the record as the legal representative of his deceased father. The District Court confirmed the decree of the Trial Court, and this Court also confirmed that decree in S. A. No. 730 of 1917. The plaintiff now seeks to execute that decreee by attaching the interest of Narayan and his deceased father in the ancestral house. It is admitted that during the lifetime of Ganesh, Ganesh and Narayan had one-third share in the house, that is the interest which is attached in execution by the order of the learned District Judge in appeal.

The defendant has appealed from the order of the District Judge, and in support of the appeal it is contended that the son's interest, *i. e.*, one-sixth share in the house, is not liable to be attached, but it is only the interest which Ganesh had during his lifetime in this house that is liable to be attached. This contention is not tenable It is contrary to the decisions of this Court in *Umed Hathising* v. *Goman Bhaiji* (1) and *Shivram* v. *Sakharam* (2). In the case of *Shivram* v. *Sakharam* (2) the father died

(1) 20 B. 385; 10 Ind. Dec (N. S.) 820.

(2) 1 Ind. Cas. 459; 33 B 39; 10 Bom. L. R. 939.

during the pendency of the litigation, and the son was brought on the record, as in the present case, as the legal representative of the father. It is clear that so far as the ancestral property is concerned; whatever was liable to be sold in the lifetime of the father remains liable to be sold after the father's death. Section 53 of the C. P. C. makes the position clear on the point which before 1908 was the same according to the decisions to which I have referred. It has been held in *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari* (3) that during lifetime of the father the whole of the one-third share including the interest of the son in this ancestral house would be liable to be attached. On principle it makes no difference that the father has died and the attachment comes to be levied after his death. The position is made further clear by the recent pronouncement of their Lordships of the Privy Council in *Brij Narain Rai* v. *Mangla Prasad* (4) where among the propositions categorically stated, it is distinctly laid down that a father can by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt, if the other member of the family happens to be his son. In that judgment their lordships refer to the following observations of Mr. Justice Chandavarkar in *Govind* v. *Sakharam* (5) with approval :—

"The law is now well established that under the Hindu Law, the pious obligation of a son to pay his farher's debts exists whether the father is alive or dead."

It is not disputed, and it cannot be disputed, in the present case, that for this debt the son's interest in the ancestral property would be liable in respect of the debt in question during the lifetime of the father, and the same liability continues after his death.

It has been urged in support of the appeal that the view taken in all these cases is contrary to the provisions of Bom. Act VII of 1866, and s. 2 of that Act is relied upon. I do not think, however, that the provisions of that section help the appellant at all. If we treat the ancestral property as belonging to the deceased father, then by attachment of that property the provisions of s. 2 of Bom. Act VII of 1866 are not in any way contravened, because that property continues to be liable for the debt of the father. That is the reason why this Act has not been held to present any difficulty in the cases prior to the Code of 1908 and s. 53 in the Code of 1908 is in effect a legislative recognition of the rule that was followed in this Presidency before it was enacted. I do not feel any hesitation in holding that the contention of the appellant is without any good foundation. I would dismiss the appeal and confirm the order of the lower Appellate Court with costs.

Fawcett, J.—I agree.

K. S. D.

Appeal dismissed.

(3) 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R. 435.

(4) 77 Ind. Cas. 689; 51 I. A. 129 at p. 139; 26 Bom L. R. 500; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 11 O. L. J. 10 (P. C.).

(5) 28 B. 383 at p. 389; 6 Bom. L. R. 344.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1921.

March 6, 1924.

Present :—Mr. Justice Martineau and Mr. Justice Moti Sagar.

NADIR ALI SHAH—DEFENDANT—APPELLANT

versus

WALI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Rights of vendee, when vest in pre-emptor—Civil Procedure Code (Act V of 1908), O. XX, r. 14.

A successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale, but from the date on which he enforces his rights, *i. e.*, from the date on which he satisfies the conditions of the decree and brings it into operation. [p. 184, col. 1.]

Dhani Nath v. *Budhu*, 136 P. R. 1894, *Darehan Khan* v. *Sohaura Mal*, 126 P. R. 1907; 3 P. W. R. 1907; 48 P. W. R. 1907, *Uttam Singh* v. *Sundar Singh*, 24 Ind. Cas. 913; 136 P. W. R. 1914; 218 P. L. R. 1914, *Beli Ram* v. *Hari Chand*, 59 Ind. Cas. 744; 28 P. W. R. 1921; 3 L. L. J. 205 and *Hadayat Ullah* v. *Ghulam Muhammad Beg*, 73 Ind. Cas. 444; (1923) A. I. R (L.) 529, followed.

Deonandan Prasad Singh v. *Ramdhari Chowdhuri*, 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J 375; 21 C. W. N. 786; 25 C. L. J. 573; 19 Bom. L. R. 4376; L. W. 65; (1917) M. W. N. 470 and 811; 22 M. L. T. 196; 44 I. A. 80 (P. C.) referred to.

Second appeal from a decree of the District Judge, Jhelum, dated the 5th November 1920, modifying that of the Junior Subordinate Judge, Gujrat, dated the 31st May 1920.

Chaudhri *Zafarullah Khan*, for the Appellant.

Mr. *B. D. Qureshi*, for the Respondents.

JUDGMENT.—This is an appeal against a decision of the District Judge of Jhelum, dated the 5th of November 1920, awarding plaintiff a decree for possession of the land in suit by pre-emption on payment of Rs. 1,100 to the defendant-vendee. The material facts are briefly these:—On the 30th of August 1918 one Khanun, son of Mehra, made a gift of 8 *kanals* of land in *Mouza* Ajjowal in the Phalia Tahsil of the Gujrat District in favour of the defendant-appellant Nadir Ali Shah. On the 5th of September 1918 one Amir sold 200 *kanals* of land in the same village to the same Nadir Ali Shah for a sum of Rs. 3,500. On the 10th of June 1919 the plaintiff Walli, a reversioner of Amir, brought two suits, one for possession in respect of 8 *kanals* of land alleging that the gift was really a sale and that he (the plaintiff) as an owner in the village had a superior right to pre-empt, and the other for a declaration in respect of 200 *kanals* on the allegations that the sale was without consideration and legal necessity and that it should not affect the plaintiff's reversionary rights after the death of the vendor. In the alternative a decree for pre-emption was also prayed for on payment of Rs. 1,100 which it was alleged was the market-value of the land in suit. The suit for pre-emption in respect of 8 *kanals* of land was decreed by the Trial Court on the 3rd of May 1920, and an appeal against this decree to the District Judge and a second appeal to the High Court were both dismissed. In the other case the Trial Court found that necessity to the extent of Rs. 700 was established, and the suit was accordingly decreed on payment of that sum to the defendant-vendee when succession opened out. Both parties appealed against this decree to the learned District Judge, with the result that the suit for a declaration was dismissed, but that a decree for possession by pre-emption on payment of Rs. 1,100 to the defendant-vendee was granted in favour of the plaintiff.

Against this decree a second appeal has been preferred to this Court by the defendant-vendee and it has been urged on his behalf that the finding of the learned District Judge that the defendant was not an owner in the village at the date of the sale and that consequently his right of pre-emption was inferior to that of the plaintiff was erroneous and should be set aside. It is pointed out that the defendant had become an owner in the village on the 30th August 1918 prior to the sale of the land in suit and that his right of pre-emption was consequently equal to that of the plaintiff at the date of the sale. On behalf of the respondents it is argued that the appellant's right of pre-emption at the date of the sale to him was a defeasible right, and that the fact that he was subsequently defeated at the instance of a pre-emptor clearly shows that it was no right at all. The learned Counsel for the appellant, on the other hand, argues on the authority of the various rulings of this Court that a pre-emptor's right to or in the property accrues only when he has complied with the conditions laid down in the decree and paid the purchase-money into Court, and that it is then and then only, that the property vests in him. It is admitted that the right of pre-emption is a right of substitution and the sole question for determination is from what date this substitution takes effect.

In *Dhani Nath* v. *Budhu* (1), it was laid down that a decree in a suit brought for the purpose of enforcing the right of pre-emption did not give the proprietor a right to the thing sold, and that he did not acquire that right until he had paid the price fixed in the decree within the prescribed period.

The same view was taken in another judgment of this Court reported as *Darehan Khan* v. *Sohaura Mal* (2), where it was held that a pre-emptor had no right or interest in the property pre-empted until his right of pre-emption was duly established by the decree of the Court and he had satisfied the terms of that decree.

Similarly in *Uttam Singh* v. *Sundar Singh* (3), it was laid down that a pre-emptor acquired a right in the land only when he had paid the money in accordance with the decree recognising his right.

The same view was taken in two recent judgments of this Court reported as *Beli*

(1) 136 P. R. 1891.

(2) 126 P. R. 1907; 3 P. W R. 1907; 48 P W. R 1907.

(3) 21 Ind. Cas. 913; 136 P. W. R 1914; 218 P L R, 1914.

Ram v. *Hari Chand* (4) and *Hadayat Ullah* v. *Ghulam Muhammed* (5), where it was laid down that "a successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale, but from the date on which he enforces his rights, *i. e.*, from the date on which he satisfies the conditions of the decree and brings it into operation."

In *Deonandan Prasad Singh* v. *Ramdhari Chowdhuri* (6), their Lordships of the Privy Council observed as follows:—"A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent and no difficulty arises; but if the claim be disputed and suit must be brought, the rights of the parties are regulated by the C. P. C.

Now, O. XX, r. 14 of the C. P. C. which corresponds to s. 214 of the Code of 1882, is in the following terms:—"(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(*a*) specify a day on or before which the purchase-money shall be so paid, and

(*b*) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in cl. (*a*) the defendant shall deliver possession of the property, to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs."

It is clear from these words that the title to the property vests in the pre-emptor on payment of the purchase-money and not before.

In Hadayat Ullah v. *Ghulam Muhammad Beg* (5), Mr. Justice Campbell held that there was nothing in the Punjab Pre-emption Act which declared that a pre-emptor's title vested at the date of the sale or which modified the explicit direction of O. XX, r. 14, C. P. C., that Courts shall declare the title of the pre-emptor to be deemed to accrue from the date of payment into Court of the purchase-money after decree, and that there was also nothing in the Act to qualify the term "owner" so as to mean a person who was not in danger of losing his ownership right at the suit of a pre-emptor.

We are in full agreement with this view and have no hesitation in holding that at the date of the sale the defendant's right of pre-emption in respect of the land purchased was equal to that of the plaintiff and that the suit must, therefore, fail.

We accept the appeal and reversing the decree of the lower Appellate Court, dismiss the plaintiff's suit with costs throughout.

K. S. D. *Appeal accepted.*

(4) 59 Ind. Cas. 744; 28 P. W. R. 1921; 3 L. L. J. 205.

(5) 73 Ind. Cas. 444; (1923) A. I. R. (L) 529.

(6) 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J. 375; 21 C. W. N. 786; 25 C. L. J. 573; 19 Bom. L. R. 437; 6 L. W. 65; (1917) M. W. N. 470 and 811; 22 M. L. T. 196; 44 I. A. 80 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 492 OF 1923.

August 8, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice and Mr. Justice Fawcett.

RAMCHANDRA PANDURANG JAHAGIRDAR—PLAINTIFF—APPELLANT

versus

YELLAVA MADAR—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (b)—Order by inamdar *to village officers—Recital as to nature of tenure—Order, whether compulsorily registrable.*

An order issued by an *inamdar* to the village officers, directing them to treat certain lands, as held by the person mentioned therein, on a permanent tenure on payment of a certain rent, does not create or declare any right but only affords evidence as to the true nature of the tenancy, and is admissible in evidence without registration.

Second appeal from the decision of the Assistant Judge, Dharwar, in Appeal No. 24 of 1921, confirming the decree passed by the Subordinate Judge, Gadag, in Civil Suit No. 543 of 1919.

Mr. *A. G. Desai*, for the Appellant.

Mr. *G. S. Mulgaonkar*, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—In this appeal the question is whether the document, which purports to be a true copy of a certain order,

addressed by the then *inamdar* of the village to the village officers, is admissible in evidence. In connection with that point it is urged that the original order required registration. This question arises in connection with the point as to whether defendant No. 1 is proved to be a permanent tenant of the land in question. The case for the plaintiff in the lower Court was that defendant No. 1 was an annual tenant. Both the Courts have found that she is a permanent tenant, and it is clear that if the copy to which I have referred is admissible in evidence, the permanent tenancy is proved.

The point of registration was not urged in either of the lower Courts, and though it has been urged here, I feel clear that the point has no merit in it. It is an order directed by the *inamdar* to the village officers in which certain directions as to this land are given. It is pointed out there that the village officers are to treat this land as held by the defendant on a permanent tenure on payment of a certain rent. I am unable to hold that such a document either creates or declares any right. It only affords evidence of what the true nature of the tenancy was. The best evidence of such an order, in the absence of the order itself would be a copy, such as the defendant No. 1 has produced in this case. It was urged in the lower Courts, and it has been argued before us, that it is not admissible in evidence because the original order is not a public document. It seems to me that the lower Appellate Court was perfectly right in admitting the document as offording secondary evidence of the order which would be in the custody of the plaintiff; and the defendants could prove it, as the plaintiff has not produced the original. The copy was rightly admitted, and if we hold that it was properly admitted and that the original order does not require registration, the finding as to permanent tenancy must be accepted.

It has been urged that the plaintiff has a right to enhance the rent, even though the tenancy may be permanent. The claim made for higher rent in the suit was not on the footing of the tenancy being permanent, but on the footing of the tenancy being annual. There is no indication in this suit that the plaintiff contended that he had a right to enhance the rent, even though the tenancy was permanent. It is difficult to see how in view of the statement, by the predecessor-in-title of the present plaintiff, in the order, of which a copy has been put in, he could contend that he has a right to enhance the rent.

I would disallow the contentions urged in support of this appeal and dismiss the appeal with costs.

Fawcett, J.—I agree. I think the document in question does not fall under cl. (*b*) of sub-s. (1) of s, 17 of the Indian Registration Act, but is a document of the class where there is merely a recital of something that has already taken place. The words in it about continuing the land without obstruction from generation to generation and the *Mharki* work of the village being done, must be read with the connected sentence, "on this undertaking the land has been given ;" and inasmuch as the document already says that the land has been for many days, *i. e.*, for a long time, continuing with a certain person, namely, Durga Holer, it merely, I think, amounts to reciting the arrangement under which the predecessors-in-title of Durga Holer obtained the land, namely, that they should do *Mharki* work of the village, and on that condition the lands would be continued to that family from generation to generation. The main purpose of the document is to order the village officers to collect an increased assessment. Therefore, I think the appeal fails and must be dismissed with costs.

Appeal dismissed.

K. S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2522 OF 1921.
May 16, 1924.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Malan.

UMRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Gujars *of Hoshiarpur Tahsil—Gift by sonless proprietor to daughter, validity of.*

Among *gujars* of Hoshiarpur Tahsil a gift by a sonless proprietor of a portion of his ancestral holding to a daughter or daughter's son in lieu of services is valid by custom. [p. 186, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 18th July

1921, affirming that of the Munsif, First Class, Hoshiarpur, date.dthe 5th March 1921.

Messrs. *Niaz Muhammad* and *Sagar Chand*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—On the 17th October 1911, Shera a sonless *gujar* of the village Basi Kikran in the Tahsil of Hoshiarpur, made a gift of 15 *kanals* and 14 *marlas* of land out of his ancestral holding to his daughter *Musammat* Mehran; and the present suit has been brought by his brothers and nephew to impeach the alienation. The Courts below have concurred in holding that the donor was an old man incapable of cultivating his land, and that the donee and her husband rendered him services in lieu of which the gift in question was made. The transfer has consequently been upheld, and the only question in this second appeal, which has been admitted on the strength of a certificate granted by the District Judge is whether a custom allowing a sonless *gujar* to gift a portion of his ancestral estate to his daughter in return for services has been established.

Our attention has been invited to an entry in the *riwaj-i-am* of the Hoshiarpur District compiled in 1914 which no doubt shows that *gujars* of Tahsils Garh Shankar and Hoshiarpur declared that a proprietor was not entitled to make a gift of his property, moveable or immoveable, to his daughter otherwise than in dowry. The *gujars* of Dasuya Tahsil, however stated that in the absence of lineal male heirs, a proprietor could gift his whole property or any part thereof to his daughter in return for services rendered. It is not clear why the custom applying to *gujars* of Garh Shankar and Hoshiarpur Tahsils should be different from that governing *gujars* of Dasuya Tahsil and one would be inclined to think that all the members of a tribe residing in a district would ordinarily be governed by the same rule in a matter of this character. It is significant that while the *riwaj-i-am* sets out as many as six instances of gifts to daughters (including the gift in question) among Muhammadan *gujars* of the Hoshiarpur Tahsil it does not mention a single instance in which such a gift was successfully impeached by the collaterals. It is to be observed that the entry in the *riwaj-i-am* prohibits gifts of even moveable property but the learned Vakil for the appellants admits that in so far as this prohibition is concerned, the *riwaj-i-am* cannot be treated as a correct exposition of the custom prevailing among the *gujars* of the Hoshiarpur Tahsil.

It is not disputed that the general agricultural custom of the Punjab allows gifts in favour of relations who have rendered services to the donor, and there is absolutely no reason why the Muhammadan *gujars* of the Hoshiarpur Tahsil should be an exception to this rule. The donee has placed her reliance, not only upon some instances deposed to by her witnesses, but also upon a judgment delivered by the Divisional Judge of Hoshiarpur Division on the 26th February 1906 in the case of *Abdulla* v. *Ghasita* in which it was held that a gift by a sonless *gujar* of Hoshiarpur Tahsil in favour of his daughter is permitted by custom. A perusal of the judgment shows that a large number of instances were quoted in support of the custom, and that the learned Judge considered that the *gujars* of the Hoshiarpur District followed the same custom as the *gujars* of the neighbouring districts of Jullundur and Ludhiana who recognised the validity of a gift in favour of a daughter or daughter's sons in lieu of services.

Considering that the entry in the *riwaj-i-am* is not supported by instances, and that, in so far as the restraint on alienation relating to moveable property is concerned, it is admittedly wrong; we are of opinion that the onus of proving the custom was a light one, and that it has been sufficiently displaced by the evidence produced by the donee. We accordingly affirm the decree of the District Judge and dismiss the appeal with costs.

K. S. D.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 240 OF 1923.

August 11, 1924.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Fawcett.

BHAGWANJI SANKLESHVAR DAVE—PLAINTIFF—APPELLANT

versus

THE AHMEDABAD ELECTRICITY CO., LTD.—DEFENDANTS - RESPONDENTS.

Electricity Act (IX of 1910), s. 22, Sch., cl. (vi) paras. 4, 5—Transfer of supply to new premises—Written requisition, whether necessary.

Before a person can claim a supply of electricity for his new premises in substitution of the supply which he used to get for his old premises, he must put in a requisition in writing as required by cl. (*vi*). of the Schedule to the Electricity Act.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 298 of 1921, confirming the decree passed by the Extra Joint Subordinate Judge, Ahmedabad, in Civil Suit No. 999 of 1920.

Mr. *H. C. Coyajee* (with him Mr. *Ratanlal Ranchhoddas*), for the Appellant.

Mr. *O'Gorman* (with him Messrs. *Little & Co.*), for the Respondents.

JUDGMENT.

Shah, Actg. C. J.—This appeal arises out of a suit filed by the plaintiff against the Ahmedabad Electricity Company Ltd., for the supply of electricity to premises situated in another street in substitution of the supply which the plaintiff used to have in respect of premises situated near Dhinkwa Chowkey. So far as the supply of electricity to the premises near Dhinkwa Chowkey was concerned, it was properly obtained by the plaintiff on a requisition contemplated by the Indian Electricity Act IX of 1910. It appears, however, that the plaintiff in accordance with the somewhat loose practice, which used to prevail before the year 1920, asked for the supply of electricity for the new premises without making a requisition in writing as required by cl. (*vi*) paras. 4 and 5 of the Schedule to the Act. There was some correspondence after he asked for this supply. The Company apparently did not insist upon any requisition as required by the Act, and for some other reason put off supplying electricity to the plaintiff. As a result, on August 27, 1920, the plaintiff filed the present suit, in which he prayed for an order directing the defendant Company to transfer the connection No. 206 from one house to another house mentioned in the plaint.

The Company pleaded in defence that the suit was not maintainable, among other things, on the ground that no requisition as required by the Act was made. Soon after this plea was taken, it appears that plaintiff submitted a requisition as required by cl. (*vi*) of the Schedule. But the contentions of the parties with reference to this requisition were not made the subject-matter of any issues in the Trial Court at the hearing. The suit proceeded on the original cause of action and the first question that the Trial Court applied its mind to was whether the requisition in writing was necessary before the plaintiff could have a new connection in lieu of the old one. The Trial Court decided that point against the plaintiff, and dismissed the suit directing each party to bear his own costs.

The plaintiff appealed from that decree, and in appeal the same position which the plaintiff had taken up in the Trial Court was sought to be justified. But the Appellate Court was not satisfied as to the correctness of the plaintiff's position, and accordingly dismissed the appeal.

The plaintiff has now appealed to this Court, and the only question that arises on this appeal is whether the requisition in writing as required by cl. (*vi*) was necessary in order to enable the plaintiff to claim the supply which he wanted in respect of the new premises.

There is no point in the memorandum of appeal, and really no point has been raised before us as to the right which the plaintiff may have on his requisition which he made in October 1920. The question whether the Company were justified in not complying with that requisition as the present suit was pending, has not been investigated in this suit, and which, it is contended by the defendant, is outside the scope of this suit. Whatever the respective rights of the parties may be with reference to that requisition, they must be left to be determined, if they are not adjusted otherwise, in a separate suit.

In this appeal we are concerned with the only question which arises, whether the requisition as required by cl. (*vi*) was essential before the plaintiff could claim a supply of electricity as of right. On that point reference is made on behalf of the appellant to s. 22 of the Act, and it has been argued that though a requisition may be necessary where a party asks for supply in the first instance, it is not an essential condition for his claiming the supply as a substitute for the existing supply that he should make such a written requisition.

It is common ground that there is no provision expressly for such transfer of supply of electricity from one house to another and whenever a requisition is made under the Act, it is for particular premises. There is no express provision for the transfer of supply from one place to another. The provisions of the Act indicate that when the plaintiff wanted the supply of electricity for

his new premises, he had to make a requisition for that purpose under the Act. That requisition he admittedly did not make before the suit.

It is urged, though I do not see how it can afford any answer to the legal defence raised by the defendant, that the practice of the Company was not to insist upon such requisitions when the person concerned wanted the transfer of such supply of electricity from one house to another. It is true that the practice of the Company was as stated by the plaintiff. It appears from the *purshis* put in on behalf of the defendant that the Company had adopted that practice. But the practice cannot alter the provisions of law, and the Company was entitled, it seems to me, in this suit to insist upon the defence open to them, that the repuisition as required by paras. 4 and 5 of cl. (*vi*) of the Schedule to the Act was necessary. It may be rather misleading and even unfair to an individual that the Company should adopt such loose practice, and then insist upon a written requisition as required by the Act, when in fact about that time they supplied electricity to some persons without such requisitions. The propriety of such conduct is not a matter in issue in this suit and it is not necessary for me to say anything more on that point. It is rather hard upon a person to be told, in effect, that the Company would not insist on a written requisition and when he insists upon his rights he is told that the absence of such requisition creates a difficulty in his way. It may be that by adopting that line of conduct in some cases, there may be an estoppel against the Company. But in the present case there is no plea of estoppel put forward, and the point of estoppel which was urged for the first time in the District Court was disallowed. In the present case there is no basis for the plea of estoppel and there was no issue on that point in the Trial Court. The inconvenience to a party resulting from such practice is not an answer to the plea that a written requisition is necessary. As I have said we are not concerned in this case with the rights of the parties on the requisition put in after the suit was filed.

I would confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Fawcett, J.—I concur. There are no doubt some equities in favour of the plaintiff, arising out of the correspondence between the parties prior to the suit, and the practice of the Company in not insisting on written requisitions. But equities cannot prevail against the express terms of the Statute, and that seems to me to be a complete answer to the contention of the plaintiff in the plaint that he was entitledto a supply for the new premises without any written requisition of the kind in question. The two lower Courts have, in my opinion, rightly decided that question; and as that is the main basis of the plaintiff's suit, I think we can only dismiss his appeal with costs.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 2 5 AND 276 OF 1921.

July 16, 1924.

Present :—Mr. Charles Gordon Spencer, Officiating Chief Justice and Mr. Justice Srinivasa Iyengar.

AYINAVILLI NARAYANAMURTHI AND OTHERS—DEFENDANTS NOS. 2 TO 5—APPELLANTS

versus

BULUSU ACHAYYA SASTRULU AND OTHERS—PLAINTIFFS NOS 1 TO 5 AND DEFENDANT NO. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Public trust—Grant, whether to Archakas *or deity—Long enjoyment, effect of—Scheme—Provision for continued supervision by Court, undesirability of—Scheme, whether* ultra vires.

In considering the question whether the grant of an *inam* was to a temple or to the *Archakas* thereof personally, burdened with the performance of daily worship, the evidence of user and enjoyment, however long uninterrupted and unquestioned, would be evidence of the grant only, in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any ambiguity in the grant. Where the grant is clearly to the "manager for the time being of the temple" and referred to as *Devadagam*, subsequent decrees, transactions, and other dealings amongst members of the family of the *Archakas*, indicating that the properties are being treated as their own, are not of any evidentiary value, in the absence of the parties or persons interested in setting up the rights of the temple as distinguished from the *Archakas*. [p. 189, col. 2; p. 190, col. 1.]

It is undesirable that Courts should assume themselves the continued supervision of institutions for the management of which they are called upon to frame schemes. Under such schemes the Courts of Law constitute themselves in some manner as temple committees as the whole burden of such functions for all time is thrown upon the Court. It is very undesirable that the Courts should be burdened with such tasks. Even in the interests of institutions

themselves, it is doubtful if such provisions are calculated to promote their improvement or efficiency. Decrees of Court making such provisions in the schemes framed by them are really *ultra vires* having regard to the express provisions of s. 92 of the C. P. C. [p. 190, col. 2; p. 191, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Rajahmundry, in O. S. Nos. 42 and 43 of 1918, respectively.

Messrs. *G. Lakshmanna* and *K. Ramamurthy*, for the Appellants.

Messrs. *V. Ramados* and *B. Satyanarayana*, for the Respondents.

JUDGMENT.—In the village of Ayinavalli, in a public temple, on the bank of Godavari, there is a shrine dedicated to Visweswaraswami. In the village of Mukheswaram in another public temple also on the bank of Godavari, there is a shrine dedicated to Mukteswaraswami. Both these shrines would appear to have been, if not constructed and established at any rate, endowed by the Peddapur Samasthanam some time in the last years of the 18th century or the beginning of the 19th. Almost from that time, the members of the same family would seem to have been officiating as *Archakas* at both these shrines. Against the five persons at present admittedly holding the office of *Archakaship* in both the shrines, two suits have been instituted by the same set of plaintiffs one in respect of Visveswaraswami temple. Both these suits were instituted under the provisions of s. 92 of the C. P. C. with the sanction of the Advocate-General for *inter alia* a declaration that the defendants are not the legal trustees, the removal of the defendants from the office of trustees if they should be found to be legal trustees, the appointment of new trustees, the taking of inventory of accounts and the framing of a scheme for the management of the temples and their properties. For some reason or another at the hearing of the suits, the defendants gave up the claim that they were the *Dharmakarthas* or the trustees of the temples. We apprehend that this abandonment of their claims as *Dharmakarthas* or trustees was probably with a view to enable them more successfully to contend that the suit lands were lands belonging to them and not to the deities but to them as *Archakas* subject to the performance of *Nitya Nivedanam* or the daily worship. The main question that has been argued before us is that the lower Court was wrong in holding that the lands were grants to the temple or deities themselves and not to the *Archakas*. For the determination of this question obviously, no oral evidence could be of any use and the learned Vakil for the appellants relied for the purpose of contention solely on the documentary evidence in the case. We are, however, constrained to observe in passing that it is to be regretted that suits involving merely the determination of such a simple question should have been pending for three years in the Subordinate Judge's Court and a further period of three years in this Court. It is true that, as contended on behalf of the *Archakas* the appellants, they have been in possession and enjoyment of the suit lands performing the *Nitya Nevadhauam* or the worship without accounting and without deeming themselves accountable in respect of surplus income, if any, from the lands to any person. If there were no documentary evidence whatever to indicate in whose favour the original grants were, whether in favour of the deities themselves, that is to say, the temples as institutions, or to the *Archakas* subject to or burdened with the performance of the daily worship, we should have been disposed to attach considerable weight to such long uninterrupted and unquestioned enjoyment. But the evidence of user and enjoyment, however long, uninterrupted and unquestioned would evidence the grant only in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any ambiguity in the grant. It seems to be clear that almost till very recently, the suit lands yielded only just what was sufficient for the *Nitya Nevadhanam* or the daily worship. No doubt in such a state of things not only the persons who established the temples and made the endowments but succeeding generations of worshippers would have allowed the *Archakas* to cultivate the lands and take the income performing the *pooja* as it was obviously the most convenient mode of arranging for the worship of the deities and the payment of remuneration for the *Archaka* service. But when the income accruing from the lands came to be considerable and the *Archakas* by reason of old habit and following their forefathers claimed the lands and surplus profits therefrom to be their own, it was only natural that the

worshippers should take steps to secure the surplus income for the institutions. The learned Vakil for the appellants stated his position thus :—

These were small temples. The daily worship had to be carried on and the *Archakas* paid for their services and obviously the most convenient method of arranging for both would be to grant to the *Archakas* sufficient lands burdened with the obligation of carrying on the daily worship, a simple and single arrangement to achieve both the purposes. The expression *Nitya Nevadanam* includes in itself the idea of remuneration of *Archikas*. No doubt there would be much force in this contention in the absence of any satisfactory evidence regarding the person to whom the grant was originally made. The learned Vakil for the appellants drew our attention to the decrees and transactions relating to the suit lands by and between the members of the family of *Archakas* all of them calculated to show that during that entire period the *Archakas* dealt with the properties as if they were their own, partitioned them amongst themselves and so forth. He relied strongly, for example on Ex. XL which was a decree of the District Munsif's Court of Amalapur in a suit of the year 1830, in which though the suit was dismissed the properties were on the admission of the parties treated by the Court as partible properties. Such decrees and transactions, however, by or between the members or branches of the *Archaka* family are not of any evidentiary value in the absence of the parties or persons interested in setting up the rights of the temples as distinguished from the *Archakas*. Mr. Lakshmanna at one stage seemed inclined to argue that having regard to the provisions of cl. 2 of s. 62 of Regulation VI of 1816 of the issue of Notification thereunder, the judgments of the Courts of Law relating to immoveable properties in these suits may amount to judgments *in rem*; but he did not press that view and it seems to us that the said provision was one merely intended to evade multiplicity of suits. It seems to us, however, quite clear from the evidence of the public documents adduced in the case that the original grant was really in favour of the temples themselves. The learned Subordinate Judge has in his judgment dealt with all the documentary evidence in detail and come to the conclusion that the grants were to the temples and not to the *Archakas*. It seems to us that the evidence in this direction is really overwhelming and conclusive. The *inam* title, Ex. "N" dated the 6th of December, 1859 is granted to the manager for the time being of the temple and referred to the grant as *Devadayam* or *pagoda inam*. Exhibit 'B' which is an extract from the *Inam* register of the same period refers to the deities as grantees and the purpose of the grant as support of the deities and liable to be continued as long as the *pagodas* are kept up. Exhibits D to H are all entitled accounts of the grants of lands pertaining to the deities in the village Ayianavalli. It is clear from all these documents that the original grants were to the temples themselves and not to the *Archakas*. In this view we entirely agree with the learned Subordinate Judge. This disposes of the main contention on the part of the appellants. The Subordinate Judge has also framed a scheme for the management of the temples, the appointment of the trustees, the remuneration of *Archakas* and other matters. In ordinary circumstances, we should have thought that one trustee for these small temples would have been sufficient, but as both parties have agreed that it is more desirable to have three and as we are further assured that there will be no practical difficulty in finding suitable persons in the locality to be appointed as trustees, we have not thought fit to interfere with the provision in the scheme. It seemes to us, however, that the provision in cl. (3) of the scheme for vacancies in the office of the trusteeship being filled up by the Court, in cl. (6) of the scheme for the appointment of an auditor every year by the Court and in para. 9 for the Court sanctioning the mortgages or leases of the temple properties and in cl. (13) for a general liberty to apply to the Court with regard to any matter arising out of the scheme or the modifications thereof are objectionable both in principle and in practice. It is far from desirable that Courts should assume themselves the continued supervision of institutions for the management of which they are called upon to frame schemes. In fact under such schemes the Courts of Law constitute themselves in some manner as temple committees as the whole burden of such functions for all time is thrown upon the Court. It is very undesirable that the Courts should be burdened with such tasks. Even in the interests of institutions them-

selves, it is doubtful if such provisions are calculated to promote their improvements or efficiency. We are also not satisfied that Courts of Law are generally the best fitted to choose proper trustees more especially having regard to the procedure generally adopted in such cases. Further we are disposed to consider though in the view we are taking it is unnecessary to decide the point, that such decrees are really *ultra vires* having regard to the express provisions of s. 92 of the C. P. C. which makes it imperative that for the purpose of getting certain reliefs in respect of public charities, suits should be instituted by persons interested after getting the sanction of the Advocate-General. Though we are aware that several learned Judges of this Court have themselves framed or sanctioned such schemes still it seems to us that such practice should be discouraged and discontinued. Though, however, we disapprove of the provisions of the scheme enabling or requiring the Court from time to time to appoint trustees, to carry out the auditing of the temple accounts, sanction acts of management, appoint and remove trustees and so forth, still in view of the fact that the Legislature is about or likely to pass into law a comprehensive act dealing with all religious institutions and endowments, we do not consider it necessary to alter the scheme at present, but only direct that as soon as such enactment should be passed, no time or opportunity should be lost by the Court, acting under the powers reserved to itself under the scheme, to make the necessary alterations with the scheme so as to place the temples under the supervision of such agencies as may be constituted and to rid the Court of much of the functions and duties assumed under the present scheme. With this intimation, the appeals are dismissed. The defendants—*Archakas* of the temples who have been for such a long time in possession and enjoyment of the suit lands have not been found to have acted *mala fide* and there is no reason to suppose that the defendants, so acted?) in setting up their claims made and believed in, by their forefathers before them. In these circumstances we direct that the direction in the decree of the lower Court for the payment of costs of the plaintiffs by the defendants be deleted. The defendants will bear their own costs both in the Court below and in this Court. The plaintiffs' costs here and in the lower Court will be paid as and when the funds permit, from such surplus as may remain in the hands of the trustees to be appointed. The memorandum of objections filed by the plaintiffs-respondents in this Court are also dismissed but without any order as to costs.

V. N. V. *Appeals dismissed.*
Z. K.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 203 OF 1924.
August 18, 1924.
Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kincaid.

NARIMAN RUSTOMJI MEHTA—DEFENDANT—APPLICANT
versus
HASHAM ISMAYAL—PLAINTIFF—OPPONENT.

Limitation Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), s. 110—Application for leave to appeal to Privy Council—Time spent in obtaining review of High Court judgment, whether can be deducted—Suit for partnership accounts—Value of subject-matter.

The time occupied in prosecuting an application for review of the judgment of the High Court should be deducted in calculating the period of limitation for presenting the application for leave to appeal to His Majesty in Council. [p. 192, col. 1.]

Brij Indar Singh v *Kanshi Ram*, 42 Ind. Cas. 43; 44 I. A. 218; 19 Bom. L. R. 866; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.), referred to.

In order to determine the value of the subject matter of a suit for dissolution and accounts of a partnership for the purposes of s. 110 of the C. P. C., it is the value of the appellant's share and not the whole of the property that should be looked to. [p. 192, col. 2.]

Application.

Mr. *J. R. Gharpure*, for the Applicant.
Mr. *K. H. Kelkar*, for the Opponent

JUDGMENT.

Shah, Actg. C. J.—This is an application for leave to appeal to His Majesty in Council. The application was filed on February 12, 1924. The decree sought to be appealed from was passed on February 9, 1923. The application is, therefore, beyond time and the first question is whether the delay in presenting the application should be excused. The reason relied upon for excusing the delay is that the petitioner filed an application for a review of the decree, now sought to be appealed

from, on April 13, 1923. On that application a Rule was granted by this Court in September 1923, and that Rule was discharged on February 11, 1924. It is urged that as the petitioner was pursuing the remedy by way of review, the time taken up from April 13, 1923, up to February 11, 1924, should be excused under s. 5 of the Indian Limitation Act and reliance is placed upon the decision in *Brij Indar Singh* v. *Kanshi Ram* (1).

In the present case, having regard to the fact that the petitioner was prosecuting this application in good faith, we think that the time occupied in prosecuting that application should be deducted in calculating the period of limitation for presenting the application for leave to appeal to His Majesty in Council. If that time is deducted, it is clear that the application is within time.

We, therefore, make the Rule absolute on the application for excusing delay, and order the costs of the Rule to be costs in the Rule on the main application.

As regards the application for leave to appeal to His Majesty in Council, the Trial Court had dismissed the suit, and in appeal this Court passed a decree for dissolution, and directed an account of the partnership to be taken. The case was remanded to take accounts. Under s. 110, therefore, of the C. P. C., if the petitioner, who is the original defendant, can show that the subject-matter involved in this appeal is worth Rs. 10,000 or more he would be entitled to the necessary certificate. On this point, he relies upon the 2nd paragraph of s. 110, because it is clear on the facts of this case that the amount or value of the subject-matter of the suit in the Court of first instance, or the amount or value of the subject-matter in appeal cannot be shown on the present materials to be Rs. 10,000 or upwards. It is urged that the decree or final order directly or indirectly involves a claim or question respecting property of the amount or value of Rs. 10,000 or upwards. Beyond the mere statement in the petition there is nothing to support this statement. No affidavit has been filed. The plaintiff values his share in the plaint provisionally at Rs. 5,001. The same valuation was accepted for the purposes of the appeal to this Court; and for the first time it is alleged in the petition that the value is more than Rs. 10,000.

It is contended that the property for this purpose must be taken to be the whole of the partnership property. No authority is cited in support of that proposition The decision of this Court in *De Silva* v. *De Silva* (2) is against this contention. That was a case of partition; but on principle it can make no difference on this point whether it is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that should be looked to. The petitioner can succeed only if the value of the whole of the partnership property is taken as the basis for determining the amount or value of the property affected by the decree. That cannot be done; and there is no allegation that the value of the share of the defendant is Rs. 10,000 or more. We, therefore, discharge the Rule with costs.

Kincaid, J.—I agree.

K. S. D. *Rule discharged.*

(1) 42 Ind. Cas. 43; 44 I. A. 218; 19 Bom. L. R. 866; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 502; 126 P. W. R. 1917; 15 A. L. J. 777; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.).

(2) 6 Bom. L. R. 403.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1646 OF 1924.

April 22, 1924.

Present:—Mr. Justice Devadoss.

RAMASUBBA NAYAKAR—PETITIONER—

versus

DOARI RAJ *alias* MUNIANDI NAYAKAR MINOR BY RENGAMMAL, GUARDIAN—RESPONDENT.

Registration Act (XVI of 1908), s. 77—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Decree directing registration—Appeal—Stay of execution.

Pending an appeal against a decree directing registration of a document under s. 77 of the Registration Act, the Appellate Court has power under the C. P. C., to stay execution of the decree. [p. 193, col. 2.]

Section 77 of the Registration Act refers to the final decision of a Civil Court and not to the decision of a Court whose judgment is likely to be reversed on appeal. [*ibid.*]

Gopinath Adhikary v. *Gadadhar Das*, 33 C. 1020 at p. 1021, relied on.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of further

proceedings in execution of the decree of the Court of the Subordinate, Judge, Ramnad at Madura, dated the 31st March 1924, in O. S. No. 27 of 1923, pending disposal of Appeal No. 170 of 1924.

Messrs. *Krishnaswami Rao* and *Nallaswami Pillai*, for the Petitioner.

Mr. *A. Venkatarayaliah*, for the Respondent.

ORDER.—This is an application for stay of the execution of a decree pending the disposal of a first appeal (unnumbered.) Mr. Vankatarayaliah on behalf of the respondent has taken notice of this application for stay and has very strongly opposed the stay on the ground that s. 77 of the Registration Act is imperative and that the document must be presented within 30 days of the decree of the Subordinate Judge's Court. In other words his contention is that this Court has no power to stay the execution of the decree and that if it does stay, the non-presentation of the document within 30 days would make the document useless. I am unable to accept this contention. Section 77 of the Registration Act provides for the filing of a suit by a person who wants to get document registered and for asking for relief and the relief that he asks is that the Registrar may be directed to register this document within 30 days after the passing of such order. This does not prevent a Civil Court which has power to hear an appeal against the order made by the lower Court from staying the execution of the decree under the C. P. C, and I wish to make it clear that the order which I make on this application will not in any way prejudice Mr. Venkatarayaliah's clients. Mr. Krishnaswami Rao has drawn my attention to a case reported as *Gopinath Adhikary* v. *Gadadhar Das* (1) in which this question is incidentally considered. Mclean, C. J., held that there was no objection to a document being presented after the disposal of the appeal provided that it was presented within 30 days from the disposal. In a matter like this, where the decision of the First Court is not final, it cannot be said that the document must be presented within 30 days from the decision of the First Court. It may be that the defendant may fail here and succeed on appeal to the Privy Council or the appellant may succeed here and the respondent may succeed on appeal to the Privy Council. Section 77 refers to the final decision of a Civil Court and not to the decision of a Court whose judgment is likely to be reversed on appeal. I, therefore, hold that the objection of Mr. Venkatarayaliah fails and I direct that the execution of this decree as to registration be stayed pending the disposal of the appeal. In other words the registration of the document will be stayed pending the disposal of the appeal. There will be no stay as regards the rest of the decree.

V.N.V. *Stay of registration ordered.*

(1) 33 C. 1020 at p. 1021.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1923.

August 11, 1924.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

MADHAVRAO HARBAJI THAKUR—DEFENDANT—APPELLANT

versus

AMBABAI LAXMAN JADHAV—PLAINTIFF—RESPONDENT.

Execution of decree—Judgment-debtor, death of—Legal representative, doubt as to—Wrong representation—Sale, validity of—Mortgagor and mortgagee—Estoppel.

B and *M*, two Hindu cousins, sold certain land belonging to them to one *D*, who afterwards conveyed one moiety of the land to the wives of *B* and *M* each. The wives of *B* and *M* subsequently mortgaged their respective moieties. After this certain creditors of *B* brought a suit to which both *B* and *M*, their wives and the mortgagee were parties. In this suit it was held that the conveyance to *D* was a sham transaction, and that *B* and not his wife was the true owner. Subsequently the mortgagee obtained a money-decree in a Small Cause suit against both *M* and his wife, which was, after the death of *M* and his wife, executed against their son, who was brought on the record as their legal representative, and the right, title and interest of both the judgment-debtors in the property was sold and purchased by the decree-holder. On this a suit was filed by the daughter of *M* and his wife for redemption of the mortgage created by her mother, alleging that she was the preferential heir to her mother's *stridhan*, that it was not open to the defendant to question the title of her mother from whom he had taken the mortgage and that the sale of the property in execution of the money-decree was invalid, as her brother was not the proper legal representative of her mother: [p. 195, col. 1.]

Held, (1) that the defendant as mortgagee was estopped from questioning the title of his mortgagor, the plaintiff's mother;

(2) that, however, the sale in execution of the money-decree was not invalid under the circumstances of the case, as the question as to whether *M* or his wife was the true owner of the land was, to say the least, not free from doubt, in view of the result in the suit brought by creditors of *B*, and, therefore, it was

difficult to say that the decree-holder had no justification whatever to treat the son as the proper legal representative for the purposes of execution proceedings. [p. 195, col. 2.]

Appeal from a decision of the First Class Subordinate Judge, Nasik, in Appeal No. 10 of 1922, confirming that of the Joint Second Class Subordinate Judge, Nasik, in Civil Suit No. 88 of 1921.

Mr. *D. R. Patwardhan*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—The facts which have given rise to this appeal are these. Bala and Malhari were cousins who owned Survey Nos. 868 and 808 in equal shares. Apparently in 1890 they sold these lands to their brother-in-law Devji, who afterwards conveyed one moiety in each of these two Survey Numbers to the wife of Malhari and the other moiety to the wife of Bala. The wives of Bala and Malhari mortgaged their respective moieties to the defendant in 1901. In miscellaneous proceedings the creditors of Bala sought to attach his interest in these lands, but the attachment was raised on the ground that he had no attachable interest in these lands. The creditors filed a suit in 1905 to which both Bala and Malhari, and the wives of Bala and Malhari, named Kashi and Baku respectively, and also the present defendant mortgagee Madhavrao were parties. In that suit it was held that the conveyance to Devji was merely a nominal and sham transaction, that Bala was the true owner and that the conveyance was merely a device to defeat the claims of the creditors. Thereafter there was a litigation between the mortgagee and Thaku, the daughter of Bala, who claimed to redeem the property as having inherited the equity of redemption belonging to her deceased mother. In that suit the mortgagee pleaded that the equity of redemption belonged to Bala and not to his wife. But it was held in that suit that the mortgagee was estopped from disputing the title of Kashi, the mother of the plaintiff in that suit, and the question whether as between Bala and his wife Kashi, the true owner was Bala, was held to be outside the scope of that suit for redemption. That view was upheld by the High Court in S. A. No. 630 of 1920 decided on August 9, 1921. We are not concerned in this suit with that moiety of the two lands.

It appears with regard to the other moiety, which originally belonged to Malhari, and which was conveyed to his wife, Baku, in the manner indicated, that it was put up for sale by the Collector in execution of a money decree in a small cause suit which the defendant mortgagee had obtained against both Malhari and his wife Baku. Before the decree was executed both of them died, with the result that in execution proceedings the son of Malhari was brought on the record as the legal representative of both the judgment-debters, and in execution in July 1914, the right, title and interest of both the deceased judgment-debtors were put up for sale and purchased by one Trimbak Keshav Thakur who in his turn sold the same to the present defendant, who was the decree-holder also.

The present suit was filed in 1921 by the daughter of Baku for redemption of the mortgage by Baku in 1901. The defendant pleaded that as a fact she had no right to redeem because the property really belonged, not to Baku, but to Malhari; and secondly, that as regards Survey No. 868, he had purchased the right, title and interest both of Malhari and Baku in the moiety, and, therefore, the plaintiff had no right to the equity of redemption.

On these pleadings the learned Trial Judge found that the plaintiff was the heir of Baku according to Hindu Law, as the daughter would be a preferential heir to her mother's *stridhan*, and that it was not open to the defendant to question the title of Baku from whom he had accepted the mortgage in 1901. He further held that the sale effected in 1914 in the *darkhast* of 1912 was an invalid sale, and that it was void and inoperative against the true heir of Baku, as in the execution proceedings according to the learned Judge, Baku could not be properly represented by her son on the ground that he was not the heir of his mother but his sister would be the proper heir. In coming to this conclusion the learned Judge relied upon the observations in *Khairajmai* v. *Daim* (1). The learned Judge found that the mortgage amount was satisfied from the proceeds of the property and that nothing was due on the mortgage, and accordingly passed a decree declaring that the mortgage was fully satisfied and that the plaintiff was entitled to redeem and recover possession of the property in suit.

The defendant appealed to the District

(1) 32 I. A. 23; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 C. 296; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71 (P. C.).

Court, and the learned First Class Subordinate Judge, with appellate powers, who heared the appeal came to the same conclusion on the two main questions in the appeal and dismissed the appeal with costs.

The defendant has appealed to this Court and it is urged in support of the appeal, first, that it is open to him to show that the real owner of the property was not Baku who motgaged the property to him, but her husband Malhari, and that if that be the case, the plaintiff would not be entitled to redeem. Secondly it is urged that in any case his title to a moiety in Survey No 868, which was sold in 1914, and ultimately purchased by him, gives him a title to that property as against the plaintiff.

As regards the first point, it is clear that the defendant as mortgagee cannot be allowed to question the title of his mortgagor Baku, and that for the purposes of the suit it must be taken that Baku was the owner. If that be so, it is not disputed that the plaintiff as the daughter of Baku would inherit the right of Baku to the equity of redemption, and as such would be entitled to maintain the suit. Whatever the rights to this property as between Baku and Bala may have been, it is not open to the mortgagee to question the title of his mortgagor in this suit. It was so held by the Court in a similar suit by the daughter of Bala against the defendant in S. A. No. 630 of 1920. The first point must, therefore, be disallowed.

The other question whether the sale held in execution of the decree against Malhari and Baku is valid or not, is more difficult. It must be remembered that the money decree was against both Malhari and Baku, and the interest of both, whether in fact Malhari was the owner or his wife Baku was the owner of the moiety in these two Survey Numbers, was liable to be put up for sale in satisfaction of that decree. No proceedings with reference to the sale in execution of this decree have been put in. At least our attention has not been drawn to any paper except the sale certificate. That certificate shows that the right, title and interest of both were purchased by the auction-purchaser. It is true that in these execution proceedings, the person brought on the record as representing both the deceased judgment-debtors was their son. It is urged that as the real heir of Baku, namely, her daughter, was not on the record in the execution proceedings, the sale cannot be treated as binding upon her. That is the only irregularity in the execution proceedings relied upon as vitiating the sale and the question is whether that irregularity, such as it is, is sufficient to vitiate the sale.

In the present case, as I have already said, both Malhari and Baku were parties to the decree, and at any rate it was known to the decree-holder who was a party as the mortgagee to the suit of 1905, that it had been held that the real owner of the moiety in these two lands was Malhari, and not Baku, as the sale in favour of Devji by Malhari and Bala was held to be a colourable transaction. He no doubt brought the son on the record as the legal representative of his father and also of his mother. It is true that there was no investigation by the Court, and the position possibly did not lend itself at the time to any further investigation. In other respects the proceedings were regular, and it must be taken that the sale was held in the presence of the son of Malhari and Baku. Under these circumstances, I am not prepared to hold that the sale was void and invalid. It is quite true that the daughter is the heir of her mother in respect of her *stridhan* property, but the mere fact that the son was brought on the record as the legal representative of both his father and mother is not sufficient to invalidate the sale under the circumstances of this case. Undoubtedly he was the true legal representative of Malhari, and the sale was brought about in execution of a decree, under which both Malhari and Baku were liable. The question as to whether Malhari or Baku was the true owner of this land was, to say the least, not free from doubt in view of the result in the suit of 1905. Thus it is difficult to say that the decree-holder had no justification whatever to treat the son as the proper legal representative for the purposes of execution proceedings.

There is a further ground to support the view that the representation of the deceased debtor was not defective; it is based upon a rule of Hindu Law which has not been referred to in the course of the argument. As the conclusion can be properly reached without reference to that rule, I do not desire to rest my decision thereon. I may, however, refer to the rule, which is contained in the Mitakshara, Ch. I, s. 3, placita 9 and 10 (see Stokes' Hindu Law Books, p. 383, and Gharpure's Translation of the

Vyavahara Adhaya of the Mitakshara, page 189). After referring to the text of Yajnavalkya that "The daughters share the residue of their mother's property, after payment of her debts," Vijnaneshwara points out in his commentary as follows :—"A debt, incurred by the mother, must be discharged by her sons, not by her daughters; but her daughters shall take her property remaining above her debts." The same view is accepted by Nilkantha in the Vyavahara Mayukha (Mandlik's Hindu Law, p. 97 and Gharpure's Translation of Vyavahara Mayukha at p. 134, placita 12 of Ch. IV, s. 10.) Thus as regards her debt payable under the decree, if the son were brought on the record it would not be unjustified. I do not say more on this point, as it has not been adverted to in the arguments.

In a case of this kind, where we are concerned with the validity of the sale otherwise regularly held in the course of execution taken out in respect of a decree against her, I do not see any objection to the son having been brought on the record under the circumstances of this case. The omission to bring the daughter on the record is not, in my opinion, sufficient to invalidate the sale. As in *Khairajmal* v. *Daim* (1) it cannot be said here that Baku was not a party to the suit, nor can it be said that the judgment-debtors were altogether unrepresented. Even admitting the irregularity in the representation, which I doubt according to the rule of Hindu Law which I have referred to, I do not think that it is anything more than a mere irregularity in procedure in execution of a decree properly obtained against the mother, which cannot affect the substance of the matter. Each case must depend upon its facts and circumstances. I think that in the present case it is merely a case of irregularity, and not of such want of representation as would amount to an absence of jurisdiction on the part of the Court to carry out the sale. I am, therefore, of opinion that the sale must now be accepted as valid even as against the present plaintiff.

The result must, therefore, be that she would have no right to the moiety in Survey No. 868. I would, therefore, modify the decree of the lower Appellate Court by dismissing her claim as regards Survey No. 868. Each party to bear his or her own costs throughout.

Fawcett, J.—I agree in allowing the appeal and in the order as to costs proposed by my learned brother. I think the decision in the suit of 1905, to which the plaintiff's mother Baku and defendant were parties (see Ex. 38), has the conclusive effect of showing that, so far as the land in suit is concerned, Baku was a mere *benamidar* of her husband Malhari. As such *benamidar*, her proper representative was her son rather than her daughter, the plaintiff. In the circumstances of the case, the mere omission to bring the plaintiff on the record does not, in my opinion, make the sale under the execution proceedings of 1914 a nullity. It is somewhat similar to the omission of Nabibaksh's infant daughter, which was held immaterial in the Privy Council case of *Khairajmal* v. *Daim* (1) and I think the case is one which can be held to fall under the discretion properly exercisable by a Court in allowing the estate of a deceased debtor to be represented by one member of the family, such as is referred to by Lord Davey at p. 314 of that report.

N. H. *Decree modified.*

RANGOON HIGH COURT.

CIVIL REVISION No. 54 OF 1924.
September 10, 1924.
Present:—Mr. Justice Young.

MAUNG PO THIN AND OTHERS—PETITIONERS
versus
MAUMG PO THIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Appeal—Filing wrong decree by mistake—Substitution of right decree, whether permissible—Court, inherent power of—Revision.

In an appeal against a decree to set aside an award, the appellant filed by mistake another decree between the same parties in opposite capacities. It appeared that both the parties had the same names. The appellant asked the Court to allow him to substitute the right decree. The Court held that there was no provision of the C. P. C., permitting the same, and rejected the appeal. In revision:

Held, that the Court had inherent jurisdiction under s. 151 of the C. P. C. to allow the appellant to substitute the decree and in refusing to do so had failed to exercise jurisdiction vested in it by law, and its order must be set aside.

Civil revision.

Mr. *Maung Pu*, for the Applicant.

Mr. *Rahman*, for the Respondent.

JUDGMENT.—The learned District Judge sets out the facts of the case very fully. There was an appeal filed against a decree

in Suit No. 46 of 1923 of the Court of the Sub-Divisional Judge of Pvapon, refusing to set aside an award. There was also a decree in a suit between the same parties, in opposite capacities, for enforcing the award. The first plaintiff and the first defendant bore, in English, the same name. By mistake the Pleader filed the wrong decree with his appeal. He, therefore, asked the Judge to allow him to substitute the decree. The learned Judge held there was no provision of the Code permitting this, and rejected the appeal.

In doing so, I think he was wrong. There was the inherent power of the Court under s. 151. The learned Judge, in my opinion, failed to exercise jurisdiction, and I set aside his order, and direct him to substitute the decree and proceed with the hearing of the appeal.

N. H. *Order set aside.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 319 OF 1923.

August 15, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

SHANKARBHAI MANORBHAI PATEL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOTILAL RAMDAS SHAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 107, O. XXII, rr. 4, 9, O. XLI, r. 33—Abatement against one respondent—Appeal, whether abates in toto—Appellate Court, powers of—Grounds for varying decree under appeal.

Plaintiffs, uncle and nephew, sued to recover possession of certain land, claiming it as tenants-in-common. The nephew having died, his widow was joined as his legal representative. The suit having been decreed, defendants appealed to the District Court and during the pendency of the appeal the widow of the nephew died in November 1919. No steps were taken to bring her legal representative on the record up to March 1921. The Appellate Court held that the appeal had abated *in toto*. The defendant filed a second appeal to the High Court:

Held, that under O. XXII, r. 4, sub-r. (3) read with s. 107 (2) of the C. P. C., the appeal would abate as against the deceased respondent only and not *in toto*. [p. 198, col. 1.]

Chandrsang Versabhai v. *Khimabhai Raghabhai*, 22 B. 718; 11 Ind. Dec. (N. S.) 1061, followed.

Raj Chunder Sen v. *Gang Das Seal*, 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.), distinguished.

Per *Fawcett, J.*—Under O. XLI, r. 33, C. P. C., the Appellate Court has power to vary the decree under appeal, not only for error, but also on grounds which have come into existence since it was passed. [p. 199, col. 2.]

Sakharam Mahadev Dange v. *Hari Krishna Dange*, 6 B. 113; 3 Ind. Dec. (N. S.) 533, *Ratonji* v. *Sheth Purshotamlas*, 25 B. 606; 3 Bom. L. R. 227, *Gorakala Kanakaiya* v. *Janardha Pathai*, 33 Ind. Cas. 736; 36 M. 439 at p. 443; (1910) M. W. N. 841; 9 M. L. T. 61; 21 M. L. J. 31 (F. B.), *Muthusami Iyer* v. *Kalyani Ammal*, 33 Ind. Cas. 223; 40 M. 818 at p. 822; 21 M. L. T. 93; 5 L. W. 334, referred to.

Appeal from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 220 of 1919, ordering to abate the appeal from the decree passed by the Subordinate Judge, Nadiad, in Civil Suit No. 91 of 1917.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *M. H. Mehta*, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—In this case the plaintiffs sued to recover possession of a certain house-site from the defendants. The plaintiffs were uncle and nephew and claimed the land as tenants-in-common. The nephew (plaintiff No. 2) died during the pendency of the suit and his widow was joined as his legal representative. The Trial Court passed a decree in their favour on April 8, 1919.

The defendants appealed to the District Court. During the pendency of the appeal, the respondent No. 2, Bai Chanchal, the widow of the nephew, died in November 1919. No steps were taken to bring the legal repesentative of the deceased respondent on the record up to March 1921, when an application was made by the appellant to the effect that the surviving respondent No. 1 was the heir and that the appeal could go on against him without any other person being brought on the record in place of the respondent No. 2. This application was opposed on the ground that the proper heir would be Bai Jekore, the sister of Bai Chanchal's husband; and that as she was not brought on the record the appeal abated as regards respondent No. 2. The learned Assistant Judge held that the appeal abated as regards respondent No. 2, and further held that in consequence thereof the appeal abated as regards respondent No. 1 also. He was of opinion that the shares of the co-owners not being ascertained, any decree that may be passed against respondent No. 1 on hearing the appeal would be infructuous, as the decree of the Trial Court in favour of respondent No. 2 would stand in any case.

The appellants apparently did not apply to the lower Appellate Court to set aside the abatement and to bring Bai Jekore on the

record as the legal representative of respondent No. 2 under O. XXII, r. 9, sub-r. (2) as they could have and should have done when their application to treat the respondent No. 1 as the heir of respondent No. 2 was disallowed.

The defendants have appealed to this Court. They have joined Bai Jekore as a party respondent to the appeal.

It is clear that the order treating the appeal as having abated as to respondent No. 1 is wrong. Under r. 4, sub-r. (3), read with s. 107 (2) of the Code, the appeal would abate as against the deceased respondent only. The words "as against the deceased defendant" have been added in the Code of 1908 and give effect to the view which was taken by this Court under the Code of 1882. In *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (1) it was held by this Court with reference to s. 368 of the Code of 1882 that as regards the deceased respondent the Court ought to have proceeded under s. 368 and declared that the appeal had abated as to him and proceeded against the other respondents or else to have directed that the legal representative of the deceased respondent should be placed on the record. In that case the suit was of the same nature as the present suit. Under the present Code the position is made clear and it is open to the Court either to hear the appeal as regards respondent No. 1 only or to set aside the abatement under r. 9 of O. XXII and then to hear it as regards both the respondents. No doubt a difficulty may arise when the abatement is not set aside under r. 9, and the relief which the Court can grant as against the other respondents in appeal is not likely to be effective. That difficulty must depend largely upon the nature of the suit, and the possible relief that can be granted in appeal under the circumstances of the particular case. The decision in *Raj Chunder Sen* v. *Gang Das Seal* (2) upon which the learned Assistant Judge has relied, has reference to a decree that was passed in a partnership suit and the observations of their Lordships of the Privy Council have relation to the nature of the suit and to the terms of s. 368 of the Code of 1882.

The view taken by the Calcutta High Court that in such suits by co-owners practically the appeal abates as a whole if it abates with reference to one of the respondents conflicts with the view taken by this Court in *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (1) and does not appear to me to be consistent with the words used in sub-r. (3) of r. 4.

Speaking with reference to the nature of the suit here, I am not at all satisfied that it may not be a matter of real advantage to the appellant to get rid of the decree against them at least as regards respondent No. 1. Their right to have the appeal heard on the merits as regards this respondent is clear and I am unable to accept the view that because the appeal has abated as regards respondent No. 2 it must be taken to abate as regards respondent No. 1 or that it could not be heard on the merits as regards him.

In this case Bai Jekore has been joined as respondent No. 2: but for the appellants it is conceded that the abatement as regards that respondent stands, as no application for setting it aside has been made.

As regards respondent No. 1, it seems to me that the appeal must be heard on the merits: and if the Court is satisfied that the plaintiffs' case is not proved it will be open to the Court to dismiss it as regards plaintiff No. 1. It is not necessary at this stage to consider exactly what the effect of such an order would be on the decree, which as now passed by the Trial Court would stand as regards plaintiff No. 2: nor is it necessary to consider what decree the lower Appellate Court will pass under its power after hearing the appeal on the merits. It is enough for our present purposes to point out that if the defendants succeed, it would place them in a more advantageous position in so far as they would have then to satisfy the plaintiff No. 2 only with reference to the decree and not the plaintiff No. 1. That is an advantage which there is no valid reason in law to deprive them of, simply because the appeal has abated as to one of the respondents.

It is possible for the Court to exercise its inherent powers in the interests of justice under such circumstances, as pointed out in *Lakhmichand Rewachand* v. *Kachubhai Ghulabchand* (3). In the present case, though the legal representative of respondent No. 2 in the lower Appellate Court is now before us, we do not consider it proper to make any order in the exercise of such

(1) 22 B. 718; 11 Ind. Dec. (N. S.) 1061.
(2) 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.).
(3) 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R. 517.

powers The appellants made no application in the lower Appellate Court under r. 9 (2) of O. XXII, and before us they have accepted the abatement of the appeal as regards respondent No. 2 as an indisputable fact in the case.

I would, therefore, allow the appeal against respondent No. 1, reverse the order of the lower Appellate Court relating to him and remand the appeal to that Court for disposal according to law.

Appellants to get their costs of the appeal here from respondent No. 1 and to pay the costs of respondent No. 2.

Fawcett, J.—As the plaintiffs were tenants-in-common, I think that under O. XXII, rr. 4 and 11, the legal representative of the deceased respondent should have been added as a party by an application made within proper time under sub-r. (1) of r. 4. But under sub-r. (3) the omission to do so only has the effect of making the appeal abate as against the deceased respondent. This is, I think, a clear indication of the intention of the Legislature that the appeal should not in such a case necessarily or even ordinarily, abate as a whole. The Privy Council decision in *Raj Chunder Sen* v. *Gang Das Seal* (2) was based on s. 368 of the C. P. C. of 1882, which said that the suit should abate, without the addition of the words "as against the deceased defendant," which is made in the Code of 1908.

Inasmuch as the appeal primarily abates only against the deceased respondent, there is still an appeal pending against the remaining respondent, and under O. XLI, rr. 13 and 16, the appellant (unless the appeal is dismissed under r. 11) is entitled to a normal hearing and decision.

The remaining respondent can of course raise a preliminary objection that the appeal is not maintainable against him alone: and this was successfully done in the present case. The main reasons for the Assistant Judge's view are given in para. 4 of his judgment, which says:—

"In the present case, the shares of respondent No. 1 and of the deceased Chanchal in the plaint property were not ascertained. They were held joint sharers so that, if the present appeal were allowed, that order would not be binding against the representatives of Chanchal. So there would be the anomalous position that the decree would bind one sharer and not the other. This, coupled with the fact that the shares of these sharers were not ascertained, would make the order of this Court infructuous."

This follows the view taken by the Calcutta High Court that, in a case like the present, where the plaintiffs are joint owners, the necessary result is that the whole appeal abates, because the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result of allowing the appeal as against the remaining respondent, and not disturbing the decree of the lower Court as against the deceased respondent [*cf. Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (4).]

But this view has not apparently been endorsed by this Court, and the decision in *Chandarsang Versabhai* v. *Khimabhai Raghabhai* (1) is against it, though the point is not discussed.

I agree with my learned brother that it is not a necessary consequence in every such case that the whole appeal abates. In the present case, for instance, supposing the defendants succeed in their appeal on the merits, I do not think (though I speak with some diffidence, as the point has not been argued, and is not really before us at the present stage) that the result will be so anomalous or inconvenient that the Court should merely on that account refuse to pass a decree in favour of the defendants as against the respondent No. 1. The result will be that defendants fail as regards plaintiff No. 2's share but succeed as to plaintiff No. 1's. The lower Court's order could in the circumstances be modified by (1) directing that defendants do put plaintiff No. 2 in joint possession of the property; (2) dismissing the suit as regards plaintiff No. 1's share; and (3) passing an equitable order as to costs. The Appellate Court has, I think, power to pass such a decree as being one "such as the case may require" under O. XLI, r. 33, C. P. C. This covers a variance of a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed: see *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (5), *Rustomji* v. *Sheth Purshotamdas* (6), *Gorakala Kanakaiya* v. *Janardha Padhai* (7) and *Muthusami Iyer* v. *Kalyani Ammal* (8).

(4) 54 Ind. Cas. 822; 24 C. W. N. 44 at p. 48; 30 C. L. J. 217.

(5) 6 B. 113; 3 Ind. Dec. (N. S.) 533.

(6) 25 B. 606; 3 Bom. L. R. 227.

(7) 8 Ind. Cas. 736; 36 M. 439 at p. 443; (1910) M. W. N 841; 9 M. L. T. 64; 21 M. L. J. 31 (F. B.).

(8) 38 Ind. Cas. 223; 40 M. 818 at p. 822; 21 M. L. T. 93; 5 L. W. 334.

If plaintiffs in the Trial Court had succeeded only regarding plaintiff No. 2's share, the Court could have passed a decree for joint possession in favour of plaintiff No. 2 [*cf. Parashram* v. *Miraji* (9) and *Naranbhai* v. *Ranchhod* (10).] There was no necessity for a distinct issue regarding joint possession in the circumstances of this case.

The above remarks, however, will not in any way bind the lower Court which will have to decide all the questions arising after hearing arguments on them.

I concur in the order proposed by my learned brother.

K. S. D. *Appeal allowed.*

(9) 20 B. 569; 10 Ind. Dec. (N. S.) 945.
(10) 26 B. 141; 3 Bom. L. R. 598.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 742 OF 1921.
April 9, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

BAHADUR SHAH AND OTHERS—DEFENDANTS APPELLANTS

versus

AHMAD SHAH—PLAINTIFF AND ANOTHER DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 22 (4)—Plaintiff, failure of, to make deposit within time fixed—Court, duty of—Omission to reject plaint—Illegality—Civil Procedure Code (Act V of 1908), s. 99.

Where the plaintiff pre-emptor fails to deposit the 1/5th of the purchase-money within the time allowed by the Court for this purpose, the mere fact that the Court receives a security bond and places it on the record after the date fixed does not warrant the presumption that the Court altered its previous order or extended the time within the meaning of sub-s. (4) of s. 22 of the Pre-emption Act. [p. 201, col. 1]

Muhammad Hayat v. *Raghbar Dial*, 33 Ind. Cas. 487; 67 P. W. R. 1916, followed.

The provision in sub-s. (4) of s. 22, Pre-emption Act, about the rejection of the plaint is a mandatory one and the Trial Court's omission to pass an order in accordance therewith is an illegality such as cannot be covered by s. 99, C. P. C. [*ibid.*]

Second appeal from a decree of the District Judge, Rawalpindi, dated the 1st December 1920, affirming that of the Subordinate Judge, Second Class, Rawalpindi, dated the 3rd August 1920.

Mr. *Dev Raj Sawhney*, for the Appellants.
Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—This is an appeal by defendants vendees from the order of the lower Appellate Court decreeing plaintiff's claim for pre-emption of the land in suit.

The only point argued before us at the hearing was whether the plaintiff having failed within the time fixed by the Trial Court to deposit 1/5th of the probable value of the land as required under s 22 of the Punjab Pre-emption Act, the Court should not forthwith have rejected the plaint. The facts in connection with this point are as follows.

This suit was instituted on the 3rd of November 1919 and on the 11th of November the Court ordered that 1/5th of the purchase-money should be paid into Court by the 2nd of December. On the 2nd of December the case was adjourned because it was found that the process fee for summoning the defendants had not been paid. The 1/5th of the purchase-money had not by that date been paid into Court and no order was passed extending the time. Subsequenlly the case came up on five defferent dates and was adjourned for one cause or another without any notice being taken of the fact that the sum ordered had not as yet been deposited and without any order for extension of the time being passed. On the 23rd of February 1920 one witness for the plaintiff was examined and a security deed was filed and attested before the Court. The order endorsed on it is "to be placed on the record" Subsequently the vendees applied that the plaint should be rejected as the order for depositing 1/5th of the money had not been complied with. The Court, however, rejected this application holding that such an order could not be passed at such a late stage.

The point was argued before the learned District Judge who was of opinion that he must presume that everything was done rightly in the Trial Court and that, therefore, the Court in accepting security on the 23rd of February 1920 had changed its previous order of the 11th of November 1919 and had extended the time.

A different view was taken by a Division Bench of the Chief Court in the case of *Muhammad Hayat* v. *Raghbar Dial* (1) wherein it was held that the mere fact that a Court receives, attests and places on the record a security bond filed after the date fixed by the Court for putting it in, does not by implication extend the time within which the security was to be furnished, and in such a case the plaint should be rejected under s. 22 (4) of the Punjab Pre-emption Act. This decision appears to us to be on all fours with the facts of the present case.

(1) 33 Ind. Cas. 487; 67 P. W. R. 1916.

We hold that the mere fact that the Trial Court received the security bond and placed it on the record on the 23rd of February 1920 does not warrant the presumption that the Court altered its previous order or extended the time within the meaning of sub-s. (4) of s. 22 of the Act.

It is, however, contended by Mr. Bhagat that the case is covered by s 99, C. P. C., which lays down that no decree shall be reversed or substantially varied on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. He urges that the lower Court's omission to reject the plaint in accordance with sub-s. (4) of s 22 was merely an error covered by s. 99, C. P. C. He even goes so far as to say that there is nothing to prevent a Court from ignoring this provision of the law and, instead of rejecting a plaint, allowing the suit to continue and ultimately granting the plaintiff a decree for pre-emption. In our opinion the provision in sub s. (4) that the plaint shall be rejected is a mandatory one and the Trial Court's omission to pass an order in accordance therewith was an illegality such as cannot be covered by s. 99, C. P. C.

Another point urged by Mr. Bhagat was that it could not be said that the decision of the District Judge is contrary to law within the meaning of s. 100 (1) (*a*), C. P. C. This very point had to be decided by the District Judge, and in our opinion he decided it wronlgy and, therefore, his decision was contrary to law.

It was finally urged that there may have been sufficient reason for extending the time under s. 22, sub-s. (4), Pre-emption Act, and that the Trial Court would perhaps have extended the time had an application with this object been made to it. We note, however, that it was not until the fifth hearing after the date fixed for paying in 1/5th of the purchase-money that the plaintiff filed a security bond. During all that time he never made any application for extension of the time. In our opinion there could have been no sufficient reason for extending the time so frequently.

To sum up. We held that there are no grounds for supposing that the Trial Court extended the time or that there was any sufficient ground for extending it up to the 23rd of February 1920. The plaint accordingly should have been rejected and the suit should not have been decreed. We, therefore, accept the appeal and setting aside the order of the lower Appellate Court reject the plaint and we direct that the plaintiff should pay the defendant-appellants' costs throughout.

K.S.D. *Appeal accepted.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 50 OF 1924.

August 26, 1924.

Present :—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

P. BABU SAH—DEFENDANT—APPELLANT

versus

V. M. PURUSHOTHAMA SAH—PLAINTIFF—RESPONDENT.

Letters Patent (Mad.), cl. 15—Permission to sue as pauper, grant of—Order of Judge, Original Side, whether "judgment"—Appeal.

The final order of a Judge sitting on the Original Side of the High Court, allowing or refusing to allow a plaintiff to sue as a pauper is a "judgment" within the meaning of cl. 15 of the Letters Patent, and is, therefore, appealable. [p. 202, col. 1.]

Taljaram Rao v. *Alagappa Chettiar*, 8 Ind. Cas. 310; 35 M. 1 at p. 17; (1910) M. W. N. 607; 8 M. L. T. 453; 21 M. L. J. 1 (F. B.), relied on.

Appasami Pillai v. *Somasundra Mudaliar*, 26 M. 437, not followed.

Appeal from an order of Mr. Justice Kumarasami Sastri, dated the 15th April 1924 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 275 of 1924.

Mr. *K. Krishnaswami Iyengar*, for the Appellant.

Mr. *K. Rajah Iyer*, for the Respondent.

JUDGMENT.—This is an appeal against an order of Mr. Justice Kumaraswami Sastri permitting the plaintiff in C. S. No. 275 of 1924 to sue *in forma pauperis*. A preliminary objection has been taken that no appeal lies. In *Appasami Pillai* v. *Somasundra Mudaliar* (1) it was held that there was no appeal under the Letters Patent against an order of a Single Judge refusing to give leave to appeal *in forma pauperis*. Although the C. P. C. does not provide for appeal against orders made under O. XXXIII, r. 7 an appeal lies under cl. 15 of the Letters Patent against the judgment of a Single Judge sitting on the Original Side with certain exceptions which do not include the present

(1) 26 M. 437.

kind of order. It is argued that the order of the learned Judge was merely an order upon an interlocutory application which was a step towards obtaining a final adjudication and that it does not finally dispose of the plaintiff's right to bring the suit, as it was always open to him to pay the Court-fees and proceed. In our opinion the learned Judge's order was not an interlocutory one and we think that the law confers a substantive right on every plaintiff, who has a good case at law but no means to prosecute it, to sue *in forma pauperis* and we think, with due respect, that the view taken in *Appasami Pillai* v. *Somasundra Mudaliar* (1) where such an order was treated as made in the exercise of a discretionary power, was not the correct view to take of the order passed upon such applications. Under s. 592 of the old C. P. C. the words used are:—"Any person entitled.....to prefer an appeal, who is unable to pay the fee required.....may.....be allowed to appeal as a pauper". The learned Judges treated these words "may be allowed" as vesting in the Court a discretionary power. But the principle on which that case was decided has been doubted in the Full Bench decision in *Tuljaram Row* v. *Alagappa Chettiar* (2) and it has now been made quite clear by O. XLIV, r. 1 of the present Code that such applications have to be dealt with in the same manner as applications to sue *in forma pauperis* in the first instance. In O. XXXIII, r. 7, cl. 3 the words: "The Court *shall* then either allow or refuse to allow the applicant to sue as a pauper." It can no longer be doubted that it is not open to the discretion of the Court to allow a person to sue as a pauper if on hearing the evidence the Court finds that he is not a pauper. The final order of a Judge sitting on the Original Side allowing or refusing to allow a plaintiff to sue as a pauper is in our opinion a judgment under cl. 15 of the Letters Patent.

As to the merits of the present appeal, the defendant filed a counter-affidavit denying the plaintiff's allegation that he had no means and giving details as to a number of items of property which belong to him and as to a fraudulent alienation of property in favour of his nephew shortly before he applied to sue as a pauper. The plaintiff did not file any reply affidavit. After several adjournments, the matter then came before the Court and the learned Judge gave leave to the plaintiff to sue as a pauper upon the Government Solicitor stating that he had received a report that the petitioner was a pauper. The appellant now says in his affidavit that he was prepared to cross-examine the plaintiff and to let in evidence in support of his allegations. We think that if the Judge was not prepared to act on his uncontradicted affidavit, the defendant should have been given an opportunity to prove the statements contained in it notwithstanding that the Government did not choose to dispute the alleged pauperism. Apparently he had no evidence ready at that hearing and he wanted time to produce his witnesses. But it appears that he expected that the other side would ask for an adjournment to file a reply affidavit and that they would not allow his statements to remain uncontradicted. It was reasonable, therefore, to suppose that if he had applied for time to produce his evidence he would have got an adjournment, and we think that now he should be given an opportunity of substantiating his allegations. The learned Judge's order is, therefore, set aside and the case will be remanded for letting in such evidence as the parties may adduce to prove or disprove the plaintiff's pauperism and for making a fresh order after considering such evidence. Costs of this appeal to abide and be provided for in the final order.

V. N. V. *Appeal allowed.*

(2) 8 Ind. Cas. 340; 35 M. 1 at p. 17; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1944 OF 1919.

January 16, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Harrison.

MAULA BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat JIWI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Sale by widow of half of husband's estate to son-in-law—Subsequent devise of other half to daughter—Suit to set aside sale—Daughter and son-in-law in joint possession—Subsequent suit for possession of share bequeathed, whether competent.

A widow in possession of her deceased husband's

estate sold one-half of the estate to her son-in-law, and bequeathed the remaining half to her daughter. The widow died, and the daughter entered into joint possession of the whole estate along with her husband. A collateral of the deceased husband brought a suit for possession of that portion of the estate which was sold to the son-in-law. The daughter was not impleaded. Subsequently the collateral brought another suit against the daughter for possession of the property bequeathed to her:

Held, that as the defendant was in joint possession with her husband of the undivided estate at the time the previous suit was brought against him, the present claim should have been joined with the earlier suit and was now barred under O. II, r. 2 of the C. P. C. [p. 204, col. 1.]

Second appeal from a decree of Additional Judge, Jullundur at Ludhiana, dated 29th June, 1919.

Mr. *Kunwar Narain*, for the Appellants.

Mr. *Badri Das*, for the Respondent.

JUDGMENT.—The pedigree-table in the judgment of the Trial Court explains the relationship of the parties. The subject-matter of the case is a Will executed by *Musammat* Mamon, widow of Allah Ditta, in favour of her daughter, *Musammat* Jiwi, by which she gave her in 1916 one-half of the property left by her husband, Allah Ditta. The plaintiffs are the two branches of collaterals descended from Allah Ditta's brother and they sue jointly for possession of the land disposed of by the Will. The suit has been dismissed by both the lower Courts on the strength of the previous litigation that had taken place between the various members of the family, the finding being that so far as the elder branch of Sikandar Khan is concerned, the matter in dispute is barred by the law of *res judicata* and so far as the younger branch is concerned the suit is barred by the O. II, r. 2, C. P. C.

Out of the estate left by her husband the widow, *Musammat* Mamon, sold one-half to her son-in-law Mir Khan in 1899. A suit was brought by Badar Bakhsh of the younger branch against the widow and Mir Khan in which he impleaded his first cousins Dhera and Nathu. The case was finally decided in 1900 by Mr. Clifford, District Judge, who gave a somewhat peculiar decree, adjudicating on the whole rights of the parties, in which he directed that, should Dhera and Nathu predecease *Musammat* Mamon, Badar Bakhsh would inherit the whole of the property of Allah Ditta, inasmuch as the sale transaction had been without necessity so far as he was concerned, but if they survived her, the alienee would be entitled to retain possession of their share and Badar Bakhsh would only receive one half. This has been held by a subsequent order to mean : if Dhera and Nathu died childless. As a matter of fact Dhera has left a family; so far as Dhera and Nathu were concerned, it was held that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by *Musammat* Mamon, and that, should they survive her, Badar Bakhsh would be entitled to take that portion and that portion which had not been sold to Mir Khan. In spite of this final and binding decision one Babu Khan, son of Dhera, brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. This man Babu Khan and his two younger brothers have now joined with Maula Bakhsh in bringing a suit for a portion of the land which was not alienated to Mir Khan. The question is clearly *res judicata* as between them and the predecessor-in-title of *Musammat* Jiwi.

As regards Maula Bakhsh, the matter is not so simple. In 1916 relying on the declaratory decree in the previous suit and on the fact of *Musammat* Mamon's death in November, 1916, he brought a suit for possession of that portion of the estate of Allah Ditta. which had been sold to Mir Khan. It is clear that he should obviously have asked for the whole relief he sought and for the property to which he was entitled on her death in accordance with the decree of Mr. Clifford. Instead of doing so he asked for the whole of the other portion, to which it had been held that he had no right whatsoever and he succeeded in obtaining a quarter of the whole or one-half of this share, it being found that he was entitled to half of this share and that the descendants of Dhera were entitled to an other quarter. Both decisions were against the decree of Mr. Clifford. Nothing was actually given to the descendants of Dhera as they had not sued, and so far as they are concerned, the decision may be treated as an *obiter dictum*. In the previous suit for possession *Musammat* Jiwi was not impleaded though at the time the suit was brought a Will existed in her favour, and the present plaint recites that on the death of the widow she had taken possession and was, therefore, jointly in possession with her husband of the whole of the estate.

The question is whether under these circumstances O. II, r. 2, applies. *Musammat* Jiwi was not impleaded in that case, but it is urged that this is immaterial as the plaintiff must seek the whole of his relief at once and that as laid down in *Rattan Kaur* v. *Badna* (1), he should join all the persons in possession of the property which he claims. That judgment makes it clear that had she been impleaded, there would have been no mis-joinder, but the further contention that she cannot now be sued is also correct under the peculiar circumstances of this case. Order II, r. 2, lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make regarding the cause of action, and it is clear that in the 1916 suit the plaintiff deliberately refrained from including the whole of his claim to the estate of the late Allah Ditta. The cause of action was the earlier declaratory decree combined with the fact of *Musammat* Mamon's death. He now sues a different defendant on the same cause of action, and the only circumstance which would save his suit from the operation of O. II, r. 2, would be the existence of a separate cause of action against the present defendant *Musammat* Jiwi. This woman was admittedly in joint possession with her husband of the undivided estate at the time the previous suit was brought against him, and, therefore, the principle laid down in *Kendall* v. *Hamilton* (2) applies and the suit fails inasmuch as it should have been combined with the earlier suit in 1916, as the cause of action in both suits is the same.

The appeal, therefore, fails and is dismissed.

N. H. *Appeal dismissed.*

(1) 24 P. R. 1899.

(2) (1879) 4 A. C. 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 57 OF 1923.

August 21, 1924.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice and Mr. Justice Kincaid.

NARSANGJI MEHRAMANSANGJI—DEFENDANT—APPELLANT

versus

BAI ACHRAT—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (Bom. Act V of 1879), ss. 118, 121—Allotment by Survey Officer—Suit for declaration of title—Civil Court, jurisdiction of.

A suit for a declaration that an allotment by the Assistant Survey Officer of the fields in dispute to the estate of the defendant is wrong is not barred by ss. 118 and 121 of the Bombay Land Revenue Code and a Civil Court has jurisdiction to entertain the suit [p. 205, col. 1.]

Appeal against an order passed by the District Judge, Ahmedabad, in Appeal No. 281 of 1920, reversing the decree passed by, and remanding the suit to the Assistant Judge at Ahmedabad, in Civil Suit No. 128 of 1914.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *Dhirajlal Thakore* (with him Mr. *M. K. Thakore*), for the Respondent.

JUDGMENT.—This has been rather an unfortunate litigation as it commenced in 1914, and in 1924 we are hearing this appeal from an order remanding the suit for re-trial on the merits.

The plaintiffs claimed to be the owners of certain lands described in the schedule to the plaint as belonging to the estate of Kankapura while the defendants who represent the estate of Dehvan contended that the suit was not maintainable as the Assistant Survey Settlement Officer had decided the questions, and that the lands belonged to the Dehvan estate. On these pleadings two issues were framed in the Trial Court:—

(1) Is the suit for alteration of the decision of the Assistant Survey Settlement Officer as regards Dehvan and Kankapura unmaintainable?

The finding was that it was not maintainable.

(4) Do the lands described in schedule A annexed to the plaint form part of the village of Kankapura and as such belong to the plaintiffs?

The finding was "if necessary I would hold in the negative."

On these findings the learned Assistant Judge dismissed the plaintiffs' suit. The plaintiffs appealed to the District Court and the learned District Judge framed in substance the same two issues. On the first point he disagreed with the Trail Court and came to the conclusion that the suit was not barred by the provisions of ss. 118 and 121 of the Bombay Land Revenue Code and that the dispute substantially related to the title to the several properties. The learned District Judge further held that, having regard to the meagre consideration of the evidence by the Trial Court, there was no real decision upon the question of title with reference to

the several lands, and accordingly reversed the decree of the Trial Court and remanded the suit for disposal on the merits after giving the parties an opporunity to adduce further evidence. The defendant No. 2 has appealed to this Court from the order of remand and two points have been urged in support of the appeal: (1) The lower Appellate Court was not right in its view that the suit was not barred by s. 121 of the Bombay Land Revenue Code. (2) In any case the lower Appellate Court could have proceeded to decide the appeal on the merits on the evidence recorded by the Trial Court and should not have remanded the case. The long delay that has occurred has been referred to as a further ground in support of the second contention.

As regards the first point, on looking to the order of the Assistant Survey Settlement Officer Ex. 57 and the survey map, it is clear that this is not a question of any boundray line between two villages. The order of the Settlement Officer makes it abundantly clear that the real dispute then was as to the title to some of these lands. The lands now in suit are claimed by the plaintiffs as owners, and I do not find any dispute as to the boundary line of the two villages or of particular Survey Numbers. In fact the map shows that there are no two villages as such: there is one map relating to Dehvan, Wadi and Kankapura. The situation of the various lands in dispute also shows that it is not a question of the boundary lines of the respective numbers but of title thereto. The lower Appellate Court appears to me to be right in holding that there was no bar to the suit in virtue of the provisions of ss. 118 and 121 of the Bombay Land Revenue Code. No other objection to the jurisdiction of the Court is taken.

As regards the second point, apparently there is some force in the argument urged on behalf of the appellant that the lowor Appellate Court could have proceeded to deal with the case on the merits as the evidence adduced by the parties was recorded. But, having regard to the nature of the dispute between th parties relating to the several lands, the consideration by the Trial Court appears to have been too meagre. The learned Trial Judge did not consider the finding on this issue to be necessary, and his treatment of the question has been too summary to be considered as a decision on the merits. In paras. 8 and 9 of the judgment this question has been dealt with, and having regard to the manner in which the Trial Court has dealt with the question, it was open to the lower Appellate Court to hold that practically there was no decision of the Trial Court on the question of title. Though it does not appear from the judgment clearly as to why the learned District Judge came to the conclusion that further evidence should be allowed, it seems to us that under the circumstances it was within his power to allow further evidence; and we are not prepared to hold that the order is wrong. It does not appear what position the learned Pleader for the respondent in the lower Appellate Court took up at the hearing of the appeal on this question. We, therefore, confirm the order appealed from and dismiss the appeal with costs.

We desire to express a hope that this suit will not be further delayed and that it will be heard by the Trial Court as soon as possible.

K.S.D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1921.

July 8, 1924.

Present:—Mr Justice Madhavan Nair.

MANJUNATH SHANBHUGA—PLAINTIFF—APPELLANT

versus

SANNAYYA *alias* NARAINA HOLLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Transferee from mortgagor—Interest, barred, liability to pay—Usufructuary mortgage.

A transferee from the mortgagor is not bound to pay to the mortgagee at the time of redemption a claim for interest which has become barred by limitation. [p. 205, col. 2.]

Where a mortgagee has been in enjoyment of the mortgaged property, he must be considered to have realised the interest from out of the profits of the property, and a mortgagor in such a case seeking to redeem the property can be compelled only to pay the mortgage-money. [*ibid.*]

Ramakrishna Kukkilaya v. *Nekkar Kuppanna*, 43 Ind. Cas. 286; 23 M. L. J. 581; 6 L. W. 621; 22 M. L. T. 422; (1918) M. W. N. 75, *Athan Kutti* v. *Matavil Illoth Sutarjanam*, 37 Ind. Cas. 756; 32 M. L. J. 317; (1917) M. W. N. 9; 5 L. W. 431, *Kesar Kunwar* v. *Kashi Ram*, 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J 880, *Panaganti Ramarayanimgar* v. *Maharajah of Venkatagiri*, 61 Ind Cas. 612; 44 M. 301; 12 L. W 685; 28 M. L. T. 234; 40 M. L. J. 236, *Kunhimai Kutti Beari* v. *Halekote Aisabai*, 62 Ind. Cas; 723; 13 L.

W. 434, and *Mungeshwar Naraina Rao* v. *Shiva Rao*, 49 Ind. Cas. 123; 41 M. 1043; 35 M. L. J. 414; 8 L. W. 405; 24 M. L. T. 370; (1918) M. W. N. 917, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A. S No. 36 of 1921 (A. S. No. 197 of 1920 on the file of the District Court, South Kanara), preferred against the decree of the Court of the District Munsif, Kundapur, in O. S. No. 785 of 1917.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Yegnanarayana Adiga*, for the Respondents.

JUDGMENT.—The plaintiff-appellant is a transferee of the suit properties from the original mortgagors. He seeks to redeem a usufructuary mortgage (Ex. A) dated the 16th of June 1875 executed to the first defendant's father. There was a prior mortgage over the same properties (Ex. B) dated the 24th January 1872 for Rs. 320. By means of Ex. D dated the 20th August 1877, this was transferred to the first defendant's father. Exhibit B does not contain any personal covenant.

The only question arising in this second appeal for decision is whether the plaintiff is bound to pay the first defendant interest under the mortgage, Ex. B, from the year 1877 up to the time of redemption. The lower Appellate Court has held that the first defendant is entitled to get interest on the strength of the decisions in *Kirat* v. *Debi Singh* (1) and in *Abdul Qayyum* v. *Sadr-ud-din Ahmed Khan* (2). It is unnecessary to discuss the applicability of these decisions to the facts of this case as the learned Vakil for the respondents has very fairly stated that these decisions do not lend him any support; and he seeks to support the judgment on other grounds which I shall presently notice. It seems to me that both on principle and on authorities, it is not incumbent on the appellant at the time of redemption to pay the interest claimed by the defendant in this case. The cases in *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (3), *Kesar Kunwar* v. *Kashi Ram* (4), *Athan Kutti* v. *Matavil Illoth Sutarjanam* (5), *Panaganti Ramarayanimgar* v. *Maharajah of Venkatagiri* (6), *Kunhimai Kutti Beari* v. *Halekote Aisabai* (7) and *Mangeshwar Naraina Rao* v. *Shiva Rao* (8) cited by Mr. Sitarama Rao, the learned Vakil for the appellant, show that the transferee from the mortgagors at the time of redemption is not bound to pay a claim for interest which has become barred by limitation. In this case even if there is a personal covenant, the right to enforce it is admittedly barred. Apart from this, it seems to me that since the mortgagee has been in enjoyment of the property, he must be considered to have realised the interest from out of the profits of the property, and a mortgagor in such cases seeking to redeem the property can be compelled only to pay the mortgage money. I think, therefore, the mortgagee in this case is not entitled to get interest on the principal amount of Rs. 320 from the year 1877.

Mr. Adiga, the learned Vakil for the respondents, has tried to support the lower Court's judgment on two grounds. Firstly, he has relied upon s. 72, cls. (*b*) and (*d*). Obviously cl. (*d*) does not apply, and as regards cl. (*b*) it is only the last part of it that is pressed into service in support of the argument. According to the arguments of Mr. Adiga, the amount claimed by the first defendant must be considered to have been the amount spent by him in preserving the property from sale; and this is sought to be supported by reference to a fact that is found mentioned in the transfer deed to the effect that the transfer was made "to avoid the trouble of litigation," and reference to a possibility of litigation is found in the written statement also. Mr. Adiga argues that if the prior mortgagee's possession is disturbed as it must be considered to have been in this case when the second mortgage was executed, he is entitled to bring a suit, and all these complications were put an end to by the first defendant taking an assignment of the first mortgage. This is altogether a new argument and opens up a new line of defence which had not been considered by the lower Courts with reference to the facts of the case. One cannot say whether the reference to litigation vaguely mentioned in the assignment deed and in the written statement would

(1) 27 A. 308; A. W. N. (1904) 268.
(2) 27 A. 403; 2 A. L. J. 23; A. W. N. (1905) 11.
(3) 43 Ind. Cas. 286; 33 M. L. J. 581; 6 L. W. 621; 22 M. L. T. 422; (1918) M. W. N. 75.
(4) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.
(5) 37 Ind. Cas. 756; 32 M. L. J. 317; (1917) M. W. N. 9; 5 L. W. 461.
(6) 61 Ind. Cas 612; 44 M. 301; 12 L. W. 685; 28 M. L. T. 234; 40 M. L. J. 236.
(7) 62 Ind. Cas. 723; 13 L. W. 434.
(8) 49 Ind. Cas. 123; 41 M. 1043; 35 M. L. J. 414; 8 L. W. 405; 24 M. L. T. 370; (1918) M. W. N. 917.

really have led to the sale of the property and whether it would have been necessary to make any payment for preserving the property from such sale. I cannot deal with this argument without the findings of the lower Court on facts involved in it, and I, therefore, cannot allow the learned Vakil for the respondents to raise this argument for the first time in second appeal. Since the argument was not even faintly suggested in either of the Courts below and since sufficient facts do not appear on the record to support it except the vague reference in the assignment deed and the written statement, I do not think that I would be justified in framing an issue about the question that is now raised and calling for a finding upon it from the lower Court.

The second argument of Mr. Adiga is this:—that since the usufructuary mortgagee under Ex. A has to realise his interest from the profits of the property, it cannot be imagined that the same amount of profits will be enough to pay for the interest on the first mortgage as well; and, therefore, it must follow that provision has to be made for this interest at the settlement of accounts during the time of redemption. No authority is cited in support of this proposition. Reference in this connection is made to the last sentence in Ex. D which says that "you the mortgagee and transferee, should recover the consideration of the said mortgage due to me from the *mulgars* together with interest being the value of (translated in Court as 'in return for') the produce commencing from the current year." The meaning of this sentence is not very clear. It does not, in my opinion, authorize the transferee to ask the *mulgars* (mortgagors) for the interest. The sentence in my view means that the transferee should get the consideration of the mortgage from the *mulgars* and interest from the value of the profits. It has also to be remembered that the plaintiff is not a party to this document.

Under these circumstances, I set aside the decree of the lower Court awarding interest to the respondents. In other respects the decree of the lower Court will stand. Time for redemption is extended to three months from this date. The parties will pay and receive proportionate costs in this Court.

V. N. V. *Decree modified.*

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 372 OF 1922.

August 22, 1924.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kincaid.

MANJAYA SANNAYA SHANBHOG—PLAINTIFF—APPELLANT

versus

SHESHGIRI SHAMBHULING UPADHYA—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Renunciation in favour of reversioners—Surrender, when valid—Alienation—Necessity—Consent of reversioners, value of.

A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one, at the moment, and the surrender must be of the whole estate. [p. 209, col. 1.]

The surrender to one of the reversioners is not equivalent to a surrender to all the reversioners, even if it is for the benefit of all the reversioners. [*ibid.*]

The consent of the whole body of reversioners at the date of an alienation by a Hindu widow would afford presumptive evidence of necessity, but it would not estop the actual reversioners from disputing the alienation, unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. [p. 208, col. 1.]

Rangasami Gounden v. *Nachiappa Gounden*, 50 Ind. Cas. 498; 46 I. A. 72; 21 Bom. L. R 640; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.), followed.

Appeal from the decision of the District Judge, Kanara, in Appeal No. 67 of 1920, reversing the decree of the Subordinate Judge at Honavar, in Civil Suit No. 61 of 1912.

Mr. *H. C. Coyajee* (with him Mr. *G. P. Murdeshwar*), for the Appellant.

Mr. *G. S. Mulgaonkar*, for Respondents Nos. 1 to 3, 5, 7 to 9, 12 and 13.

Mr. *D. R. Ugrankar*, for the heirs of Respondent No. 14.

JUDGMENT.—The genealogical table showing the necessary relationship is given at page 3 of the print. One Subbaya had two sons, Timanna and Puttaya. Timmanna adopted as his son one Narayan. Narayan died before 1873, leaving a widow Timmamma. In 1873 the four sons of Puttaya, the brother of Timanna, one named Sannaya *alias* Subbaya, by his first wife, and three named Shambhulinga, Timmanna and Subbaya, by his second wife, were alive. In 1873 Timmamma, the widow of Narayan, alienated the whole of her estate to Shambhulinga. Shambhulinga afterwards sold these properties to different persons by different sale-deeds. Three of the sale-deeds executed in 1877 by Shambhulinga in favour of the purchasers from him were attested

by Subbaya, the step-brother of Shambhulinga. These alienees obtained possession of these properties and continued in possession until the death of Timmamma in April 1913. At the time of her death the reversioners were the two sons of Subbaya, namely, Manjaya and Krishnaya, and Venkatraman the son of Timmanna as shown in the pedigree. Ganpati, the brother of Venkatraman, had died before that date. Manjaya filed the present suit in 1919 as a reversioner claiming possession of these properties on the ground that the alienation made by the widow in favour of Shambhulinga was not for legal necessity and ceased to be operative on the death of the widow. The transferee of his interests joined with him as plaintiff No. 2.

The defendants are several alienees from Shambhulinga and the two other reversioners, namely, Krishnaya and Venkatraman. The defence of the alienees was that the sale by the widow to Shambhlinga was for legal necessity and with the consent of all the reversioners at the date of the sale.

The Trial Court raised several issues. Two of them are material for our present purpose. Issue No. 4 was : "Were the alienations for legal necessity?" The finding was in the negative. Issue No. 11 was: "Is it proved that the alienations in question were made with the consent of the next reversioners?" The learned Judge was satisfied that the alienations by the widow in favour of Shambhulinga were not for legal nacessity, but he came to the conclusion that they were with the consent of all the brothers of Shambhulinga including Sannaya and that it was for their common benefit. This conclusion is based upon the circumstance that Sannaya attested three of the sale deeds passed by Shambhulinga to the purchasers from him. It appears from the judgment of the Trial Court, and it cannot be disputed, that there is no other evidence in the case either with regard to the consent of all the reversioners at the date of the alienation by the widow or that this alienation was for the common benefit of all the then reversioners. It is not suggested in the present case that there was any consent of the actual reversioners, that is of the plaintiff and defendants Nos. 14 and 15, who were the reversioners when the reversion opened. The Trial Court dismissed the suit with costs on the ground that in view of his finding, the transaction by the widow was to be treated as acceleration of the reversion and as the surrender of the entire estate for the benefit of all the then reversioners although in the name of Shambhulinga alone.

The plaintiffs appealed to the District Court and the learned District Judge accepted in its entirety the view taken by the Trial Court and confirmed the decree of that Court.

In the appeal before us it is contended that the lower Court erred in applying the doctrine of acceleration to this case. It is further contended that the inference drawn by the lower Court as to the consent of Subbaya is not justified as it is exclusively based upon the only circumstance that he attested some of the sale-deeds in 1877. As both the Courts have found that there was no legal necessity, it is not necessary to deal with that part of the case. It may be accepted that the alienation by Timmamma in favour of Shambhulinga in 1873 cannot be justified on the ground of necessity. It is also common ground that there is no consent of the actual reversioners. The consent of the whole body of reversioners at the date of the alienation would afford presumptive evidence of necessity but would not estop the actual reversioners from disputing the alienation unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. This position is made clear in *Rangasami Gounden* v. *Nachiappa Gounden* (1). Their Lordships considered the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) and stated the effect at page 86* of the report in *Rangasami Gounden* v. *Nachiappa Gounden* (1). The only ground, therefore, that remains to be considered is whether the lower Courts were right in applying the doctrine of acceleration to this case. It is an admitted fact that the alienation was in favour of Shambhulinga alone. There is hardly any justification for the inference which the lower Courts have accepted that it must be taken to be for the benefit of all the four reversioners at the date of the alienation. It is based upon the only circumstance that Subbaya attested the sale-deeds by Shambh-

(1) 50 Ind. Cas. 498; 46 I. A. 72; 21 Bom. L. R. 640; 33 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 23 C. W. N, 777; (1919) M. W. N. 232; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.).

(2) 35 I. A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 30 A. 1; 5 A. L. J. 1; 3 M. L. T. 1; 11 O. C. 78 (P. C.).

*Page of 46 I. A.—[*Ed.*]

linga in 1877. The essentials of a valid surrender by a Hindu widow of her estate are stated in *Rangasami Gounden* v. *Nachiappa Gounden* (1). A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one, at the moment, and that the surrender must be of the whole estate. In the present case the alienation in question related to the whole estate but it was in fact a surrender in favour of one of the reversioners and not all the revesioners of the same degree. At the date of the alienation there were four reversioners of the same decree and it is not possible, in my opinion, to extend the doctrine of surrender by a Hindu widow in the manner in which the lower Courts have extended it. No authority is cited in support of the proposition that the surrender to one of the reversioners is equivalent to a surrender to all the reversioners, if it is for the benefit of all the reversioners. Assuming, however, that the doctrine can be extended in that way we have to consider whether the inference drawn by the lower Courts is justified. It appears to us that it was open to the Trial Court to draw an inference that the attestation by Subbaya to the documents in question was with knowledge of the contents of those documents. But it was hardly open to that Court to draw from that circumstance the further inference that he was a consenting party to the alientation by the widow in 1873. It may be said, however, that when he came to know in 1877 that Timmamma had alienated her property to Shambhulinga, he acquiesced in that position. Even then the further finding that in 1873 the alienation in favour of Shambhulinga was for the benefit of all the four reversioners at the time is purely conjectural and is based on no evidence. There is no valid surrender of her estate by the widow in this case.

We may mention that the three reversioners take the estate equally. There is no question of claiming through their fathers in the present case as reversioners, and, therefore, though their shares have not been accurately stated in the plaint, it must be made clear that all the three are entitled equally to the estate.

We allow the appeal, reverse the decree of the lower Appellate Court and pass a decree for possession in favour of the plaintiffs, the heirs of defendant No. 14, and defendant No. 15 against the other defendants Plaintiffs should get their costs throughout from defendants other than the heirs of defendant No. 14 and defendant No. 15. The heirs of defendant No. 14 and defendant No. 15 should bear their own costs throughout.

We make no order as to mesne profits prior to this date under the circumstances of this case. This is rather a hard case for the alienees and we think that the justice of the case will be met by allowing mesne profits from the date of this decree until the delivery of possession or the expiration of three years whichever event first occurs.

Mesne profits to be determined by the Trial Court under O. XX, r. 12.

K.S.D. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1327 OF 1921.

August 15, 1924.

Present:—Mr. Justice Madhavan Nair.

SISTLA VENKATA SASTRI—PLAINTIFF—APPELLANT

versus

ZERNINI VENKATAGOPALUDU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—"Between parties to the suit," meaning of—Decree for specific performance of contract on payment of purchase-money—Contest between judgment-debtor inter se as to right to receive purchase-money, decision of—Suit, separate, whether maintainable.

The expression "between the parties to the suit" in s. 47, C. P. C., imports between parties opposed to each other in the suit, but does not necessarily mean between parties who are plaintiff and defendant respectively in the suit. [p. 210, col. 2.]

A suit for specific performance of a contract for the sale of immoveable property was decreed against the vendor and a subsequent purchaser from him. In execution of the decree, a contest arose between the judgment-debtors as to which of them was entitled to receive the amount of the purchase-money from the decree-holder and it was decided that the money should be paid to the subsequent purchaser from the vendor. The vendor then brought a suit against the subsequent purchaser to recover the amount of the purchase-money paid to him by the decree-holder:

Held, that the order of the Execution Court deciding that the purchase-money should be paid to the subsequent purchaser fell within the purview of s. 47 of the C. P. C. and that a separate suit in respect of the same question was barred by the provisions of that section. [p. 211, cols. 1 & 2.]

(Case-law discussed.)

Second appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in A. S. No. 70 of 1920 (A. S. No. 15 of 1920, District Court, Kistna), preferred

against that of the Court of the Principal District Munsif, Gudivada, in O. S. No. 530 of 1918.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *K. Kameswara Rao*, for the Respondent.

JUDGMENT.—The facts necessary for deciding this case are not sufficiently stated in the appellate judgment. The plaintiff is the appellant. He entered into a contract of sale of some properties with one Gangadharudu for Rs. 1,500 and after receiving Rs. 200 from him as earnest money, put him in possession of those properties. Subsequently, he executed a sale-deed to Gopaludu (the defendant in the present suit) for a consideration of Rs. 2,000. Both the vendees instituted suits against the plaintiff for appropriate reliefs, O. S. No. 352 of 1909 was by the second vendee (the present defendant) against his vendor (the present plaintiff), Gangadharadu and another for possession of the properties; and O. S. No. 473 of 1909 was by Gangadharudu (the first vendee) for specific performance of the contract against his vendor (the present plaintiff), subsequent vendee (the present defendant), and another Seshayya. Both suits were ultimately tried together. Original Suit No. 352 of 1909 was dismissed and it was found in the litigation between these parties that Gopaludu was only a *benamidar* for Seshayya, the 3rd defendant in O. S. No. 473 of 1909 and had no real interest in the transaction. The decree in O. S. No. 473 of 1909 directed that either defendants Nos. 1 and 2 (the present plaintiff and defendant) jointly, or the 2nd defendant (*viz.*, the present defendant) alone do execute a registered sale deed to Gangadharudu receiving the balance of the purchase money (*viz.*, Rs. 1,300). The decree did not specifically say who should receive the amount, but in connection with the application to execute the decree, it was decided that the present defendant, Gopaludu was the proper person to execute the sale-deed and should receive the purchase-money. The present defendant, thereupon, executed a deed and applied for a cheque for the amount of Rs. 1,300 lying in deposit. The present plaintiff opposed this application but the cheque was ordered to issue to the present defendant and he received the sum of Rs. 1, 300.

Some time after this order, a pending suit which had been instituted by the present defendant for Rs. 2,000 was decided against him on the ground that he was only a *benamidar*, that he had no title to the property and that a suit by him was not maintainable. The suit out of which the present second appeal has arisen was filed by the plaintiff-appellant for the recovery of Rs. 1,300 taken away by the defendant in the execution proceedings in O. S. No. 473 of 1909.

The only question argued in this second appeal is whether the present suit is barred by s. 47, C. P. C., or, in other words, whether the order, Ex. M, directing that the money deposited by the plaintiff in O. S. No. 473 of 1909 should be paid to the present defendant who was the 2nd defendant in that suit was one passed under s. 47, C. P. C. in execution of the decree passed therein and, therefore, no separate suit is maintainable by the present plaintiff who was the 1st defendant in that suit. It has not been argued by the learned Vakil for the appellant that the question that was decided in Ex. M is not one relating to the execution, discharge or satisfaction of the decree; but it was argued by him that the question is not between the decree-holder on the one hand and the judgment-debtor on the other, but one between the judgment-debtors, namely, the defendants, *inter se* and, therefore, s. 47, C. P. C. is not a bar to the present suit. In *Samalapalli Mangayya* v. *Samalapalli Sriramulu* (1), the question arose between two defendants in the course of execution of a mortgage decree as to whose property should be sold first. The learned Judges point out : "Although the 5th and 10th defendants were both arrayed as party defendants, they were arrayed against each other so far as the question whether any of the items of the mortgaged properties should be first sold was concerned," and they proceed to say "the expression 'between the parties to the suit' no doubt imports 'between parties opposed to each other in the suit' but does not necessarily mean between parties who are plaintiff and defendant respectively in the suit" and cite as an instance partition suits where parties who are co-defendants are often arrayed against each other. In *Thoppai Vedaviasa Aiyar* v. *The Madura Hindu Sabha Nidhi Co., Ltd.* (2), also, the learned Judges decid-

(1) 19 Ind. Cas. 448; 24 M. L. J. 477; 13 M. L. T. 347; (1913) M. W. N. 382.

(2) 77 Ind. Cas. 148; 45 M. L. J. 478; 18 L. W. 311; (1923) M. W. N. 662; (1924) A. I. R. (M.) 365.

ed that the question as to the order in which the items of property are to be sold arising between the defendants in the case was also a question which arose between the parties to the suit, though the parties were not arrayed as plaintiffs and defendants in the suit. It is stated in that decision: " We can see no reason for acceding to the suggestion that we should limit the scope of s. 47, C. P. C. in the way suggested, when to do so would exclude from its purview the decision of many of the questions which must inevitably arise only after the decree and when the result would be to frustrate the object of the section recognised by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3) the cheap and speedy settlement of all disputes at the stage of execution." The decision in *Budaraju Hanumantha Rao* v. *Allamneni Krishnamma* (4) also seems to support the same view. Even a defendant who has been exonerated from a suit would, on a liberal construction, be treated as one of the parties to the suit within the meaning of s. 47, C P. C. *vide Ramaswami Sastrulu* v. *Kameswarama* (5). I cannot agree with the suggestion of the learned Vakil for the appellant that the interpretation put upon the term "parties to the suit" in *Samalapalli Managayya* v. *Samalapalli Sriramulu* (1) and *Thoppai Vedaviasa Aiyar* v. *The Madura Hindu Sabha Nidhi Co., Ltd.* (2), should be confined to mortgage and partition suits. He, however, relies upon a decision in *Anavarda Khan* v. *Misiri Khan* (6), where it was held that disputes between judgment-debtors *inter se* as to possession of property after satisfaction of a decree would not be disputes between parties to the suit within the meaning of s. 47, C. P. C. In that case it was pointed out by Sadasiva Iyer, J., that the decree-holder had absolutely no interest in the question that was raised by the judgment-debtors. I do not think that the same can be said about the decree-holder in this case. As pointed out by the Subordinate Judge, Gangadharudu, the decree-holder in O. S. No. 473 of 1909 who deposited the balance of purchase money was certainly interested in seeing that the money was paid to the proper person. The other decisions of the Calcutta and Allahabad High Courts brought to my notice do not materially help us in deciding this case.

I, therefore, hold that the plaintiff's suit is barred by s. 47, C. P C. and dismiss the second appeal with costs.

Appeal dismissed.

Z. K.
V. N. V.

(3) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N s.) 898 (P. C.).

(4) 70 Ind. Cas 329; 32 M. L. T. 118; (1924) A. I. R. (M.) 518.

(5) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. s.) 653.

(6) 35 Ind. Cas. 179; 31 M. L. J. 44; (1916) 1 M. W. N. 468.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1181 OF 1922.

August 19, 1924.

Present :—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

KALI NARAYAN ROY CHOUDHURY—PLAINTIFF—RESPONDENT.

Land Revenue—Asli lands assessed at Permanent Settlement—Submergence and re-emergence—Person in possession, title of, dispute about—Additional assessment, whether justified.

Lands settled as *asli* lands at the time of the Permanent Settlement and assessed with revenue are not liable to additional assessment of revenue, when they re-emerge after submergence. [p. 212, col. 1]

The mere fact that the title of the person in possession is in dispute does not give the Government the right to make assessment of the lands. [*ibid.*]

Appeal against the decree of the Additional District Judge, Dacca, dated the 31st of January 1922, affirming that of the Subordinate Judge, Fifth Court of that District, dated the 20th of June 1919.

Babu *Surendra Nath Guha* and M. *Nuruddin Ahamed*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Sarat Chandra Lahiri*, for the Respondent.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council against the decision of the Additional District Judge of Dacca affirming the decision of the Subodinate Judge, 5th Court, Dacca. The suit arises out of certain resumption proceedings by which certain lands in the possession of the plaintiff was assessed to revenue. Both the Courts have held that these lands are not liable to such assessment and the plaintiff has been

given a decree declaring his title to the land in suit. His title is declared in respect of some of these lands to be in *taluki* right in respect of other lands to be by right of accretion. In the view we take it is not necessary to discuss at length the facts of the case.

The main facts as found are these:—The plaintiff is the proprietor of *Mouzas* Mastul and Bailjuri. At the time of the Permanent Settlement the lands in suit were *asli* lands and were assessed to revenue. Sometime after the Permanent Settlement but before the *thak* Survey the river Dhaleswari, a navigable river, flowed over the land in suit. Subsequently the river receded and as it receded the Government claimed the right to assess the newly formed land to revenue. Sometime after 1860 there was what is called a *daimibundobust* by which certain estates were created which were settled with the plaintiff's predecessor. The plaintiff claimed the land in suit partly as appertaining to certain estates dating from the Permanent Settlement and partly as appertaining to these so called *daimibundobust* estates. Having regard to the finding that all this land was *asli* land and was settled as *asli* land at the time of the Permanent Settlement and were then assessed with revenue it seems obvious that the Government has no right to make additional assessment of revenue on these lands. The plaintiff is, undoubtedly, in possession and it is immaterial whether these lands appertain to his estate or not. If these lands formed part of other estates, it is for the proprietors of these estates to assert their rights and they will not be bound by the decision in this suit. The Government clearly can have no right to make assessment of this land and recover it from the plaintiff. The Government has, in fact, settled these lands in dispute with the plaintiff and the plaintiff has paid revenue on this assessment under protest. The Government, therefore, cannot deny the plaintiff's title to these lands. Under the Regulations the Government is bound to settle the lands with the proprietors even if they are accreted lands.

The lower Courts, in our opinion, have fallen into some error in the remarks they had made with reference to accretion. On the finding that the lands in suit were assessed to revenue at the time of the Permanent Settlement they cannot now be treated as accretions in the strict sense of the word. The plaintiff is entitled to these lands either as reformation *in situ* or possibly by adverse possession, but he does not base his title on accretion, since accretion of land to a permanently settled estate is liable to Settlement of revenue. However, no cross-appeal has been filed and the plaintiff is satisfied with the decree which has been given to him which in fact gives him all he wants, namely, a declaration that he is not liable to pay additional revenue for this land and is entitled to a refund of such revenue as has been wrongly paid.

For these reasons we must dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 292 OF 1922.
September 25, 1924.
Present:—Mr. Justice Devadoss.

M. C. NAGASAMI IYER—PLAINTIFF—APPELLANT

versus

N. RAMASAMI IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Trusts Act (II of 1882), s. 90—Joint pattadars, *whether co-owners—Default in payment of land revenue—Revenue sale—Purchase by one* pattadar, *effect of—Collector, order by—Notice, absence of, effect of.*

The mere fact that a *raiyatwari patta* stands in the name of two or more persons who own specific items in the property covered by it, does not make them co-owners within the meaning of s. 90 of the Trusts Act. [p. 213, col. 1.]

Faizur Rahman v. *Maimuna Khatun*, 20 Ind. Cas. 510; 17 C. W. N. 1233; 18 C. L. J. 111 and *Deonandan Prasad* v. *Janki Singh*, 39 Ind. Cas. 346; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 30 (P. C.), distinguished.

Section 90 of the Trusts Act applies only to the case of a co-owner who takes advantage of his position as co-sharer and does something in that capacity *qua* co-sharer to bring the property to sale or gain an advantage in derogation of the rights of the other co-owners. [p. 213, col. 2.]

The mere fact of a purchase of joint property by one co-sharer in a Court sale not brought about by any act or illegal omission on his part is not sufficient to entitle the other co-sharers to the benefit of the sale. [p. 214, col. 1.]

The District Collector is the final authority entitled to set aside or confirm a revenue sale and not the Deputy Collector who has only delegated authority. In every case in which an order is made against a party, notice should be given to that party before

such order is made, whether the order is made by a Revenue Authority or by a Judicial Authority. But where it appears that the party has not been prejudiced by his not being given notice, the order would not be invalid. [p. 214, col. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Madura, in Appeal Suit No. 91 of 1920 (A. S. No. 179 of 1920, District Court, Madura), preferred against that of the Court of the Second Additional District Munsif, Madura, in Original Suit No. 230 of 1917.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *K. Rajah Iyer*, Advocate-General, for the Respondents.

JUDGMENT.—The first point urged for the appellant in this second appeal is that the purchase by the 1st defendant enured for the benefit of the plaintiff as well, and that he is, therefore, entitled to a decree, so far as his share is concerned. The finding is that both the plaintiff and the 1st defendant defaulted to pay the Government revenue, in consequence of which the Revenue Authorities brought the plaintiff's properties to sale, and it was sold in auction. The contention of Mr. Anantakrishna Iyer for the appellant is that the plaintiff and the 1st defendant are co-owners, that by the default of the co-owners the property was sold, that taking advantage of his position as such the 1st defendant bought the property and that, therefore, s. 90 of the Trusts Act applies to this case. In the first place I am not satisfied that the word 'co-owner' applies to the case of joint *pattadars* who are *raiyatwari* tenants. The plaintiff is the owner of specific items of property, and the mere fact that the *patta* stands in the joint names of himself and one or two others would not make the other persons co-owners with the plaintiff within the meaning of s. 90 of the Trusts Act. It is urged that there is a joint liability to pay the Government revenue and that that joint liability makes them co-owners. In my opinion it is only an accident that the *patta* stands in the names of two persons who are entitled to different items of property and who have no community of interest between them. In this case no doubt the plaintiff and the 1st defendant happen to be relatives, but there are cases in which persons who have nothing to do with one another happen to own property for which *patta* stands either in the joint names of both or in the name of one of them or in the name of a third person. In such cases, if the owner of some specific items makes default in paying the Government revenue, the Government is entitled to bring any one of the items mentioned in the *patta*, in respect of which a default in payment of revenue is made, to sale, and this circumstance, in my opinion, will not make joint *pattadars* or persons, who own lands separately but for which the *patta* is joint, co-owners. Reliance is placed upon an observation in *Faizur Rahman* v. *Maimuna Khatun* (1) for the position that the plaintiff and the 1st defendant are co-owners. There is no definition given of co-owners, but in all the cases which have been cited at the Bar I find that co-owners are persons who own property jointly, that is to say, there was no division by metes and bounds of the shares of the different owners. In the case of *Faizur Rahman* v. *Maimuna Khatun* (1), the persons who made default in payment of the revenue due to Government were co-owners with the persons whose shares were afterwards sold. Section 90 of the Trusts Act applies only to cases of tenants for life, co-owners, mortgagees and other qualified owners of property who avail themselves of their position as such in gaining an advantage in derogation of the rights of other persons interested in the property. In that view I do not think that the decision in *Deonandan Prasad* v. *Janki Singh* (2) helps the appellant. In that case their Lordships of the Privy Council held that, if one co-owner makes default in payment of Government revenue and if the object be to bring the share of the other co-owners to sale and afterwards to buy the property himself, such a sale, though good, would enure for the benefit of the owner of the share which has been sold. They also observe that it is not necessary that there should be actual fraud proved in order to enable the co-sharer whose share has been sold in auction in a revenue sale to claim the benefit of the purchase by another co-sharer; but from their judgment it is clear that the person who takes advantage of his position as a

(1) 20 Ind. Cas. 510; 17 C. W. N. 1233; 18 C. L. J. 111.

(2) 39 Ind. Cas. 316; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. L. 410; 44 I. A. 30 (P. C.).

co-sharer must have done something in that capacity, that is *qua* co-sharer, to bring the property of the other co-sharer to sale. In this case the finding is that both the plaintiff and the 1st defendant defaulted to pay the Government revenue, and there is no finding that the 1st defendant by any act or illegal omission on his part brought the plaintiff's property to sale. That being so, I do not think the plaintiff can claim from the 1st defendant the property which he purchased in Court auction. The auction was a public one, and the 1st defendant and the plaintiff's brother were present. Under the Revenue Law it was open to any defaulter to buy the property. It was open to the plaintiff to buy the property, as it was open to the 1st defendant to buy it. In these circumstances it cannot be held that the purchase by the 1st defendant enured for the benefit of the plaintiff.

The next point urged by Mr. Ananthakrishna Iyer is that the Collector had no power to set aside an order made by the Deputy Collector. But on this point the law is quite clear. The Collector is the final authority on matters of this kind, and he is the person who has to dispose of such matters. The Deputy Collector has only delegated authority, and the Collector has power to set aside or confirm the order of the Deputy Collector. I do not think this contention is tenable.

The last contention is that the Collector did not give notice to the plaintiff when he set aside the order of the Deputy Collector. I must observe, as was fairly conceeded by the learned Advocate-General, that in every case in which an order is made against a party, notice should have been given to that party before such order is made, whether the order is made by a Revenue Authority or by a Judicial Authority. I think it is a salutary principle that notice should be given to a person before an order is made against him. In this case the Deputy Collector set aside the sale, but the Collector afterwards confirmed the sale. The plaintiff has not proved that he could have urged any matter before the Collector which could have induced him to pass an order different to that which he has passed. It appears from the evidence that the plaintiff was aware of the order, but he did not apply to the Collector to have the order reviewed. The Collector set aside the order of the Deputy Collector solely on the ground that the reason given by the Deputy Collector was not one of the reasons contemplated by the Revenue Recovery Act. The Deputy Collector set aside the sale on the ground that there was no proper bid. That is not a reason for which a sale could be set aside. If the plaintiff could show that he had very good grounds which he could have urged before the Collector, I would be inclined to hold that the plaintiff was prejudiced by his not being given notice before the Collector passed his order. But in the circumstances of the case it cannot be said that he was in any way prejudiced, because from the evidence it appears that he could have urged no ground successfully against the order of the Collector. On this ground, I think, this objection is not tenable.

In the result, the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2373 OF 1921.

November 21, 1923.

Present:—Mr. Justice Walmsley and Justice Sir Suhrawardy, KT.

JAGABANDHU NANDI AND OTHERS —DEFENDANTS—APPELLANTS

versus

ABDUL HAMID MEA AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148A—Suit for rent by co-sharer landlord—Plaint, when in accordance with law.

In a rent suit by a co-sharer landlord, the plaint mentioned the rent payable annually both on the whole and in different shares, together with the amount believed to be due for the period in suit to the plaintiff and to other co-sharers. It was also alleged that the other landlords refused to let the plaintiff know what was due to them:

Held, that there was a sufficient compliance with the law as set out in s. 148A of the Bengal Tenancy Act. [p. 215, col. 2.]

Baikantha Nath Sen v. *Ramapati Chatterjee*, 45 Ind. Cas. 767; 27 C. L. J. 101, distinguished.

Nunda Lal Choudhury v. *Kala Chand Chowdhury*, 8 Ind. Cas. 50; 15 C. W. N. 820, and *Brohmanlannath Deb Sircar* v. *Hem Chandra Mitter*, 23 Ind. Cas. 981; 18 C. W. N. 1016, referred to.

Appeal against the decree of the Additional Subordinate Judge, Bakerganj, dated

the 17th of August 1921, modifying that of the Munsif, First Court at Barisal, dated the 7th of June 1922.

Babu *Brajendra Nath Chatterjee* (with him Dr. *Sarat Chandra Basak* and Babu *Sachindra Nath Roy Chowdhury*), for the Appellants.

Babu *Gunada Chandra Sen* (with him Babu *Prasanta Bhusan Gupta*), for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by some of the defendants who bought at an auction-sale some property which had been included in a mortgage executed by the defendant No. 1 in favour of the plaintiff. The defendants say that the sale was a rent-sale at which they purchased and that, after they had purchased, they took steps under the Bengal Tenancy Act to annul the encumbrances and, in consequence, the property in their hands is exempted from the mortgage liability. The whole question turns upon whether or not the decree in execution of which the defendants made their purchase was a rent-decree and that again turns upon the question whether the plaint which led up to the decree was a plaint such as is contemplated by s. 148A of the Bengal Tenancy Act. The learned Munsif held that the plaint was properly drawn up under s. 148A of the Bengal Tenancy Act. The learned Subordinate Judge on appeal took a contrary view and he relied on the decision in the case of *Baikantha Nath Sen* v. *Ramapati Chatterjee* (1) It appears to me that the learned Judge has really misunderstood that decision. If the opening paragraphs of that judgment are read, it will be seen that there was practically no attempt on the part of the plaintiff in that suit to comply with the provisions of s. 148A of the Tenancy Act. There was only a casual reference to the fact that some share of the rent might be due to the co-sharers and, if necessary, the plaintiff might be allowed to amend his plaint so as to secure a decree for the whole sum. That decision, I think stands by itself on a set of facts which may be distinguished from the facts of other cases. On the other hand, there are several cases: *Nundalal Chowdhury* v. *Kala Chand Chowdhury* (2) and *Brohmandannath Deb Sircar* v. *Hem Chandra Mitter* (3) and later cases in which the facts appear to be very similar to those in the present case. All of them have this common feature that the plaintiff in each case made an honest effort to frame his suit in such a manner as to comply with the provisions of s. 148A of the Bengal Tenancy Act. In the present instance, the plaintiffs certainly tried to do so and I think they succeeded. A translation of the plaint has been placed before us and it appears that the plaint mentioned what was the rent payable annually in the 16-annas share, what was payable in the different shares, what was believed to be due altogether for the period in suit with damages in the 16-annas and then what was due to the plaintiffs in their share and what was payable to the other landlords in their shares. Then, the plaint went on to allege that the other landlords refused to let the plaintiffs know what was due to them and the plaintiffs had been unable to ascertain that and on that account, they asked for a decree for the amount due to themselves alone. They also made an alternative prayer that, if the other landlords wished to be added as plaintiffs on disclosing what was due to them, then they might be transferred from the category of defendants to that of plaintiffs. In my opinion, there was sufficient compliance with the law as set out in s. 148A of the Bengal Tenancy Act in the rent suit which led up to the defendants' purchase. Accordingly I hold that defendants-appellants bought the property at a rent-sale and then made it free from the mortgage liability. The result is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside so far as Plots Nos. 1 and 2 are concerned and those of the Court of first instance are restored with costs in this Court and in the Court of Appeal below.

Suhrawardy, J.—I agree.

K.S.D. *Appeal allowed.*

(1) 45 Ind. Cas. 767; 27 C. L. J. 101.
(2) 8 Ind. Cas. 50; 15 C. W. N. 820.
(3) 23 Ind. Cas. 981; 18 C. W. N. 1016.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 22 AND 23 OF 1923.

August 27, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

K. M. K. R. K. R. RAMANATHAN CHETTIAR BY HIS AGENT RAMA IYER —APPELLANT

versus

P. L. V. V. R. SUBRAMANIA CHETTIAR AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 51 (1)—"Date of admission of petition", meaning of—"Assets realised," what are—Execution creditor, rights of.

The policy and the object of the Statute of Insolvency is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active. [p. 217, col. 1.]

The words "date of the admission of the petition" occurring in s. 51 (1) of the Provincial Insolvency Act qualify the words "assets realised" and not the word "sale", so that only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor. [*ibid.*]

When property is sold in execution of a decree, the sale-proceeds may be said to be "assets realised" within the meaning of s. 51 (1) of the Provincial Insolvency Act only when the balance of the purchase-money is paid and not when the 25 per cent. is deposited in Court. [*ibid.*]

Hafez Mahomed Ali Khan v. *Damodar Pramanick*, 18 C. 242; 9 Ind. Dec. (N. S.) 161, *Ramanathan Chettiar* v. *Subramania Sastrial*, 26 M. 179, *Arimuthu Chetty* v. *Vyapuri Pandaram*, 8 Ind. Cas. 852; 35 M. 588; (1911) 1 M. W. N. 47; 9 M. L. T. 121; 21 M. L. J. 505 and *Maharaja of Burdwan* v. *Apurba Krishna Roy*, 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50, relied on.

Appeals against the orders of the District Court, Coimbatore, in I. A. Nos. 312 and 313 of 1922 in I. P. Nos. 56 and 57 of 1922.

Mr. *T. N. Krishnaswami Iyer*, for the Appellant.

Mr. *Ranganada Iyer*, for the Respondents.

JUDGMENT.—The facts of this case are not disputed. In execution of a decree against the respondent, his properties were brought to sale on the 27th of June 1922 and his auction-purchaser deposited 25 per cent. of the sale-proceeds in the District Munsif's Court at Tiruppur. On the 1st of July 1922, an insolvency petition was filed against the 2nd respondent and the Official Receiver was appointed *interim* Receiver on the 4th of July 1922. The balance of the purchase-money was deposited on the 11th of July 1922 and the 2nd respondent was adjudicated an insolvent on the 15th of September 1922. In the meanwhile the sale-proceeds of the 2nd respondent's properties were forwarded to the Official Receiver, by the District Munsif. On the 26th of July 1922 an application was filed before the District Judge of Coimbatore by the creditor who attached the properties and brought them to sale for the re-transfer to the District Munsif's Court of Tiruppur of the sale-proceeds to be dealt with by him according to law. The petitioning creditor who applied under the Insolvency Law for the adjudication of the debtor as an insolvent and for the appointment of the *interim* Receiver resisted this application and the District Judge rejected it. This appeal is by the creditor against the order of the District Judge refusing to re-transfer to the District Munsif's Court of Tiruppur the sale-proceeds of the 2nd respondent's properties now in the possession of the *interim* Receiver.

The principle of law to be applied to the decision of this appeal is embodied in s. 51, cl. (1) of the Provincial Insolvency Act which runs as follows:—"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition." It has been argued by Mr. Krishnaswami Iyer that, according to this section, irrespective of the time of realisation, assets realised in the course of execution by a sale which has been held before the date of the admission of the insolvency petition are preserved for the benefit of the execution creditor, or, in other words, if the sale, by means of which the assets are realised, is held before the date of the admission of the petition, then the assets even if they be realised after the date of the admission of the petition, enure to the advantage of the execution creditor. Shortly stated this argument makes the "date of the admission of the petition" qualify the "sale" and not "assets realised" in the section. The records in the case do not show the date of the admission of the petition; but for the purposes of this appeal, the date may be taken to be some time between the 1st and 4th of July; in any event, it cannot have been later than the 4th of July when the *interim* Receiver was appointed, since the execution sale in this case was held on the 27th of June 1922, (*i. e.*,) anterior to the 4th of July, it follows from the argument just stated that the ap-

pellant-creditor is entitled to all the assets as against the *interim* Receiver. We cannot accept this argument. It seems to us that "the policy and the object of the Statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active" [*Bower* v. *Hett* (1)]. This object will obviously be frustrated if we accept the construction put upon the section by the learned Vakil for the appellant. We think that the words " date of the admission of the petition" occurring in this section qualify "assets realised" so that only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor. The question then arising for consideration is, were assets realised in the course of execution before the date of the admission of the petition in this case? The words "assets realised in the course of execution" have been interpreted in many decisions in cases which arose under s. 295 of the old C. P. C., corresponding to s. 73 of the present Code. We think these may be usefully referred to for elucidating the meaning of the words "assets realised" occurring in this section. In *Hafez Mahomed Ali Khan* v. *Damodar Pramanick* (2), it was held that, when property is sold in execution of a decree, the sale-proceeds may be said to be assets realised only when the balance of the purchase-money is paid and not when 25 per cent. is deposited in Court. In *Ramanathan Chettiar* v. *Subramania Sastrial* (3) occur the following observations by Sir Arnold White, C. J., "It seems to me that the word 'assets' in s. 295, C. P. C., means the proceeds of the sale of the property which is sold in execution of the decree. As far as the present case is concerned I am of opinion that the assets were realised when the whole of the proceeds were paid into Court." Though there is no doubt a change in the corresponding provision of s. 73 of the present Code in that it substitutes the word "receipt" for the word "realised" in s. 295, still so far as the question before us is concerned, the decisions under s. 73 are also helpful in arriving at a conclusion as to the meaning of the term "assets realised." In *Arimuthu Chetty* v. *Vyapuri Pandaram* (4), where the purchaser made the deposit on the 17th of September 1909 and the balance of the purchase-money was paid into Court on the 29th of September 1909, it was stated by Abdur Rahim, J.: "it must be taken having regard to the decision in *Ramanathan Chettiar* v. *Subramania Sastrial* (3), that the assets were realised only on the 29th of September 1909 within the meaning of s. 295 of the old Code. There is no doubt a change in the corresponding provision of s. 73 of the present Code. But so far as the question before me is concerned, the change in the language is immaterial. The purchase-money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made." To the same effect is also the decision in the *Maharaja of Burdwan* v. *Apurba Krishna Roy* (5). Having regard to these decisions, we must hold that in this case the appellant is not entitled to claim either the balance of the purchase-money or the initial deposit of 25 per cent. as these cannot be considered to be "assets realised" in the course of the execution by sale before the date of the admission of the insolvency petition within the meaning of s. 51 of the Provincial Insolvency Act. It follows therefore that the appellant's petition for a re-transfer of the sale-proceeds to the District Munsif's Court of Tiruppur was rightly rejected by the District Judge.

We dismiss this Civil Miscellaneous Appeal with costs.

IN CIVIL MISCELLANEOUS APPEAL NO. 23 OF 1923.

Following the decision in Civil Miscellaneous Appeal No. 22 of 1923, this Civil Miscellaneous Appeal is also dismissed. No costs.

Appeals dismissed.

V. N. V.
Z. K.

(1) (1895) 2 Q. B. 51 at p. 56; 64 L. J. Q. B. 483; 72 L. T. 659; 43 W. R. 557.
(2) 18 C. 242; 9 Ind. Dec. (N. S.) 161.
(3) 26 M. 179.
(4) 8 Ind. Cas. 852; 35 M. 588; (1911) 1 M. W. N. 47; 9 M. L. T. 121; 21 M. L. J. 505.
(5) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 31 OF 1924.

July 16, 1924.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Graham.

JOGENDRA NATH ROY AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

NAWAB MURTAZA BEGUM—DEFENDENT —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 34—Interest —Transaction not unfair—Contract rate, pendente lite.

Where there is no question of any unfair dealing, a creditor is entitled to interest at the contract rate not only up to the time fixed for payment but also during the time that the suit has been pending.

Appeal from the decision of the Subordinate Judge, Third Court, 24 Parganas, dated the 5th of December 1932.

Dr. *S. C. Basak*, Babu *Bankim Chandra Banerjee*, for the Appellants.

Babu *Sitaram Banerjee*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is whether the appellants, the mortgagees, are not entitled to interest at the contract rate during the time the suit has been pending. There is no doubt that the mortgagees are entitled to interest at the contract rate until the date fixed for payment and thereafter at such rate which the Court may allow. The learned Subordinate Judge has allowed interest at the contract rate upon the principal amount, but has allowed interest at the rate of six per cent. per annum from the date of suit till the expiration of the period of grace.

The learned Vakil for the respondent has contended that the Subordinate Judge had the power to allow interest at a lesser rate than that agreed upon under the provisions of s. 3 of the Usurious Loans Act. Section 3 of that Act lays down the circumstances under which the Court has power to interfere with the contract rate of interest. The Court below has not stated any reasons in its judgment as to why it did not allow *pendente lite* interest at the contract rate.

It appears that the plaintiffs instituted the suit so far back as the 8th August 1922. The defendant-respondent virtually had no defence to make and she took time twice in the Court below on the grund that she was trying to raise money from some other creditors, and she is, therefore, responsible for the delay in the disposal of the suit which terminated on the 5th December 1923, that is, about a year and a half since its institution. There is no question of any unfair dealing towards the lady. When the plaintiffs were about to sue, they were approached by the husband of the lady, and the plaintiffs agreed not to sue upon the defendant executing an agreement by which the rate of interest was to be raised from 9 to 11 per cent. We do not see any reason why the mortgagees should not get interest at the contract rate during the time the suit was pending. The creditors, however, are willing to accept Rs. 2,500 less provided that the defendant pays off the mortgage-debt within one month from this date, that is, on or before the 16th August 1924.

The date fixed for payment is three months from this date.

The appeal is allowed with costs, the hearing-fee being assessed at three gold *mohurs*.

K. S. D. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 524 OF 1924.

September 16, 1924.

Present:—Mr. Justice Jackson.

N. SRINIVASACHARIAR—PETITIONER

versus

BHAGAVATHAPURAM S. VENKATARAMA IYER—RESPONDENT.

Madras District Municipalities Act (V of 1920)—Election Rules—Poll not held—Election petition, whether maintainable.

Under the Rules framed by the Madras Government for the decision of disputes as to the validity of elections held under the Madras District Municipalities Act, the District or Subordinate Judge has no jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies, a candidate has been deemed to be duly elected under r. 7 (1) of the Rules for the conduct of elections. [p. 220, col. 2.]

The scope of r. 1 of the Rules for the decision of disputes as to validity of elections must be limited to cases where a poll has been held. [*ibid.*]

Sarvothama Rao v. *The Chairman, Municipal Council, Saidapet*, 73 Ind. Cas. 619; 45 M. L. J. 23; 17 L. W. 431; (1923) M. W. N. 236; 32 M. L. T. 178; (1923) A. I. R. (M.) 475; 47 M. 585, referred to.

Petition, under ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order

of the Court of the Subordinate Judge, Kumbakonam, in O. P. No. 54 of 1923, dated the 22nd July 1924.

Mr. *K. Bhashyam Iyengar* (with him Messrs. *V. K. Srinivasa Iyengar* and *K. Narasimha Iyengar*), for the Petitioner.—The petitioner was one of two candidates duly nominated for election as Municipal Councillor. His name appeared in the final list of valid nominations. The election was to have been held on the 20th December 1923. The Chairman acting under a forged letter of withdrawal of his candidature purporting to be from the petitioner stopped the holding of the poll. The petitioner presented two petitions to the Chairman stating that he had not withdrawn and the alleged letter of withdrawal was a forgery. Nothing was, however, done. Hence this election petition to declare the election of the respondent void. The Subordinate Judge has held that he has no jurisdiction since according to the petitioner there was no contested election and dismissed the petition on the ground of jurisdiction. The allegations in the petition ought to be taken as the basis when the Court decides *in limine*. There were more than one candidate duly nominated and the Chairman ought to have gone on with the election.

[Mr *K. S. Jayarama Iyer*, for the Respondent.—There was the letter of withdrawal and the Chairman was bound to act on it.]

The letter of withdrawal was a spurious and forged one and the Chairman was notified of this. Hence the Chairman ought to have gone on with the election. See rr. 5, 6 and 8 of the Rules for the Conduct of Elections.

Under the Rules no election held under the Municipal Act shall be called in question except by an election petition. A Court of exclusive jurisdiction has been created further, under r. 2, and election shall be declared void, if the result of the election is materially affected by any non-compliance with the provisions of the Act or the Rules made thereunder. Here is clearly a non-compliance of the Rules under the Act since the Chairman stopped the holding of the poll when there were more than one candidate duly nominated. Under r. 8 a poll has to be taken. It is also obvious that the result of the election must have been materially affected by this course. The Subordinate Judge has, therefore, jurisdiction to entertain the petition.

Secondly, an offence under s. 58 of the District Municipalities Act has been committed in this case. Every person who in the course of electoral operation falsifies or attempts to falsify the record of an election, etc., is guilty of an electoral offence under the section. Here the introduction of the forged letter of withdrawal was in the course of electoral operation just before the election and it was an attempt to falsify the record of an election. The words 'by any other act or omission' are wide enough to include this forged letter of withdrawal. The Subordinate Judge has held that "any other act or omission" in s. 58 must refer to acts analogous to those described in the rule by applying the rule of *ejusdam generis*.

[JACKSON, J.—Here is the word 'omission.' Obviously the rule cannot apply].

On this ground also the Subordinate Judge has jurisdiction to entertain the petition.

Mr. *K. S. Jayarama Iyer*, for the Respondent.—The Subordinate Judge is functioning as a Special Tribunal and when a Tribunal is given jurisdiction on special conditions, unless the conditions are satisfied the Tribunal has no jurisdiction. The Rules throughout mention the expression "returned candidate" (though there is no definition of the word 'returned candidate' either in the Act or in the Rule) and the candidate has been declared by the Chairman to be duly elected. So that the petition under the Rules is against a returned candidate or a candidate who has been declared by the Chairman to be duly elected. Is the petitioner herein such a person? The respondent is neither a returned candidate nor a candidate declared by the Chairman to be duly elected. He is a candidate deemed to have been duly elected. There is a fundamental distinction between the expressions.

The District Municipalities Act, ss. 4, cl. (2), 8, 9 (1) and cl. (3) speak of candidate's "elected" and "candidate's deemed to have been elected." The Rules speak likewise. Rule 7 refers to a candidate "deemed to be elected." Rules 9 to 25 deal with voting. Rule 23 (*a*) speaks of scrutiny of votes, counting, preparation and return of results in form No. 8 and a declaration by the Chairman of the election of the candidate to whom most votes have been given. The heading in returns showing the result of the election and at the bottom is the decla-

ration of the Chairman, so that there is a distinction between a candidate who is elected and a candidate who is deemed to have been duly elected. The candidate who is elected is one who is returned in a contested election and the Candidate who is deemed to have been elected is one who *ipso facto* becomes a Councillor without a contest and without any declaration by the Chairman. In a case such as the present no declaration of the Chairman is contemplated. Rule 1 speaks of election petition against the candidate (herein after called returned candidate) who has been declared by the Chairman to have duly elected. Rule 2 speaks of the result of the election that is after contest. The Rules also say that the petition shall be filed within 7 days after the date of the declaration of the result of the election. The present petition again does not come under this clause, since no declaration is contemplated in a case where there was no contest. The omission of the Government to provide for a case of an uncontested election cannot give jurisdiction to Court to entertain the petition. The petitioner may have a remedy by way of suit in the ordinary Courts. The present petition does not lie.

Mr. *K. Bhashyam Iyengar*, in reply.—This is an election held under the Act. A dispute as to the validity of an election under the Act can be agitated only by an election petition and not by a suit. See r. 1 which provides that no election under the Act shall be called in question except by an election petition. The expression 'deemed to be elected' means and include "declared to be elected." There is at least a notional election. The case of *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet* (1) decided by Chief Justice and Waller, J., is in point. Their Lordships held there that even in a case of uncontested election the remedy is only by way of election petition. See the observation of Chief Justice particularly on page 26.

[JACKSON, J.—There was no decision. It seems to be merely *obiter*].

No, the point directly arose. The election was uncontested. The suit in Civil Court was dismissed on the ground that the remedy was by way of election petition. It was not *obiter*, but the ground of decision.

(1) 73 Ind. Cas. 619; 45 M. L. J. 23; 17 L. W. 431; (1923) M. W. N. 266; 32 M. L. T. 178; (1923) A. I. R. (M.) 475; 47 M. 585.

JUDGMENT.—The facts are fully set out in the order petitioned against. The petitioner was a candidate for election as Councillor in Kumbakonam Municipality when the Chairman received a letter purporting to be from him but which he repudiates as forged, withdrawing his candidature. Accordingly the counter-petitioner was deemed to be elected, and the petitioner moved the Subordinate Judge under the Rules for the decision of disputes as to the validity of an election. The Subordinate Judge has held that he has no jurisdiction under these Rules; and hence this Civil Revision Petition. The question for determination is whether under the Rules framed by Government for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, the District or Subordinate Judge has jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies, a candidate has been deemed to be duly elected under r. 7 (1) of the Rules for the conduct of elections?

Rule 1 of the Rules for the decision of disputes runs:—"No election held under the Madras District Municipalities Act whether of a Councillor, Chairman or Vice-Chairman shall be called in question except by an election petition presented in accordance with these Rules to the District or Subordinate Judge having jurisdiction by any candidate or elector against the candidate (hereinafter called the returned candidate) who has been declared by the Chairman to have been duly elected."

Rule 7 (1) of the Rules for the conduct of elections runs: "If the number of candidates who have been validly nominated and have not withdrawn their candidature is equal to the number of vacancies, all such candidates shall be deemed to be duly elected." These last words are tantamount to saying that an election shall be deemed to have been held, and so far, r. 1 for the decision of disputes presents no difficulty. An election has been held under the Act. But when the Rule proceeds to confine the petition to one against the candidate (hereinafter called the returned candidate) who has been declared by the Chairman to have been duly elected, I think that its scope must be limited to cases where a poll has been held. Because when the candidates are deemed to be duly elected under r. 7 (1), there is no question of any declaration

by the Chairman. In fact, in the present case, the petitioner has never alleged that he was declared by the Chairman to have been duly elected. It is only after a poll that the Chairman is directed [r. 23 (*a*)] to prepare a return in form No. VIII and declare the election of the candidate to whom most votes have been given. If the wording in r. 1 had simply been "declared to have been duly elected," I should have been inclined to hold that the Rule gave jurisdiction in cases where the candidate was deemed to be duly elected. For "declared" by itself means no more than published, and there would presumably be a publication of the result whenever a candidate was deemed to be elected. In this connecion the Rules for election to the Legislative Assembly may be compared. There, after a poll, a declaration of the result is to be made by the returning officer, but if there is no poll the result simply "shall be declared" and by whom is not stipulated. On the other hand the Rules for the conduct of Municipal Elections might have contained a specific direction that when the number of vacancies and of candidates was equal, the Chairman should forthwith declare the candidates to be elected, and return their names. This would follow the English Rule in s. 1 of the Ballot Act of 1872 and then there would clearly be jurisdiction under the Rules for decision of disputes. But inasmuch as Government have omitted all references to a declaration in cases where the number of vacancies and of candidates is equal and have fully provided for a declaration by the Chairman in cases where there has been a poll, I think it may fairly be presumed that they intended a petition against the candidate who has been declared by the Chairman to have been duly elected to be confined to cases where he has been elected by a poll. That this was the intention of Government is further borne out by the framing of Form VIII—the only form supplied for the return of elected condidates, in which the reference to valid and invalid votes clearly shows that a poll is contemplated.

I, therefore, agree with the learned Subordinate Judge that he has no jurisdiction to inquire into disputes of this nature. The petitioner cites as authority in his support the ruling in *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet* (1). Two candidates whose nomination papers had been rejected applied for an injunction to restrain the candidates deemed in consequence of this rejection, to have been duly elected from acting as Councillors. Sir Walter Salis Schwabe, C. J., observed: "It is open to these candidates to proceed by election petitions." Wallace, J. also observes: "The petitioners have their remedy by way of election petitions. Elections have been held and there is a Tribunal set up by the Rules for the decision of petitions to set aside an election." The peculiar difficulty which has been discussed in this case was evidently not present to the minds of the learned Judges, and until the point is specially raised, it is natural to assume *prima facie* that r. 1 applies to all cases of election. Therefore I do not hold that the ruling in *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet* (2) governs the case,

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*
Z. K.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1551 TO 1553 OF 1921.

February 2, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

RAMANI KANTA RAY—PLAINTIFF—APPELLANT

versus

BHIMNANDAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Document executed by am-mukhtar—*Presumption—Plaintiff what must prove.*

When a document 30 years old is signed by the *am-mukhtar* on behalf of his principal, the only presumption that arises under s. 90 of the Evidence Act is that the document was signed by the *am-mukhtar* as such, and it must be proved that the *am-mukhtar* had authority to execute the documents on behalf of the principal.

Appeals against the decrees of the Subordinate Judge, Rangpore, dated the 31st March 1921, reversing those of the Munsif, Gaibanda, dated the 3rd December 1919.

Babu *Atul Chandra Gupta*, for the Appellant.

Babus *Mahendra Nath Roy* and *Debendra Narayan Bhattacharjee*, for the Respondents.

JUDGMENT.

Ghose, J.—These appeals arise out of three suits for rent. The claim is based upon three *kabuliyats* alleged to have been executed by two ladies, Sheo Kumari and Kulamanti. The defendants are in possession of the properties included in the *kabuliyats* claiming to have interest as the reversionary heirs of the last male owner. The question only relates to the rate of interest stipulated in those *kabuliyats* which is six pies per rupee, per month. The defendants' plea is that as the lands have come to their hands as the reversionary heirs of the last male owner, they are not bound by the stipulation contained in the *kabuliyats* as regards the payment of interest and that the ladies did not, as a matter of fact, execute these documents. The documents purport to be more than thirty years old and on the face of them, they are executed or rather signed as "Sheo Kumari and Kulamanti—*ba-kalam* —Sadanand *am-mukhtar*." The Court of first instance presumed that the documents had been executed by these two ladies under s. 90 of the Evidence Act and gave a decree to the plaintiff according to the rate of interest claimed. On appeal the learned Subordinaie Judge held that, though there was a presumption that the documents had been executed by Sadanand, no presumption could be raised that Sadanand had authority to execute those documents on behalf of the ladies. Upon that finding, the learned Subordinate Judge held that those documents had not been proved to have been executed by the ladies and that consequently, under no circumstance, could it be held that the defendants were bound by the stipulations contained in them as regards the payment of interest. It is not necessary to refer to the other two points dealt with by the Subordinate Judge, if this finding with regard to the question of the execution of the decuments is accepted to be correct.

It is contended on behalf of the plaintiff, who is the applleant before us, that the effect of the signature by the *am-mukhtar* is that the documents purport to have been executed by the ladies, and if that is so, the presumption under s. 90 of the Evidence Act arises and it should be held that the ladies were the executants of the documents. It seems to me that the documents were really executed by Sadanand as the *am-mukhtar* of the ladies and the presumption raised by s. 90 of the Evidence Act is that the documents were executed by Sadanand as *am-mukhtar*, and it must be proved that this *am-mukhtar* had authority to execute the documents on behalf of the ladies. The presumption raised seems to be equivalent to this, as if Sadanand had come to Court and simply said: "I signed the documents (*ba-kalam*) for the ladies," and nothing more. In such a case, on that evidence, the plaintiff certainly could not have asked the Court to infer, without further proof, that the documents were executed by the ladies. The presumption under s. 90 of the Evidence Act, in my opinion, only exonerates the plaintiff from calling Sadanand for the purpose of proving that he signed the documents for the ladies. He must prove that Sadanand had authority from the ladies to sign their names. The ground, therefore, urged on this head fails. It is not necessary as I have already stated, to notice the other grounds urged as regards the liability of the defendants to pay interest according to the terms in the *kabuliyats* as this first ground fails.

Another ground urged is that, instead of allowing interest at the rate of 12½ per cent. per annum, the Court should have allowed damages at the rate of 25 per cent. So far as I can see the difference, if any, would be a very small amount, the rent claimed being for four years. In any case, there is no good ground why the decrees of the Subordinate Judge allowing interest at the rate of 12½ per cent. should not stand.

The appeals, therefore, fail and must be dismissed with costs.

Walmsley, J.—I agree.

K. S. D. *Appeals dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 169 OF 1923.

April 11, 1924.

Present:—Mr. Justice Lentaigne.

MA GUN—PLAINTIFF—APPELLANT

versus

MG LU GALE AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 65 (a)—Sale in execution of mortgage-decree, effect of—Defect in mortgagor's title—Mortgagee-purchaser, position of—Refund of purchase-money.

In the case of a sale under a mortgage-decree, the purchaser acquires the interest of both the mortgagor and mortgagee, whilst in the case of a sale in execution of a money-decree, the purchaser obtains only the interest of the judgment-debtor (*i. e.*, mortgagor). [p. 224, col. 1.]

Maganlal v. *Shakra Girdhar*, 22 B. 945; 11 Ind. Dec. (N. S.) 1212, referred to.

A mortgagee who purchases the mortgaged property at a Court sale but subsequently finds that the vendor had no title to a portion of the property sold is entitled to claim a proportionate refund of the purchase-money. [p. 224, col. 2.]

Second appeal against a decree of the District Court, Maubin, in Civil Appeal No. 88 of 1922.

Mr. *San Win*, for the Appellant.

Mr. *Ba Shin*, for the Respondents.

JUDGMENT.—In this case it is stated that the plaintiff Ma Gun became the mortgagee of certain lands belonging to the estate of Ma Sa Ma deceased under a mortgage-deed executed by Lu Gale and Diba, two of the five children of Ma Sa Ma.

Ma Gun subsequently brought a suit against Lu Gale and Diba for recovery of the mortgage debt by sale of the mortgaged property. Diba died pending the suit but his heirs were not made defendants and the decree was obtained against Lu Gale alone.

The mortgaged property was sold in pursuance of such decree and was bought in by the decree-holder Ma Gun for Rs. 1,615.

She was allowed to set off her mortgage debt of Rs. 893-12-8 against the purchase price and she paid Rs. 721-3-8 into Court. Portion of that amount was applied towards Bailiff's charges and another portion was applied to some other claim against Lu Gale. The balance Rs. 572-5-8 was drawn out by Lu Gale, and according to the finding of fact in the Trial Court was in part divided by Lu Gale between himself and the other defendants in this suit, who were the heirs to the estate of Ma Sa Ma and it was also held that the balance of that sum was retained for the expenses of a suit, which was presumably the partition suit instituted by such heirs against Ma Gun.

Then the other defendants instituted the partition suit against Ma Gun alleging that they were heirs of Ma Sa Ma and that Lu Gale's sole interest in such estate was one-fourth, and that, therefore, the mortgage-decree was only valid to the extent of Lu Gale's one-fourth share in such property; and they obtained a decree for partition and for recovery of a three-fourths share of the property.

Finally, Ma Gun, the plaintiff-appellant instituted the suit now under appeal in the Sub-Divisional Court of Yandoon against the defendants-respondents, alleging such mortgage and mortgage-decree, that the mortgaged property had been sold in pursuance of such decree and bought in by her as aforesaid for Rs. 1,615, that she had paid into Court Rs. 721-5-8 after deducting the amount due to her; and that the said sum of Rs. 721-5-8 had been divided amongst the defendants by Lu Gale and she sought for a decree for the recovery of that sum from the defendants.

Lu Gale did not appear and did not defend the suit, but the other defendants filed a written statement admitting plaintiff's allegations but denying that they had knowledge of the fact that Lu Gale drew out the said sum and denying that they had shared the money and also denying the demand.

The Trial Court framed two preliminary issues:—

(1) Whether there is a cause of action or not?

(2) Whether the suit is maintainable?

The Trial Court decided both of these issues in favour of the plaintiff on the ground that it was money paid under a mistake of fact and was recoverable under s. 72 of the Indian Contract Act, 1872. Lu Gale had mortgaged the whole of the land and the money was paid for the whole of the land and was alleged to have been drawn out on behalf of the defendants and enjoyed by the defendants.

The Trial Court then decided the two additional issues.

(3) What is the amount of money drawn by first defendant Maung Lu Gale?

(4) Whether Maung Lu Gale enjoyed the amount jointly with the other defendants?

On these issues the Trial Court decided that the sum of Rs. 572-5-8 had been drawn

out by first defendant Maung Lu Gale on the 14th July 1920, and he then accepted the evidence of two witnesses examined for the plaintiff to the effect that this money had been divided amongst the defendants, the second defendant, Ma Dwe taking Rs. 90 and the other four defendants taking Rs. 30 each, making Rs. 210, and that Lu Gale then said that the balance Rs. 362-5-8 had been paid as lawyer's fee and Court-fee, which the Trial Judge stated was apparently paid for the purposes to recover their shares and that the other defendants had, in fact, agreed to such payment. The Trial Judge disbelieved Maung Chit Pe, the defendant's agent, who denied that division. On these findings the Trial Judge passed a decree for Rs. 572-5-8 against the five defendants with costs in proportion.

On appeal the District Judge reversed this decree and dismissed the suit with costs in both Courts, holding that in auction-sales there is no warranty of title and he cited the decision of *San Baw Ri* v. *Tun Pru* (1) in support of this proposition. He in effect held that Lu Gale had some saleable interest and that, therefore, the money could not be recovered. The decision is not applicable to a sale under a mortgage-decree.

The present appeal is against that decision. On the facts I may say at once that I accept the findings of the Trial Court. The facts as found had been deposed to by two witnesses and I see no reason for not accepting their evidence as the truth. I attach no force to the denial of the defendant's agent and I draw the strongest inference as to the truth of such facts because the other defendants did not give evidence denying such facts.

The distinction between the interest which an auction-purchaser takes when he buys the property on a sale effected under a mortgage-decree and when the sale is merely one in execution of a money-decree is pointed out in the case of *Maganlal* v. *Shakra Girdhar* (2), where various authorities are cited. In the case of a sale under a mortgage-decree the purchaser acquires the interest of both the mortgagor and mortgagee, whilst in the case of a sale in execution of a money-decree, the purchaser obtains only the interest of the judgment-debtor (*i. e.*, mortgagor). Consequently Ma Gun on her auction-purchase retained certain rights which she previously had as mortgagee against the property. One of the rights which she had obtained as mortgagee was the right to the covenant implied by cl. *(a)* of s. 65, of the Transfer of Property Act, 1882, that the interest which the mortgagor professed to transfer subsists and that the mortgagor had power to transfer the same. Therefore Ma Gun was entitled to enforce the implied covenant that Lu Gale and Diba were entitled to sell the entire ownership of the whole of the mortgaged property, and when the partition suit disclosed the absence of such power and Ma Gun was deprived of a three-fourths share, Ma Gun had a right to sue Lu Gale on a breach of such covenant, and to claim a refund of the money paid under the mistake. Lu Gale must have been well aware that the larger price was being given for the property on the basis that the entire ownership therein was being sold and the fact that Lu Gale divided the balance received from such sale also tends to indicate that he was acting throughout with the consent of the co-heirs, and that the fact that the interest of the other co-heirs was not sold was owing to a technical failure of Lu Gale to get them to execute the mortgage for a loan which they had presumably authorised.

In any case it is clear on the facts that the co-heirs having taken their shares of the sale price of the land sold on the basis that the entire ownership was sold, then repudiate that basis and obtain back three-quarters of the land. It is obvious that they cannot have both the three-quarters share in the land and the price which was paid for the whole of the land and, therefore, they must refund the sum which they obtained from the sale of the land.

For these reasons I set aside the decree of the District Court and restore the decree of the Sub-Divisional Court with costs throughout.

K. S. D. *Decree set aside.*

(1) 1 Bur. L. T. 72.
(2) 22 B. 945; 11 Ind. Dec. (N. S.) 1212.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 450 OF 1924.

June 25, 1924.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Ryves.

EMPEROR—PROSECUTOR

versus

MUKHTARA—ACCUSED.

Penal Code (Act XLV of 1860), s. 215—Receiving gratification to restore stolen property—Accused suspected of actual theft—Conviction, whether legal.

The accused promised to return a stolen bullock on payment of Rs. 30. He received the money and 3 days later produced the bullock:

Held, that the accused must have known who the actual thieves were and as he took no steps to bring them to justice, he was guilty of an offence under s. 215, Penal Code. [p. 225, col. 2.]

Queen-Empress v. *Muhammad Ali*, 23 A. 81; A. W. N. (1900) 205, doubted and not followed.

Per *Walsh, A. C. J.*—It cannot be a defence to the charge of accepting money for returning stolen property, that the person who takes the money is himself the thief. [p. 226, col. 1.]

Criminal appeal from an order of the First Additional Sessions Judge, Saharanpur, dated the 10th March 1924.

The Government Advocate, for the Crown.

Mr. *S. P. Sinha*, for the Accused.

JUDGMENT.

Ryves, J.—This is an appeal by the Local Government from an order of acquittal passed by the learned First Additional Sessions Judge of Saharanpur. Mukhtara a *jat* was convicted by a Magistrate of the First Class under s. 215 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment. It appears that on the 6th of December 1923, two bullocks, out of a number which had been sent by Narpat to graze in the jungle, failed to return. Later on the same night one of these bullocks returned with a broken rope tied round its neck. The other one did not return. It was suspected that both the bullocks had been stolen. A *panchayat* was held, and Mukhtara was certainly suspected of being, if not the thief, at any rate, cognizant of who the thieves were. He promised to recover the bullock on payment of Rs. 30. He received the money, and three days afterwards produced the bullock. On the 9th of December Narpat made a report of the circumstance at the Police Station, and he said significantly that he had come to make a report because "the people had made it their business." Mukhtara's defence was a total denial of everything. He said the whole of the prosecution evidence was false from beginning to end. The Trying Magistrate found that there was reliable evidence on which he could hold that the bullock had been stolen. He found it proved that Mukhtara received the Rs. 30 on the understanding that he would bring back the bullock. He found that Mukhtara must have known who the actual thieves were, and that he took no effort to get them apprehended. The fact that he was able to get hold of the bullock and bring it back shows that he knew where the bullock could be found. The inference is irresistible that he knew who the thieves were. There is a considerable amount of suspicion (to say the least of it) that Mukhtara himself was the thief or one of the thieves. But the Magistrate did not take that point into consideration, holding that according to the case of *Queen-Empress* v. *Muhammad Ali* (1), the thief himself could not be convicted under s. 215.

On appeal the learned Additional Judge found that there was no evidence on the record to show that theft had been committed in respect of these bullocks, and held that it was possible that Mukhtara took the money not knowing where the bullock was to be found, and after due search was lucky enough to find the missing animal. In our opinion the learned Judge is not correct in saying that there is no evidence to show that theft was committed. We agree with the Trial Court that the theft of the bullock is proved. We agree with him that Mukhtara took Rs. 30 in order to bring back the bullock which he knew was stolen, and that he obviously took no steps to bring the thieves to justice. He was rightly convicted under s. 215. We doubt whether the case reported as *Queen-Empress* v. *Muhammad Ali* (1) was rightly decided. We allow the appeal, set aside the order of acquittal, and restore the order of the Trial Court. Any term of imprisonment which Mukhtara has already served, will be deducted from the one year's imprisonment which he has been awarded.

Walsh, Actg. C. J.—I agree. I think the inference is irresistible that the bullocks were stolen and that the thief was the present accused. Mr. Sinha has said everything that can be said for him,

(1) 23 A. 81; A. W. N. (1900) 205.

which is not much. I agree as to the decision in *Queen-Empress* v. *Muhammad Ali*(1). I am definitely of opinion that it is not good law and ought not to be followed. The learned Judge who decided it was probably embarrassed by the fact that there had been a conviction against the thief for both offences. But what he appears to have overlooked is this. Take the ordinary case of a man against whom suspicion is strongly entertained, as in this case. The complainant may be in doubt as to whether he is the guilty person, or whether he is not, but he does not mind, so long as the person he suspects agrees to return the animal for a consideration. Can it be seriously suggested that when the charge under s. 215 comes into Court, and the complainant confines his allegation as regards the theft to mere suspicion, the accused can be heard to say; "the complainant is wrong to confine his allegation to mere suspicion. I am the thief. I have always been in a position to confess the theft and, if it suited my purpose, to provide the complainant with means for proving my guilt. But the High Court has decided that this section does not apply to the thief, and I being the thief it does not apply to me, and I am entitled to an acquittal." It seems to me that this is a *reductio ad absurdum* of that decision. It cannot be a defence to the charge of accepting money for returning stolen property, that the person who takes the money is himself the thief.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 217 OF 1924.

September 18, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

NARAYAN ANANT DESAI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Factories Act (XII of 1911), ss. 18 (2), 41 (g)—"Serve on the manager an order in writing," meaning of—Order of Inspector, failure to comply with—Prosecution of manager—Condition precedent.

The words "serve on the manager an order in writing" in s. 18 (2) of the Factories Act mean that such an order as is referred to in Form O should be served definitely on the manager of the factory and that it should specify exactly what measures the manager is to take in order to remove the danger. [p. 228, col. 1.]

Section 18 (2), Factories Act, contemplates that the Inspector is to make up his mind definitely what is the order which he requires to be carried out under the Act, and for breach of which he will prosecute the factory owner or manager under the Act, and that equally definite notice is to be given to the latter. [*ibid.*]

The mere fact that the manager was aware of what the Inspector wanted him to do is not a sufficient compliance with the specific requirements of the Act. [*ibid.*]

A manager of a factory cannot, therefore, be prosecuted under s. 41 (*g*) of the Factories Act unless the condition precedent mentioned therein is complied with, that is to say, that the requisite notice has been served on the manager of the factory. [p. 229, col. 1.]

Criminal Revision against the conviction and sentence passed by the Acting Fourth Presidency Magistrate, Bombay.

Mr. *A. G. Desai*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Marten, J.—In this case it is now common ground that the accused is charged and convicted solely under ss. 41 (*g*) and 18 (2) of the Indian Factories Act, 1911. Section 41 (*g*) provides for the case where any order of an Inspector (*inter alia*) under s. 18 is not complied with. Then s. 18 (2) runs:

"If in any factory there is any other part of the machinery or mill—gearing which may, in the opinion of the Inspector, be dangerous, if left unfenced, the Inspector may serve on the manager of the factory an order in writing, specifying the measures which he considers necessary for fencing such part in order to remove the danger, and requiring him to carry them out before a specified date."

Why I lay stress on the particular sections under which the accused is now charged and convicted is, that the original application of February 27, 1924, by the Inspector of Factories, asked for a summons under s. 41 (*f*) for breach of s. 18 (3) of the Act. Then the summons that was actually served on the respondent, and which we have seen, is under s. (41) (*f*) for breach of s. 18 (2). The summons was clearly wrong because s. 41 (*f*) does not apply to sub-s. (2) of s. 18 at all.

Then as regards the original application made by the Inspector of Factories, s. 18 (3) applies to a different matter altogether, *viz.*, that "all fencing must be constantly

maintained." But the allegation here is not that the fencing was not maintained, but that it was not put up at all. So that also was a mistake. Similarly to avoid any misunderstanding, I wish to make it perfectly clear that the charge is not under s. 18 (1) (c) which provides that "Every part of the machinery and electrical fittings including live wires and switches which the Local Government may by rule require to be kept fenced shall be securely fenced." It is admitted by the Government Pleader that that sub-section does not apply here.

That being so, we are left with s. 18 (2). and the short point for our decision is this: Did the Inspector serve on the manager of the factory an order in writing specifying the measures for protection which the manager of the factory was to carry out? Now the actual document relied on by the prosecution as being such an order is a note made by the Inspector of Factories, Mr. Johnstone, on July 30, 1923, in what is called the "Inspection Book" which has to be kept under the rules. It runs: "Visited. The manager has agreed to visit the Wolverhampton Works and to see the press guards in operation. Similar guards or guards automatic in operation which will prevent an accident similar to the one to Ram Singh to be fitted within five months."

I should explain that the Wolverhampton Works here have nothing whatever to do with any works at Wolverhampton in England, but are some local works of that name in Bombay. Similarly the accident to Ram Singh was an accident in this factory of the accused which had happened prior to the visit of the Inspector.

I should also have explained at the outset that this factory is a metal stamping press, and though there is no express evidence on the point, the Government Pleader has explained to us that the machinery in question consists of a vertical rod going up and down into a cup which is fed by the workman with the object of stamping the article as the rod goes up and down. Consequently if the workman makes a mistake and does not withdraw his hand in time, it may be crushed. The automatic guards referred to by the Inspector were intended to be of such a nature that they would prevent such an accident happening to the workman. Nothing turns on that, and I only mention it to show what were the surrounding circumstances.

Now under the Act there are some other material sections. Section 37 provides for Rules being made by Government. Then if one turns to the Rules framed under the Act, *viz.*, the Factories Amended Rules, Bombay, 1923, it will be found that under r. 4 the manager has to maintain an inspection book. Under r. 5 the Inspector at each inspection has to satisfy himself of certain things. Then after the first sentence in sub-r. (c) there is the following provision, *viz.*, "A note of all defects or illegalities discovered together with orders for their remedy or removal passed by him under the Act or these Rules shall then be prepared in triplicate. One copy shall be entered in the inspection book. In confirmation of such orders the Inspector shall subsequently send to the occupier or manager a note of all defects and illegalities discovered in Form O and a copy of the said list shall be sent, at the same time, to the District Magistrate concerned, and to the authority to whom the Inspector is subordinate."

Then if one turns to Form O one finds that it is a formal notice which runs as follows; "Upon a recent inspection of your factory it was found, to the extent indicated below, that certain provisions of the above Act and Rules were not being carried out. I, therefore, request that the necessary steps be taken at once to comply with the law."

Then there is one other section which I should refer to, *viz.*, s. 50, as to the right of appeal. It enacts that "any person on whom an order under...s. 18 has been served may, within fourteen days from the date of service of the order, appeal against such order to the Local Government or to such authority as it may appoint in this behalf, who may confirm, modify or reverse any such order."

Then sub-s. (3) provides that in the case of such an appeal, the appellate authority may, and if so requested by the appellant shall, hear the appeal with the aid of two assessors. So that section as to appeals lays stress on the date of the service of the order.

Now the service of an order or notice is a well-understood expression in our law Courts, and we have numerous provisions in the Procedure Code for the service of notices or orders. They are intended to

make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected. Accordingly a mere knowledge that proceedings may be instituted or something of that sort, is not sufficient to take the place of the imperative directions in our Code as to service on the actual individual. To take one instance. One knows that in civil proceedings for contempt of Court one of the essential points is that the initial process for committal or attachment should be served personally on the respondents. The same applies with equal force to anything in the nature of criminal or penal proceedings.

Here in my opinion the fair meaning of the words in s. 18 (2) "serve on the manager an order in writing" is that such an order as is referred to in Form O should be served definitely on the manager of the factory: and that it should specify exactly what measures the manager is to take in order to remove the danger. Then if the manager disobeys that order, he does so at his peril. He also knows that he has a certain limited time within which to appeal if he objects to the order. But a mere note of a visit like the one here which begins by saying that the manager has agreed to visit certain works, can hardly be said to be an order, at any rate not the first part of it. And one can well understand that if every thing that the Inspector chooses to write in an inspection book is necessarily to be taken as an order against which the factory owner must appeal within fourteen days to the Local Government, then a considerable amount of trouble and confusion may be caused. I think s. 18 (2) contemplates that the Inspector is to make up his mind definitely what is the order which he requires to be carried out under this Act, and for breach of which he will prosecute the factory owner or manager under the Act, and that equally definite notice is to be given to the latter.

In my opinion there was no service of any order in writing by the Inspector in the present case within the meaning of s. 18 (2). Merely writing that note in that book was not contemplated by the Act as sufficient. And I think the mere fact that the manager was aware of what the Inspector wanted him to do is not, in my opinion, a sufficient compliance with the specific requirements of this penal Act. It is not suggested that there was any service by registered post under r. 69.

I may add that no explanation has been given to us why originally the Inspector charged the accused under a different section, and not under s. 18 (2) at all. It is said this was a mistake, but it was a curious mistake for the authorities to make in launching criminal proceedings or *semi*-criminal proceedings against the accused, if they really thought that any such orders in writing had been made and served on the manager.

Accordingly in my opinion the decision of the learned Magistrate was wrong, and I would accordingly set aside the conviction and sentence and direct the fine, if paid, to be refunded.

I wish to add this. I am fully alive to the great importance of Factory Acts being properly enforced for the protection of workmen, and I have no doubt that in India it is particularly necessary that their beneficial provisions should be carried out. On the other hand one must also bear in mind that the employers' position has to be considered too. It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence, then it would seem only fair that the matter should be clearly brought home to them. That I have no doubt is the reason why the Legislature has distinctly specified what the Inspector has to do under s. 18 (2) and also under r. 5 (*c*) and Form O. Whether the particular accused in the present case was negligent or not does not concern this question of general principle on the construction of the Act.

I am glad to add the accused's Counsel has been able to tell us that our decision in no way affects the order of compensation which was passed by the learned Magistrate *viz.*, Rs. 200. His client, he says, will pay double that amount to the injured workman. His reason for appealing to us has not been to evade payment of any fair compensation, but to avoid a conviction under the Indian Factories Act.

Fawcett, J.—It may be noticed that in every case of an order of an Inspector that is covered by cl. (*g*) of s. 41, the section authorising the order requires the Inspector to serve on the manager of the factory a notice of his requisitions. The same condition is also laid down in s. 8A, which

is not a section specified in cl. (*g*) of s. 41. This cl. (*g*), as printed in the compilation handed to us, mentions s. 19B, but that is a mistake for s. 19A which has been corrected by Act XI of 1923.

The Legislature obviously lays stress on this service of a notice, and there cannot, in my opinion, be a punishable breach of an order under any of these particular sections unless the condition precedent mentioned in those sections is complied with, that is to say, that the requisite notice has been served on the manager of the factory. That is in accordance with the ordinary rule of construing penal Statutes.

In regard to what is ordinarily contemplated by the service of a notice, I may refer to the provisions of the Indian Income Tax Act, 1886. That is an Act which allowed the Collector to serve notices on certain persons. For instance, ss. 12 and 13 say that the Collector shall cause a notice to be served on either the company or the person concerned, and provision is made that in case of such person failing to comply with the provisions of those sections, he can be punished under s. 34. But the Act contains a section, *viz.*, s. 46, as to service of notices, and the main provision is s. 46 (1): "A notice under this Act may be served on the person therein named either by a prepaid letter addressed to the person and registered under Part III of the Indian Post Office Act, 1866, or by the delivery or tender to him of a copy of the notice." Then follow certain provisions in regard to presumption of posting, etc., which I need not specify.

Then in the General Clauses Act 1897 we have s. 27 which is a section dealing with the manner of service by post. It provides that if you properly address, prepay and post a notice by registered post, then the presumption is that service has been effected. Consequently in later Acts, for instance, the Indian Income Tax Act VII of 1918, the provision in s. 46 as to service of notices merely required that "a notice or requisition under this Act may be served on the person therein named either by post or by the delivery or tender to him of a copy of the notice or requisition in the manner provided by the C. P. C., 1908, for the service of summons."

A similar provision will be found in s. 63 of the last Income Tax Act of 1922. So that it is obvious that there is a recognised degree of formality in regard to service of notices, and this is clearly provided for by the Rules, especially r. 5 (*c*), r. 69 and Form O of the forms attached to the Rules. The Act itself also in ss. 41 and 53 shows the necessity for care as to proper service of a notice.

I think, therefore, that the conviction of the petitioner under cl. (*b*) of s. 41 of the Indian Factories Act, 1911 cannot be sustained, and I concur in the order proposed by my learned brother.

K. S. D. *Rule made absolute.*

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 1170 OF 1924.

October 7, 1924.

Present:—Mr. Justice Godfrey.

L. W. NASSE—APPELLANT

versus

EMPEROR—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 102—Obtaining credit by trick—Debtor undischarged insolvent—Offence.

Obtaining credit by a trick is within the purview of s. 102 of the Presidency Towns Insolvency Act, when the fact of the person obtaining it being an undischarged insolvent is not disclosed. [p. 230, col. 2.]

Criminal appeal from an order of the Sub-Divisional Magistrate, Rangoon, in Summary Trial No. 580 of 1924.

Mr. *F. C. Brown*, for the Appellant.

JUDGMENT.—The appellant in this case has been convicted by the Western Sub-Divisonal Magistrate, Rangoon, of an offence under s. 102 of the Presidency Towns Insolvency Act, and sentenced to a term of two months' rigorous imprisonment and he appeals to this Court against the same.

He was charged upon the complaint of Messrs. Oppenheimer and Company, who, it appears, had, on the Ist August, 1924, received a telephone message purporting to come from a client of theirs of the name of J. L. Nasse, an uncle of the appellant, to the effect that Messrs. Oppenheimer and Company might safely supply cement on credit to the appellant. Shortly after this the appellant himself came to their office and said he had come in connection with the telephone message about cement, and he asked for 100 casks and agreed to pay for them at

the rate of Rs. 12 per cask on the 12th August.

Messrs. Oppenheimer and Company gave him a delivery order and he took delivery of 60 casks at Rs. 12 a cask. Next morning, however, they learnt that the appellant had sold the 60 casks at the rate of Re. 1 less than the rate at which they had sold to him. They spoke to J. L. Nasse on the subject and he denied all knowledge of the telephone message. They accordingly stopped delivery of the balance of 40 casks cement, and on learning that the appellant was an undischarged insolvent—a fact which he had not disclosed to them—they filed their complaint.

Section 102 of the Insolvency Act provides that an undischarged insolvent obtaining credit to the extent of Rs. 50 or upwards from any person without informing such person that he is an undischarged insolvent shall, on conviction by a Magistrate, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

From the evidence adduced, it is perfectly clear that the appellant has been gulity of the offence charged. His defence was that his uncle had telephoned to Messrs. Oppenheimer and Company and that they were really giving credit to his uncle and not to him. His uncle, however, entirely repudiates the sending of any telephone message and there appears to be no good reason for not believing him.

The Director of Messrs. Oppenheimer and Company who received the telephone message only knows J. L. Nasse very slightly and not sufficiently well to be able to recognise his voice on the telephone, and he did not know the appellant before at all. The appellant relies on a letter he wrote to his uncle on the 7th August, which his uncle produced in the witness-box when asked for it. That letter appeals to the uncle for help on the ground that things are going wrong with the appellant with regard to the cement he had obtained from Messrs. Oppenheimer and Company, and that they were threatening to file a complaint and he asks his uncle to see Messrs. Oppenheimer and Company and to ask them to wait for payment and not to take any action. He proceeds: "Now I will tell you what really happened. The man I gave the cement to is a Baboo I am doing work for in Sandwith Road ..... Well, he wanted some cement and gave me Rs. 600 for it. I straight away went to Clark of the Plumbing Company and paid him the money I am due (*sic*) him as he is now taking up my case for arbitration. Well I took 60 casks from Messrs. Oppenheimer, gave it to the Baboo signing for it as sold to him ... I really had the honest intention of paying the firm something on Tuesday, but unfortunately things turned out otherwise and what made matters worse was when you denied all knowledgs of what happened ....."

It is contended that these last words indicate that the uncle knew all about it inasmuch as he had himself sent the telephone message; but it is obvious that such a construction conflicts with what is previously stated in the letter and the need for telling his uncle what "really happened." The appellant alleges that he had written another letter to his uncle asking him to telephone and he complains that he has not been allowed to call witnesses to prove that he had so written. It does not appear to me that there is any real substance in this complaint, because the uncle does not appear to have been cross-examined with regard to any other letter, and, even if he had been and had denied it, the fact that the appellant's proving that he had written to the uncle asking him to telephone, does not, in the face of the uncle's evidence, prove that the uncle did, in fact, send a telephone message as the appellant alleges. So that it can make no material difference to the case against the appellant whether such evidence is adduced or not.

It is further contended that the offence is not committed unless Messrs. Oppenheimer and Company in fact gave credit to the appellant and it is argued that the evidence shows that they really gave credit to the uncle. It is clear, however, from the acknowledgment put in by the appellant in this Court that Messrs. Oppenheimer and Company were looking to him for payment and not to his uncle—in the first instance at all events. And their case is that the message was that they could safely give credit to the appellant. Moreover, I take it that obtaining credit by a trick would equally be within the purview of the section, the fact of the person obtaining it being an undischarged insolvent being undisclosed

It is finally contended that the sentence of two months' rigorous imprisonment without the option of a fine is unnecessarily severe and I am asked to alter it to one of fine

as being more appropriate. I have considered this question, and I think that, having regard to all the circumstances, this is not a case in which I can properly interfere. The appellant first of all impersonated his uncle on the telephone, then obtained goods by falsely representing that he had come in connection with his uncle's telephone about cement, and then obtained money by selling at a lower rate the cement which he had obtained on credit and for which he has not yet paid in full.

The appeal is dismissed. The bail bond will be cancelled and the appellant re-arrested and committed to jail to serve the remainder of his term.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

DEATH REFERENCE No. 8 OF 1924 AND CRIMINAL APPEALS NOS. 341 AND 400 OF 1924.

August 1, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

ALIMUDDIN NASKAR AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 233, 235, 239—Penal Code (Act XLV of 1860), s. 114—Charges of murder, arson and conspiracy—Joint trial of several accused—Prejudice to accused—Embarrassment to Jury—Re-trial.

The accused were charged at one trial with the offences of conspiracy to murder, murder and arson, in that they were alleged to have set fire to a house, barred the doors, burnt most of the inmates and killed such as tried to escape. It appeared that there was really no foundation for the charges of murder and arson as regards most of the accused according to the facts alleged by the prosecution. The Jury, however, found all the accused guilty on all the charges:

Held, that since a multitude of charges not having any proper foundation and obscuring the case which the accused had to meet were put forward, the accused were prejudiced in their defence and the Jury misled and confused, and that, therefore, the accused should be retried. [p. 236, col. 1.]

Per *Walmsley, J.*—The charges should be framed in such a way as to render it beyond doubt that there was neither prejudice to the accused nor embarrassment to the Jury. [p. 233, col. 1.]

Per *Mukerji, J.*—The provisions of s. 233 of the Cr. P. C., are mandatory. [p. 234, col. 2; p. 235, col. 1.]

The provisions of ss. 235 and 239, Cr. P. C., are merely enabling ones and if there is a risk of embarrassing the defence by a joinder of charges such joinder should not be resorted to. [p. 235, col. 1.]

Where a conspirator is present at the commission of the offence, he may, under the provisions of s. 114, Penal Code, be deemed to have committed the offence, but if that is the way in which the accused are all to be made responsible for the offences, they should be specifically charged with such offences as read with the provisions of s. 114, Penal Code. [p. 235, col. 2.]

Abdul Salim v. *Emperor*, 60 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (C.) 107; 23 Cr. L. J. 657 and *Subrahmanya Ayyar* v. *King-Emperor*, 25 M. 61; 23 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 510; 5 C. W. N. 856; 2 Weir 271; 8 Sar. P. J. 160 (P. C.), referred to.

Reference under section 374, Cr. P. C., made by the Sessions Judge, 24-Parganas, dated the 17th June 1924.

Babu *Bir Bhusan Dutt*, for the Accused, in Reference No. 8 and Appeal No. 341.

Mr. *B. M. Sen* and M. Syed *Nasim Ali*, for the Crown.

Babus *Bir Bhusan Dutt* and *Sekhar Kumar Bose*, for the Appellant, in Appeal No. 400.

Mr. *B. M. Sen*, for the Crown.

JUDGMENT.

Walmsley, J.—There are two appeals before us and a Reference under s. 374, Cr. P.C. The circumstances are as follows. It is said that the accused had a quarrel with the family of one Momrez and that one night they went to his house and set fire to the hut in which Momrez and his two wives and some children were sleeping: the inmates of this hut were not allowed to escape and they were all burned to death. In other huts Intaz and Bibijan were sleeping and they were also killed.

The Committing Magistrate framed charges under s. 120B read with s. 302, Indian Penal Code and under s. 302, Indian Penal Code and s. 436, Indian Penal Code. The learned Judge made changes in the charge under s. 120B read with s. 302, Indian Penal Code. The Jury was unanimous in finding all the accused guilty on all the charges. The Judge agreed with the verdict and sentenced two of the men to death, and the others to transportation for life. Hence the two appeals and the Reference. Objection is taken on behalf of the appellants that the trial was vitiated by the charges. It is said that there has been mis-joinder of charges and also of persons.

It must be conceded that a crime of such a whole-sale nature presents considerable difficulty.

The charges framed by the Committing Magistrate were as follows:—

(1) "That you, between December, 1923 and 7th January 1924 at Daria P. S. Canning did agree with one another and with other persons unknown to do and cause to

be done an illegal act, to wit, commission of the offence of murder of Momrez Baddy and other members of his family by setting fire to his huts and by means of guns, daggers, spears and other deadly weapons and in pursuance of the said conspiracy caused the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali, Jabed Ali, Yunus and his grandson Jead Ali and mother Bibijan Bibi and thereby committed an offence punishable under s. 120B/302 of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge." In this charge the conspiracy to commit and the actual commission, with the names of the persons killed, are mentioned.

(2) Of murder under s. 302, Indian Penal Code. In this one charge the names of the seven inmates of Momrez' hut are mentioned.

(3) Of murder under s. 302, Indian Penal Code, in regard to the killing of Intaz.

(4) Of murder under s. 302, Indian Penal Code, in regard to the killing of Bibijan.

(5) Of arson under s. 436 in pursuance of the conspiracy in the first charge in respect of the hut occupied by Momrez.

These five charges were drawn up against all the accused.

The charge under ss. 120B and 302, Indian Penal Code, drawn by the learned Judge differs from that drawn by the Magistrate in two respects, namely, that it refers to the date of the occurrence only, and that it mentions only the conspiracy to commit and not the commission.

It is merely a technical defect that the seven inmates of Momrez's hut are all named in one charge of murder, instead of a separate charge of murder being drawn in regard to each. To that I attach no importance. It is more serious that all the accused are charged in regard to the killing of Intaz and in regard to the killing of Bibijan, for those deaths were caused by particular members of the attacking party, and it is possible that they lay outside the common intention, at any rate, that the killing of Bibijan did so.

No objection, however, was taken at the trial to the charges as framed, and it appears to me that they gave the accused full information of what they were said to have done.

The learned Judge, however, in his address to the Jury seems to have added difficulties. He says "that the first charge of conspiracy does not seem to be important in view of the main charge of murder." Again he says "since the murder was accomplished the charge of conspiracy is of no importance." He did, however, continue: "If you find that the accused agreed to with one another to kill Momrez and the other members of his family then you can find them guilty under s. 120B." With regard to the killing of Intaz he said that it was for the Jury to decide whether any one but Bilait Ali should be held guilty, and with reference to Bibijan he said that the murder may not have been in the programme, adding. "For that Alimuddin himself alone is responsible." Then he went on: "Against all the accused it is the charge of murder of Momrez and six others with him. That is the important charge."

These remarks show some confusion or carelessness, but it is clear that the Judge set the main issue before the Jury—Was it proved that the accused were the men who shut Momrez in the burning hut?

The answer of the Jury was free from all ambiguity, but it has this defect that it found all the accused guilty on all the charges, that is to say the Jurors ignored the Judge's reference to the individual responsibility in the case of Intaz and Bibijan.

The question is whether, in these circumstances, the defects in the charge have led to a miscarriage of justice. For the purposes of this case that question means whether the accused were prejudiced in their defence, whether the Jury was confused as to the problem which it had to solve.

As to the defence the accused have not gone further than saying that they are innocent: they said that to the Magistrate and they declined to say more to the Judge; and cross-examination is devoted to showing that the assailants were not recognised and that witnesses are hostile. I find it difficult to believe that more perfectly drawn charges could have lightened the task of the defence.

As to the decision of the Jury, when we look at the substance, what they held was this that the accused are the men who went to Momrez's house, who set fire to his hut, who prevented the inmates from escaping. Instead, however, of dealing with the individuals responsible for killing Intaz and

Bibijan, they found all the accused guilty in respect of killing those two victims, and again they found all the accused guilty of committing arson.

The case is a very grave one, and it is most desirable that the charges should be framed in such a way as to render it beyond doubt that there was neither prejudice to the accused nor embarrassment to the Jury. With some hesitation I have come to the conclusion that it cannot be said that the charges were framed with sufficient clearness, and I think we must set aside the conviction and sentences and order a re-trial. I agree with my learned brother in the remarks which he makes about the form which the charges should take. The re-trial should take place as early as possible, and not be allowed to wait until after the vacation.

Mukerji, J.—The occurrence which forms the subject-matter of the present case, though perhaps without a parallel in the history of crimes in this part of the country, may yet be narrated in a few words.

In village Daria within the jurisdiction of P. S. Canning in the District of 24-Pargannas there lived two families, the Baddys and the Naskars. They were neighbours, but for the last four years or so there has been bitter enmity between the families owing to causes into the details of which it is unnecessary to enter.

On the night of Monday, the 7th January 1924, Entaj Baddy was up till about midnight; he was doing some accounts and his wife Jasiman Bibi was sitting near him. In an adjoining hut, slept Intaz's father Momrez Baddy, the two wives of Momrez, named Chandra Bibi and Dasi Bibi, three sons of Momrez names Safed Ali, Jabedali and Yunus, and Momrez's grandson Jiad Ali. In a third hut there were Esharali, another son of Momrez and his wife Maurjan Bibi, and Bibijan Bibi, the mother of Momrez. Suddenly the huts were set fire to, the exits from some of them being barred by closing some of the doors from outside with iron bolts or clamps. Out of the inmates of these huts, Jasiman Bibi, somehow or other, managed to escape with a child in her arms, and took shelter in the house of a neighbour. Esharali and his wife Maurjan Bibi also succeeded in running away. Intaz stepped out with a gun which he had in the hut in which he was, but while yet on the threshold he was speared in the leg and he fell on the courtyard. He tried to crawl and get up but injuries were inflicted on him and his head was almost severed from his body. Bibijan Bibi succeeded in coming out of her room, and on her saying that she had recognised all the accused and that there would be retribution the next day, she was shot dead. The villagers who came to the spot on hearing the noise of the crackling flames and report of guns or seeing the blaze were scared away by the culprits. Those who arrived in the early hours of the morning found nearly the whole homestead reduced to ashes. In Momrez's hut, close to the door, were seven charred dead bodies. There were the four children, the sons and grandsons of Momrez; over them lay the two wives of Momrez as if sheltering them from the flames, and over them all lay Momrez with his hands outstretched as if in their protection. Intaz's dead body was lying on a step to the threshold partly burnt, and his head almost severed from the body. Bibijan was lying dead on the verandah of her hut with her entrails out and blood flowing from the verandah into the yard.

The case for the prosecution was that the perpetrators of this horrible crime were the Naskars and their men. The accused Alimudid Naskar, Bilaitali Naskar, Amir Naskar, Bainaddi Naskar, Farazali Naskar, Golam *alias* Golap Naskar are six brothers and the accused Dudali Molla is their servant.

The charges upon which the accused were tried were as follows: First of all there was a charge under s. 120B, Indian Penal Code, that the accused conspired with one another and with others unknown to commit the offence of murder of Momrez Baddy and other members of his family. Then there were three counts of charges under s. 302, Indian Penal Code, the first one for causing the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi, and his sons Safed Ali, Jabed Ali and Yunus and his grandson Jiad Ali by barring the exit from their hut and setting fire thereto; the second one for causing the death of Intaz Ali; and the third one for causing the death of Bibijan Bibi. Lastly there was a charge under s. 436, Indian Penal Code, for setting fire to the huts of Momrez Boddy.

The Jury unanimously found all the accused guilty on all the charges, and the learned Judge accepting the verdict con-

victed the accused in respect thereof. Under s. 302, Indian Penal Code, he sentenced Alimuddin and Bilaitali to death, and Amir, Boinaddi, Farazali, Golam *alias* Golap and Dudali each to transportation for life. He passed no separate sentence for the offence under s. 120B or under s. 436, Indian Penal Code. The matter has now come up before us on a Reference for confirmation of the sentences of death as well as on appeals by the accused persons.

In dealing with this matter we are met at the outset with a serious difficulty arising out of the charges on which the accused were tried in the Court below.

As I have stated above the first charge against the accused was a charge of conspiracy. As amended in the Court of Sessions, it ran as follows:—

"That you on or about the 22nd *Pous*, 1330 *B. S.* corresponding to 7th January, 1924 at Daria P. S. Canning, conspired with one another and others unknown, to commit the offence of murder of Momrez Baddy and other members of his family and thereby committed an offence punishable under s. 120B of the Indian Penal Code, and within the cognizance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge"

It assumed this form on amendment of a charge of conspiracy which the Committing Magistrate had framed in these words.

"That you, between December, 1923 and 7th January, 1924 at Daria P. S. Canning, did agree with one another and with other persons unknown to do and cause to be done an illegal act, to wit, commission of the offence of murder of Momrez Baddy and other members of his family by setting fire to his huts and by means of guns, daggers, spears and other deadly weapons and in pursuance of the said conspiracy caused the death of Momrez Boddy, his two wives Chandra Bibi and Dasi Bibi, his sons Intaz, Safed Ali, Jabed Ali, Yunus and his grandson Jiad Ali and mother Bibijan Bibi and thereby committed an offence punishable under s. 120B/302 of the Indian Penal Code, and within the cognisance of the Court of Sessions. And I hereby direct that you be tried by the said Court on the said charge."

It is difficult to see why this amendment was made; if any thing, the charge framed by the Committing Magistrate was fuller and more specific in details and gave the accused better notice of the case they had to meet. If instead of the words "you caused the death", the words "death was caused" were substituted, and the allegation as to the huts having been set fire to was introduced it would have been an ideal charge of conspiracy consonant with the facts of the case. It would then have been on the lines of the charge of conspiracy in the case of *Abdul Salim* v. *Emperor* (1). The amended charge, however, is not open to any objection which can be said to have vitiated the trial or caused prejudice to the accused.

Then as to the charges under s. 302, Indian Penal Code, the first count runs thus:—

"That you on or about the 7th day of January, 1924 at Daria committed murder by intentionally causing the death of Momrez Baddy, his two wives Chandra Bibi and Dasi Bibi and his sons Safed Ali, Jabed Ali and Yunus and his grandson Jiad Ali by barring the exit from their hut and setting fire thereto and thereby committed an offence punishable under s. 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

This charge on the face of it relates to seven offences of murder. Causing the death of one person is one offence; there can be no question that seven offences were committed. Whether the offences were separable or not, so as to justify the application of s. 71 of the Indian Penal Code, is outside the purview of this enquiry. They may have been committed by one single act or set of acts, but the result has been seven different offences. That they are distinct offences cannot for a moment be doubted. Even under the Code of 1898 wherein in s. 35 there was some apparent ambiguity in the meaning of the expression "distinct offences," Sir Henry Prinsep observed: "Section 35, Cr. P. C., seems to have been intended to enhance the ordinary powers of a Court convicting, at the same trial, a person of distinct offences, rather than to declare what are to be distinct offences." By Act XVIII of 1923, the explanation and the illustration have been deleted; and there is nothing to suggest now at any rate that separate or different offences are not distinct offences. The first part of s. 233, Cr.

(1) 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (C.) 107; 23 Cr. L. J. 657.

P. C., lays down that for each distinct offence there shall be a separate charge. This provision is mandatory and seven different charges should have been framed for these seven offences of murder which appear to have been huddled into the first count as it stands. Whether this provision of the law is obligatory or merely directory, or whether the failure to comply with is an illegality which vitiates the trial or is a mere irregularity—a question with regard to which there is a clear conflict of judicial opinion in this Court, is a matter upon which I need not express my opinion on the present occasion. Suffice it to say that it is clear that the practical effect of the charges has been to try the accused persons in respect of a charge of conspiracy, and on nine separate charges of murder and one of arson. I do not suggest that upon the allegation that all these offences were committed in pursuance of the conspiracy or at any rate in the course of the same transaction, such a joinder of charges was not permissible. Applying the exceptions laid down in ss. 235 and 239, Cr. P. C., all these charges could, no doubt, be legally joined; but it should be remembered that the provisions of these sections are merely enabling ones and if there is risk of embarrassing the defence such joinder of charges should not be resorted to.

It is, therefore, necessary to consider the facts and materials upon which these charges have been framed. So far as the charge of conspiracy is concerned, there is no direct evidence of it, but it is based upon some evidence as to preparation on the part of Alimuddi and perhaps of some of the other accused as well. The main evidence, however, is afforded by the presence of the accused at the house of Momrez and the acts done by them there and the learned Judge was right in directing the Jury thus: "To bring home the charge of conspiracy against them (meaning the accused) the prosecution rely on the same evidence on which they rely for their charge under s. 302, Indian Penal Code. If you believe that the accused went to the house of Momrez that night, you will not have much difficulty in holding that they agreed with one another to kill Momrez and the other members of his family." So far then as the charge of conspiracy was concerned there was ample foundation for it.

The same, however, cannot be said in respect of the other charges framed in this case. As for the offences of murder as regards the seven persons named in the first count, there is no evidence against any of the accused such as would justify the framing of the charge. As to the offence of murder of Intaz there is nothing on which such a charge can be framed against any of the accused other than Bilatali. As to the offence of murdering Bibijan none except Alimuddi can be charged with it. As for the offence of arson there is evidence only against Dudali. The charges, however, have been framed on the assumption that as they were all members of a conspiracy for committing these offences, and these offences were committed, they may be charged with having themselves committed the offences. This position is hardly tenable in law. It is true that where a conspirator is present at the commission of the offence he may, under the provisions of s. 114, Indian Penal Code, be deemed to have committed the offence, but if that is the way in which the accused are all to be made responsible for the offences, they should be specifically charged with such offences as read with the provisions of s. 114, Indian Penal Code. There may arise a further question in that case in respect of some of the accused, namely, whether it would be permissible to infer conspiracy from mere presence, and again to make them liable as principals by taking into account the fact that they were present at the commission of the offence.

The charges of murder and arson, apart from the weight and number of them which in itself is sufficient to crush the accused, relating as they do to such serious offences as murder and arson, must necessarily embarrass the accused all the more when there is really no foundation for them as regards most of the accused persons in this case. They are likely to be bewildered in their defence, unable to discover how they are to meet the charges when there is no allegation upon which such charges could be based. They are equally apt to confuse the Jury; and that they did confuse them is clear, for inspite of the fact that there is no evidence in support of these charges so far as many of the accused are concerned, as pointed out above, the Jury returned a unanimous verdict of guilty against all the accused in respect of all the charges. The confusion could perhaps have been avoided by giving them proper directions discriminating between the different charges; but that does not appear to have been done in

this case. On the other hand the learned Judge observed as follows: "The first charge of conspiracy does not seem to be important in view of the main charge of murder against the accused, for if you do not believe the charge of murder I do not suppose that you will believe the charge of conspiracy against the accused." Then the Jury were asked to consider whether they would not hold all the accused responsible for the murder of Intaz although the evidence was that Belait struck him on the neck with a *dao*, and that although Alimuddin shot Bibijan dead whether they should not hold any of the others responsible for it, and it was also suggested to them they might not hold the others responsible as the murder of Bibijan in the manner in which it was done might not have been in the programme; and further more they were told as regards the murder of Momrez and the other six persons, that if they believed that the accused had a common intention to cause the death of these people in that way then they could find them all guilty. These directions had the effect of misleading the Jury as to how they were to deal with the charges before them and that they were so misled is evident from the verdict which they returned.

In my opinion the accused were embarrassed in their defence and the Jury misled and confused, and there has not been a trial of the case upon charges properly framed in consonance with the facts alleged by the prosecution, a multitude of charges, not having any proper foundation obscuring the case which the accused had got to meet, were put forward and, therefore, there was no proper trial which the accused were entitled to under the law.

In my opinion the observations of the Lord Chancellor in the case of *Subrahmania Iyer* v. *King-Emperor* (2) apply in substance to the charges framed in the present case. In that case though their Lordships were dealing with s. 234, Cr. P. C., the importance and necessity of precision in the framing of charges was pointed out in the following passage in the judgment: "The reason of such a provision...is obviously in order that the Jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and the accused. *It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain.* The policy of such a provision is manifest and *the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.*" The mischief sought to be averted by the Statute has been done as is evident from the verdict of the Jury and the acceptance of it by the learned Judge; and the effect cannot now be "averted by dissecting the verdict" and "appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the Jury."

I would, therefore, set aside the convictions of and the sentences passed upon the accused and direct that they be re-tried on a charge of conspiracy against all of them under s. 120B, Indian Penal Code, together with a charge under s. 302, Indian Penal Code, against Belaitali for the death caused to Intaz Ali and a charge under s. 302, Indian Penal Code, against Alimuddin for the death caused to Bibijan Bibi.

K. S. D. & N. H. *Conviction set aside; Re-trial ordered.*

(2) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 890 OF 1924.

August 28, 1924.

Present :—Mr. Justice Baguley.

A. V. JOSEPH—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Evidence Act (I of 1872), s. 118—"Accused", meaning of—Accomplice, when competent witness—Criminal trial—Irregular Police investigation—Trial, whether void—Charge against one person—Offence also disclosed against another—Stay of proceedings—De novo trial—Charge of substantive offence—Abetment, conviction for—First Information Report, nature of.

An accused person when not being jointly tried with a co-accused is a competent witness for or against him. [p. 240, col. 2.]

Reg. v. *Hanmanta*, 1 B. 610; 1 Ind. Dec. (N. S.) 405, *Queen-Empress* v. *Dala Jiva*, 10 B. 190; 5 Ind. Dec. (N. S.) 512 and *Empress of India* v. *Asghar Ali*, 2 A. 260; 4 Ind. Jur. 250; 1 Ind. Dec. (N. S.) 727, distinguished.

Govinda Sambhuji Mali v. *Emperor*, 58 Ind. Cas. 449; 16 N. L. R. 9; 21 Cr. L. J. 769 and *Subrahmania Ayyar* v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), explained.

Queen-Empress v. *Mona Puna*, 16 B. 661; 8 Ind. Dec. (N. S.) 919, *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass*, 10 C. L. R. 553, *Banu Singh* v. *Emperor*, 33 C. 1353; 10 C. W. N. 962; 4 Cr. L. J. 145, *Empress* v. *Durant*, 23 B. 213; 12 Ind. Dec. (N. S.) 141 and *Akhoy Kumar Mukerjee* v. *Emperor*, 45 Ind. Cas. 999; 45 C. 720; 27 C. L. J. 91; 22 C. W. N. 405; 19 Cr. L. J. 663, followed.

The "accused" in cl. 4 of s. 342 of the Cr. P. C. means the accused then under trial and under examination by the Court. [p. 240, col. 2.]

Empress v. *Durant*, 23 B. 213; 12 Ind. Dec. (N. S.) 141, followed.

Section 118 of the Evidence Act makes no distinction between witnesses called for the prosecution and those called for the defence. [*ibid.*]

A trial is not necessarily void simply because it is preceded by a Police investigation which has failed to comply with Ch. V of the Cr. P. C. [p. 241, col. 1.]

A Magistrate who finds that there is a chance of getting a conviction against a person not charged, is not bound to stop the proceedings at any stage of the trial, arrest such person and start the original trial *de novo*. [p. 241, col. 2.]

A man who is charged with a substantive offence and nothing else, can always without framing a further charge be convicted of abetment of it. [p. 242, col. 2.]

Kehr Singh v. *Emperor*, 59 Ind. Cas. 913; 22 Cr. L. J. 161; 11 P. W. R. 1921 Cr., *Yeditha Subbaya* v. *Emperor*, 15 Ind. Cas. 85; 13 Cr. L. J. 453; (1922) M. W. N. 725; 12 M. L. T. 203; 23 M. L. J. 722 and *Lala Ojha* v. *Queen-Empress*, 26 C. 863; 3 C. W. N. 653; 13 Ind. Dec. (N. S.) 1153, followed.

A First Information Report need not be made with the same precision and particularity as a charge or a plaint in a civil suit. [p. 242, col. 1.]

Criminal appeal from an order of the Western Sub-Divisional Magistrate, Rangoon, in Cr. Reg. Trial No. 1560 of 1923.

JUDGMENT.—The appellant, A. V. Joseph, has been tried and convicted by the Western Sub-Divisional Magistrate of Rangoon on a charge of fraudulently and dishonestly using a forged document under s. 471 read with s. 468 of the Indian Penal Code, and sentenced to nine months' rigorous imprisonment and a fine of Rs. 1,000, or, in default, a further six months' rigorous imprisonment.

The appellant is a timber-trader on a large scale, and has been supplying sleepers to the Bengal-Nagpur Railway Company, Limited, for some years. He has had several contracts, and the particular contract which is now in question is one known as "No. 4" for $11\frac{3}{4}$ lakhs of sleepers.

The Railway Company appointed a special officer, Mr. Lamond for passing sleepers. The procedure was as follows :—

"The appellant, or his sub-contractors, got a large number of sleepers ready for inspection, laying them out in rows. On Mr. Lamond's arrival, he would walk up one row and, as he passed each sleeper, it was turned over in his presence, so that he could see both faces of it. Having got to the end of the row, he would walk down, examining the butt ends of the sleepers on one side, and then return from the other side of the row, examining the opposite butt ends of the sleepers. Any sleeper which he refused to pass was originally marked on its face in the middle with a hammer mark, "R. E. J."; but later, in deference to the objections raised by the appellant, the use of the "R. E. J." hammer was discontinued, and the sleepers refused were simply marked with a chalk. When inspection of the row was complete, all those sleepers that he had passed were marked with a particular passing hammer, which was varied from time to time; and, it would appear that, while this was being done by the coolies, he would be examining the next row. It does not appear in evidence that he stood over the coolies while they used the hammers.

Before Mr. Lamond's appointment, sleepers supplied by Joseph to the Bengal-Nagpur Railway were passed by various passing officers, who appear to have been engineers in the employ of the Burma Railways, and various passing hammers were used. From the time Mr. Lamond began his work, he used a hammer for passing sleepers, bearing the letters

He says that there were three hammers made of this description, of which two were issued to, and used by, him. What happened to the remaining hammer does not appear from the record. It seems to have been left in the possession of the Burma Railways.

Mr. Lamond started his duties on the 1st of September, 1921, and he used these two hammers from the beginning. About June, 1922, he got a fresh hammer or hammers made, bearing the letters "C. B. R." only without a triangle, and the two hammers he had previously used were thrown into deep water in the Maubin river. They have, of course, not been produced in Court.

Under the terms of the contract, sleepers were to have been of four kinds of timber, namely, Pyinkado, Taukkyan, Ingyin and Thitya only. It would appear that, when the

shipments of sleepers were received in India by the Bengal-Nagpur Railway, they failed to give satisfaction; they were reported, or some of them were, to have been warped, waved, split, and as timber not mentioned in the contract. Eventually, information was given to the Railway Authorities that Joseph was cheating over his contracts, and that he was somehow getting sleepers marked with what purported to be Mr. Lamond's hammer, but which were not so marked. Investigations were set on foot, and, eventually, Mr. Lamond made a report to the Police, charging Joseph under s. 420, Indian Peneal Code, and stating that "a large number of sleepers were marked by, or under, A. V. Joseph's instructions with a false hammer mark manufactured in imitation of the mark used by me in marking sleepers passed by me."

The case was tried by the Western Sub-Divisional Magistrate, Rangoon, and it would seem that the idea originally was that the charge, on the facts proved should be one under s. 420, Indian Penal Code; but, for some reason which has not been explained, when the charge was actually framed, it was under s. 471 read with s. 468, Indian Penal Code. I mention this, because, I think, this would explain why the evidence has come up in the form in which it has.

When the case came to be tried, after the evidence of Mr. Lamond, who had no personal knowledge of Joseph's malpractices, beyond the fact that sleepers, which, he contended, had never been passed by him, had been received by the Bengal-Nagpur Railway, the main evidence was found to be that of two witnesses named Hormasji and Chit Maung. Hormasji is a man who used to be a mill manager under Joseph. He has parted with Joseph on what are clearly, unfriendly terms, and, since he left his employment, there has been a civil suit between them with regard to his pay and Provident Fund. Chit Maung is Hormasji's wife's nephew, and he would appear to be more or less a hanger-on of Hormasji.

Hormasji's statement, so far as the forgery is concerned, is that, on Joseph's instructions, he got Chit Maung to make a hammer, which was an exact imitation of the one used by Mr. Lamond to mark passed sleepers with. Chit Maung corroborates his statement. It was stated by Hormasji that the way in which the false hammer was used was as follows:—

The sleepers, which were to be passed by Mr. Lamond, were cut a few inches longer than necessary; they were then put up to Mr. Lamond, and he passed them. Subsequently, after he had departed, an inch or so was cut off each end of the sleepers, or some of them, which he had passed, thereby removing his hammer marks. In place of the sleepers so treated, a false hammer mark was put on the sleepers which Mr. Lamond had either rejected, or not seen, and which may or may not have been of the prescribed kind of timber. These were shipped in place of the ones which Mr. Lamond had passed, and then the sleepers from which the genuine marks had been removed were put up again for Mr. Lamond to pass on his next visit.

It is quite patent that, without the evidence of Hormasji and Chit Maung, the case would have to fall, and the first legal point, which was argued before me in this appeal, was that Hormasji and Chit Maung were wrongly examined as witnesses, and that their statements on oath should not have been recorded by the Magistrate and must be excluded from the consideration of the Court.

I will deal with this point first.

The argument, which was placed before me, has a certain amount of support from several old rulings, and one new one. As I have said, the original complaint was made by Mr. Lamond to the Police, and only one accused person was mentioned in it, namely, A. V. Joseph, the present appellant. He was also the only accused person sent up for trial before the Magistrate. Hormasji and Chit Maung, if their statements are believed, were undoubtedly accomplices in the offence charged, for both of them knew of the use to which the hammer was intended to be put. They have not been tendered pardons for the simple reason that no pardon could legally have been tendered to them, for the offence charged was one triable by a Magistrate. They have not been sent up for trial before any Court, and, consequently, they have not been convicted, acquitted or discharged.

The argument put forward on behalf of the appellant is that, as soon as the Police began their investigation, it was their bounden duty, under s. 170, Cr. P. C., to have taken steps against both Hormasji and Chit Maung, and that the Police have disobeyed an imperative direction of the Cr. P. C. in not sending them up as accused

persons before a Magistrate, despite the fact that they were not mentioned in Mr. Lamond's complaint. It is argued that they really come under the category of "accused persons," and that, consequently, no oath could have been administered to them unless they were made approvers, which they could not be made in view of the section under which the complaint was made.

For authority on this point, the first case to be quoted is that of *Reg*, v. *Hanmanta*, (1). In that case several accused were sent up for trial on charges of theft and kindred sections, and two persons, who, according to their statements, were accomplices in the alleged fraud, were brought before the Magistrate under a warrant issued by him. The Magistrate gave each of them a certificate of pardon, purporting to be under s. 347, Cr. P. C. They were then examined as witnesses. After their examination was complete, they were informed that their pardon was invalid, and they were asked whether they adhered to their statements, and they replied in the affirmative. It was held that they were "accused persons;" that they had not been legally pardoned; and that, therefore, they could not be examined as witnesses until they had been acquitted, discharged or convicted, and their evidence was rejected as absolutely inadmissible. That case differs from the one under consideration, in that the witnesses had actually been arrested and brought before a Magistrate. Whereas, in the present case, the two witnesses had never been arrested at all.

The next case is that of *Queen-Empress* v. *Dala Jiva* (2), in which, following *Reg.* v. *Hanmanta* (1), it was held, that in a case in which a pardon cannot legally have been given, an accused person could not be examined as a witness. This case was also followed in *Empress of India* v. *Asghar Ali* (3) in which the facts were almost the same.

These are all old cases; but the case upon which the appellant's Counsel mainly relies is a case from the Court of the Judicial Commissioner, Nagpur, namely, *Govinda Sambhuji Mali* v. *Emperor* (4), which, I understand, has also been officially published by the Nagpur Court. This was also a case concerning a forgery. It would appear that one Sakharam Dinaji was concerned in the forgery. He made a statement to the Police, but was never arrested, nor brought to trial before the Magistrate. He was, however, examined as a witness against the rest of the gang, and mainly upon his evidence, it would appear, they were convicted. The point was raised that he was not a competent witness, following the cases I have already mentioned.

It would seem, however, that the learned Additional Judicial Commissioner held that he was a competent witness, even though illegally converted into a witness, but it was held that, as the trial had been in disobedience of an express provision of the Code, it was bad, and that the proceedings must be set aside. In coming to this conclusion, the learned Additional Judicial Commissioner considered that he was following the principle laid down by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (5).

It will be seen then that, even this case [*Govidna Sambhuji Mali* v. *Emperor* (4)] upon which appellant's Counsel mainly relies, cannot be held to be in support of the contention that the witness, Sakharam, was an incompetent witness. On page 453* column 1, there is a definite statement which runs as follows:—"I hold that Sakharam, even if illegally converted into a witness, is nonetheless a competent witness. This view, which is in accordance with the plain meaning of s. 342 (4), is supported by the authorities and is based on reasons of convenience."

There is, indeed, ample authority for holding that a witness of this nature is a competent witness. In *Queen-Empress* v. *Mona Puna* (6), where several persons had been arrested in connection with a case of housebreaking and theft, one of the persons so arrested made certain disclosures to the Police, whereupon the Police discharged him and made him a witness, and, at the trial, he gave evidence against the accomplices who were all convicted. It was held that the evidence of this person Hari was admissible under s. 118 of the Indian Evidence Act, despite the fact that he had

(1) 1 B. 610; 1 Ind. Dec. (N. S.) 405.
(2) 10 B. 190; 5 Ind. Dec. (N. S.) 512.
(3) 2 A. 260; 4 Ind. Jur. 250; 1 Ind. Dec. (N. S.) 727.
(4) 58 Ind. Cas. 449; 16 N. L. R. 9; 21 Cr. L. J. 769.
(5) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir. 271; 8 Sar. P. C. J. 160 (P. C.).
(6) 16 B. 661; 8 Ind. Dec. (N. S.) 919.

*Page of 58 Ind. Cas.—[*Ed.*]

been illegally discharged by the Police. This case follows an unreported case of the High Court of Calcutta, which is given on pages 667 and 668*.

There is another case of *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass* (7). In this case Mohesh Chunder Dass and one Dulaladee were jointly accused of stealing paddy. It was apparently a complaint case. The Magistrate issued process against Mohesh Chunder Dass only. It was sought to examine Dulaladee as a witness for the defence; but the Magistrate, following *Reg.* v. *Hanmanta* (1), refused to examine him. It was held that Dulaladee should have been examined as a witness. The case was not apparently argued before the Bench; but, nevertheless, it must be taken to be the opinion of the High Court. I may add that it was a two-Judge decision.

I am asked to distinguish this case from the present one, because that was a case in which the "accused person was sought to be examined as a defence witness". But, nevertheless, in these cases s. 118 of the Evidence Act has been relied upon as a basis of decision, and s. 118 in no way distinguishes between witnesses called for the prosecution and those called for the defence.

I would also mention the case of *Banu Singh* v. *Emperor* (8). In this case many authorities have been quoted which may, howover, be summed up in the statement appearing on page 1357†:—"The law, however, is well settled, and there can be no controversy on the point that an accomplice, if he is not an accused under trial in the same case is a competent witness and may as any other witness, be examined on oath."

It is true, as was pointed out to me, that after making this statment, the learned Judges proceeded to discuss the matter for about five pages, and I am asked to hold that this shows that their statement, that there can be no controversy on the point, is hardly correct ; but I take it that they were merely summing up the results of their investigation before giving details of it.

In *Empress* v. *Durant* (9), where accused persons were being tried separately, because one was a European British subject and the remainder were Natives of India, and, therefore, were entitled to a separate Jury, it was held that Durant was entitled to call his co-accused as defence witnesses; and it was held that "*the accused*" in cl. 4 of s. 342 of the Cr. P. C., means the accused then under trial and under examination by the Court. Here also the witnesses were sought to be examined for the defence, but, as I have said before, s. 118 of the Evidence Act makes no distinction between witnesses called for the prosecution and those called for the defence.

The most recent case would appear to be that of *Akhoy Kumar Mukerjee* v. *Emperor* (10) in which it was held that an accused person actually under trial at the time cannot be sworn as a witness and no accused jointly tried, is a competent witness for, or against, the co-accused; but, when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other.

It will be noticed that the words "at the trial of the other" are used without distinction as to whether he is sought to be examined as a witness for, or against, the co-accused.

It will, I think, therefore, be seen that there is ample justification for the dictum that it is now beyond controversy that an accused person, when not being tried jointly with a co-accused, is a competent witness for, or against, him.

I will now proceed to deal with the second part of the Nagpur case [*Govinda Sambhuji Mali* v. *Emperor* (4)] in which it was held that, because the Police had failed to do their duty under s. 170, and because the Magistrate had failed to issue process against a person shown to be implicated in the crime under s. 204, Cr. P. C., the whole trial was bad. It will be noticed that s. 170 of the Cr. P. C., appears in Ch. V, which relates to information to the Police and their powers to investigate. The dictum of the learned Additional Judicial Commissioner is based upon *Subrahmania Ayyar* v. *King-Emperor* (5). That was a case in which the provisions of the Cr. P. C. with regard to joinder of charges had been infringed. There had clearly been a mis-joinder of charges. The indictment referred to no less than forty-one acts. Their Lordships of the Privy Council set aside the conviction, holding that the trial was illegally conducted. They state at page 98*:—"But this trial was prohibited in the mode in which it was conducted.

(7) 10 C. L. R. 553.
(8) 33 C. 1353 at p. 1357; 10 C. W. N. 962; 4 Cr. L. J. 145.
(9) 23 B. 213; 12 Ind. Dec. (N. S.) 141.
(10) 45 Ind. Cas. 999; 45 C. 720; 27 C. L. J. 91; 22 C. W. N. 405; 19 Cr. L. J. 663.

*Pages of 16 B.—[*Ed.*]
†Page of 33 C.—[*Ed.*]
*Page of 25 Mad.—[*Ed.*]

. . . . . ," and, therefore, the conviction was set aside. This is the point which the learned Additional Judicial Commissioner professes to have followed; but it must be noticed that their Lordships are only referring to the "trial" and "the mode in which it was conducted." They are in no way, whatsoever, adverting to the previous investigation by the Police.

I am quite unable to agree that *Subrahmania Ayyar's case* (5) is a warrant for holding that every trial, which is preceded by a Police investigation, which has failed to comply with Ch. V of the Cr. P. C. in its entirety, is thereby void. For example, it is possible that the Police may search a dwelling and find in it stolen property; the witnesses to the search may be men of unimpeachable character, but not living in the locality in which the search is held. This would be a breach of s. 103 of the Cr. P. C.; but, nevertheless, the fact of the finding of the stolen property may be proved beyond all possible doubt. If every breach of the Cr. P. C. renders the trial which follows it void, the owner of that house could never be convicted of possession of stolen property. *Subrahmania Ayyar's case* (5) must be held to refer to a trial of such a case, and it goes no further than that.

It was next argued that it was the duty of the Magistrate, on receipt of the Police papers and before beginning the proceedings under s. 204, to have issued warrants, or summonses, to Hormasji and Chit Maung, and that they should then have been put in the dock together with Joseph. How he could have done this, I entirely fail to see. All that he had before him was the Police charge sheet, on which Joseph's name alone appears. There is nobody else mentioned on the charge sheet except Joseph. Hormasji appears in the list of witnesses, and all that is noted against his name is that "he will prove that the accused gave instructions for false hammers to be made for sleepers which had been passed to be butted and inferior sleepers to be marked with a false hammer mark and substituted therefor, and that the cost of the sleepers, (? hammers), was entered in the accused's account." There is nothing here to suggest that Hormasji was supposed to be an accomplice.

Chit Maung also appears in the witness list, and all that is noted against him is "to prove the order for making a false hammer."

There is nothing whatsoever to suggest that either of these men is an accomplice.

Appellant's Counsel argued, no doubt inadvertently, that the Magistrate had the Police papers before him, and that he could have referred to them; but this was obviously suggested in a moment when learned Counsel had forgotten the new form of s. 162, Cr. P. C. It appears to me that, when the charge sheet was placed before the Magistrate, he could do nothing but issue process against Joseph only. It is possible that, as the case progressed, he might have thought fit to join Hormasji as a co-accused, or he might have directed the Police to take action against him in separate proceedings, or he might have taken the course that he did and left the matter for future consideration.

There is nothing in the Code, so far as I am aware, which states that a Magistrate is bound, at any stage of a trial, to stop the proceedinge, arrest any person against whom he thinks there is a chance of getting a conviction, and start the original trial *de novo*. There is nothing on the record to show that Hormasji, or Chit Maung, has ever been promised a pardon, and, even if they had each been granted an illegal pardon, they would merely be in the same position as many of the persons who have been declared competent witnesses in the various cases I have already cited.

I see no reason whatsoever for holding that the evidence of Hormasji and Chit Maung must be excluded from consideration.

Appellant's Counsel had much to say about the Police, who, by failing to arrest Hormasji and Chit Maung, connived at the offence of "compounding a felony." This, however, is not an offence as such under the Indian Penal Code, which knows nothing of "felony," and I note that the section under which, he says, they have committed an offence is s. 213, Indian Penal Code. A reference to this section, however, shows that the gist of it consists in accepting, or obtaining, a gratification in consideration of screening a person from punishment. But there is no evidence anywhere, which suggests that Hormasji bribed the Police, still less that Chit Maung did.

I hold, then, that Hormasji and Chit Maung are competent witnesses against the

appellant, and that their evidence against him must be considered.

The next law point which was taken up was a complaint that Mr. Lamond's complaint to the Police only referred to an offence under s. 420, Indian Penal Code; and that it gave no specific details of time and place. I do not quite follow the criticism involved.

Had Mr. Lamond's complaint to the Police been a charge framed by a Magistrate, or had it been a plaint in a civil suit, one would certainly have expected much greater detail and definition. Nowhere, however, have I seen it laid down that a First Information Report to the Police has got to be made with the same precision and particularity as a charge, or a plaint in a civil suit. It is the charge, as framed by the Magistrate, that the accused has to answer, and not the First Information Report, nor, ultimately, the charge-sheet sent up by the Police.

Another legal point taken up on behalf of the appellant was that the Magistrate had wrongly admitted a large amount of, what was termed, "evidence of prejudice." This consisted of two sets; one was a large bundle of copies of decrees recently passed against Joseph; and the other was a series of letters found in the appellant's letter-books, which show apparently that he had been complaining about Mr. Lamond's strictness in passing sleepers, and also that he was making desperate efforts to get all kinds of sleepers, which were not in accordance with the specification laid down in his contracts, passed as being in compliance with his contracts. For example, he writes to one of his contractors telling him to get his sleepers passed "as Taukkyan," suggesting that some of them were not Taukkyan really, but of different kinds of wood—a point which is emphasised in the following Ex. of YY, which refers to an attempt to pass red coloured Thitsi. Zinbyoon and Banbwe as Taukkyan.

It is clear that these can, in no way, be held as direct evidence of the appellant's having forged, or used forgeries. But the decrees may well show the scarcity of money, which would perhaps be a motive for forgery, and thereby relevant under s. 8, even though not directly admissible under s. 11; and the attempts to pass off inferior sleepers would possibly come under the same category. These attempts, in part at any rate, failed, and the appellant may have had to have recourse to a false hammer in order to get through some of the sleepers, which, by trickery, or other means, he had failed to get Mr. Lamond to pass with a genuine hammer.

Another law point raised was that it was perfectly clear that Joseph did not make the hammer himself; that, therefore, he did not forge it; that, he certainly did not make hammer marks on the sleepers; that, therefore, he did not forge any mark on the sleepers; that, in consequence, a conviction of a substantive offence must be bad; and that, all that he could have been convicted of, at the worst, would be of abetment of the substantive offence.

It was argued that, even if I found the facts as the Magistrate has found them, I must acquit the appellant of the substantive offence, and that I could not alter a conviction in appeal into one of abetment of a substantive offence. It appears to me that this argument is entirely devoid of merit. Section 236 of the Cr. P. C. states that if a single act, or series of acts, is of such a nature, that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and it is very common thing to have a man charged in the Sessions Court with murder under s. 302, abetment of murder under s. 302 read with s. 109, and also under s. 302 read with s. 114, such joinder is a matter of every-day occurrence and I have never before known it to be attacked as illegal.

Section 423 of the Cr. P. C. states that an Appellate Court, in an appeal from a conviction, may alter the finding; and s. 237 of the Cr. P. C. states that, in any case mentioned in s. 236, if the accused is charged with one offence, and it appears that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence which he is shown to have committed, even though he was not charged with it. From this it is quite clear that a man, who is charged with a substantive offence, and nothing else, can always, without framing a further charge, be convicted of abetment of it. If authority for this statement is required, it can be found in cases of *Kehr Singh* v. *Emperor* (11), *Yeditha Subhaya*

(11) 59 Ind. Cas. 913; 22 Cr. L. J. 161; 11 P. W. R. 1921 Cr.

v. *Emperor* (12) and *Lala Ojha* v. *Queen-Empress* (13).

It was argued that a hammer is not a document and that, therefore, it is not susceptible of being forged. This argument is based on a *dictum* of Lord Justice Cockburn in *Reg* v. *Closs* (14); but it is pointed out that this is a decision under the English Common Law, where the definition of "document" is narrower than it is under the Indian Penal Code. This is shown in Mayne's Criminal Law of India, page 756, and Gour's Penal Law of India, 2nd Edition, page 625.

Holding, therefore, as I do, the law points, that have been raised by the appellant's Counsel, against him, it is necessary for me to turn to examine the evidence in detail to decide whether Hormasji and Chit Maung are accomplices who can be believed without corroboration; and, if I consider that corroboration is necessary, whether there is sufficient corroboration to enable me to accept their statements.

[His Lordship then discussed the evidence of the accomplices, and disbelieved the evidence as untrustworthy. He acquitted the appellant on the materials on the record.—*Ed.*]

K. S. D. & N. H.

(12) 15 Ind. Cas. 85; 13 Cr. L. J. 453; (1922) M. W. N. 725; 12 M. L. T. 203; 23 M. L. J. 722.

(13) 26 C. 863; 3 C. W. N. 653; 13 Ind. Dec. (N. S.) 1153.

(14) (1858) 27 L. J. M. C. 54; 3 Jur. (N. S.) 1309; Dears & B. 460; 6 W. R. 109; 7 Cox. C. C. 494.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 28 OF 1924.

September 9, 1924.

Present:—Mr. Dalal, J. C.

Pandit RAM CHARAN—ACCUSED—APPLICANT

versus

IMPROVEMENT TRUST, LUCKNOW—COMPLAINANT—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 307—Disobedience of notice—Offence—Notice, validity of, proof of.

For a conviction under s. 307 of the U. P. Municipalities Act it is necessary to prove that the notice disobeyed by the accused was issued under the provisions of the Act or under a rule or a bye-law. If a notice is not issued according to the provisions of the Act or under a rule or a bye-law a person to whom notice is issued may disobey it and yet not be liable to punishment. [p. 243, col. 2.]

From the mere fact that a person accused under s. 307 of the U. P. Municipalities Act admits that he received the notice and disobeyed it, it does not follow that he is guilty. It is open to him to plead that the notice was issued without authority and without reason. [*ibid.*]

Reference made by the Fourth Additional Sessions Judge, Lucknow, dated the 31st July 1924.

Messrs. *H. C. Dutt* and *Ramacharan*, for the Applicant.

The Government Pleader, for the Opposite Party.

ORDER.—The mat er is a very simple one. A notice was served on the applicant by the Trust and the notice was disobeyed. The Trust then prosecuted the applicant under s. 307 of the Municipalities Act II of 1916. On inquiry made by the learned Joint Magistrate either the applicant stated or it was stated on his behalf that he did receive the notice and disobeyed it. The Court presumed from this that there was an admission of guilt. It was overlooked that there can be a defence of the notice having been issued without authority and without reason. It is distinctly said in s. 307 that the notice should be one issued under the provisions of the Act or under a rule or a bye-law. If a notice is not issued according to the provisions of the Act or under a rule or a bye-law, the person to whom the notice is issued may disobey it and yet not be liable to punishment. The learned Magistrate makes the same mistake in law in his explanation which is marked (2). What he says is: "Accused was asked to show cause. He had nothing relevant to say as the offence consists in failing to obey the order contained in the notice served on accused. Accused admitted service and failure to obey it." The learned Magistrate does not go further and state that the accused admitted that the Trust was justified in issuing the notice that it did. Even if an order of a Court is issued without authority or jurisdiction, it may be disobeyed with impunity.

I set aside the conviction and sentence and order a re-trial of the case according to law. The fine, if any recovered, shall be refunded.

Z. K. *Conviction set aside.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 17 OF 1924.

December 8, 1924.

Present:—Mr. Justice Carr and Mr. Justice Maung Gyi.

MAUNG SHWE PHWE AND OTHERS —APPELLANTS

versus

MA ME HMOKE—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195 (c), 476—Successor of Trying Judge, whether can order prosecution—Omission to make formal complaint, effect of —Complaint against person not party to suit—Court, jurisdiction of.

Under s. 476 of the Cr. P. C., the power to order prosecution may be exercised by any Judge of the Court concerned and not only by the Judge who tried the case.

The fact that instead of making a formal complaint, the Court sanctioning the prosecution merely directs a copy of its order to be sent to the District Magistrate for necessary action does not vitiate the order inasmuch as the defect is merely formal. [p. 244, col. 2.]

For offences mentioned in s. 195 *(c)*, Cr. P. C., the Court has jurisdiction to file a complaint only against parties to the suit. [*ibid.*]

C. T. Guruswamy v. *D. K. S. Ebrahim*, 84 Ind. Cas. 439; 2 R. 374; (1925) A. I. R. (R.) 28; 26 Cr. L. J. 295, followed.

Appeal from the order of the District Court, Pegu, in C. M. No. 82 of 1923.

JUDGMENT.

Carr, J.—In Civil Regular Suit No. 24 of 1923, the District Court of Pegu, Ma Me Hmoke was plaintiff and the first appellant Ko Shwe Hpo was the first defendant. The other appellants were not parties to that suit. The suit was heard by the Additional District Judge, U. E. Maung, who, on the 29th September, 1923, decided it in favour of the plaintiff. The defendants had put forward a written agreement Ex. A, which the Judge believed to be false. On the 17th October, 1923, *i. e.*, only 18 days after the decision of the suit, Ma Me Hmoke applied under s. 195, Cr. P. C., for sanction to prosecute the appellants under ss. 465 and 468, Indian Penal Code, in respect of the document Ex. 1. This was presented to the Judge U. E. Maung who tried the suit. He, equally with Ma Me Hmoke's Pleader, overlooked the fact that as the Cr. P. C., now stands, sanction to prosecute cannot now be granted under s. 195. He ordered notice to issue to the appellants to show cause. He was then succeeded by U Ba On, who, on the 19th November noted in the diary that sanction did not now appear necessary. He allowed respondent's Pleader time to argue the question and on the 28th November an amended application was filed asking that action be taken under s. 476, Cr. P. C. Ultimately, on the 22nd December, the Judge ordered the prosecution of the appellants under the provisions of s. 476, Cr. P. C. It may be noted that he did not strictly comply with the provisions under that section by making a formal complaint, but merely directed a copy of his order to be sent to the District Magistrate for the necessary action. This, in my view, is only a formal defect and does not vitiate the order. This is an appeal against that order. So far as concerns appellants Nos. 2 to 6, the order must clearly be set aside. They are not parties to the suit and the decision *C. T. Guruswamy* v. *D. K. S. Ebrahim* (1) is a sufficient authority for the proposition that for offences mentioned in s. 195 (*c*), Cr. P. C., the Court has jurisdiction to file a complaint only against parties to the suit. As regards the first appellant reliance is placed on *Begu Singh* v. *Emperor* (2), *Rahimadullah Sahib* v. *Emperor* (3) and *Aiyakannu Pillai* v. *Emperor* (4). In these cases it was held by Full Benches of the Calcutta and Madras High Courts that action under s. 476 can be taken only by the Judge who tried the case and that it must be taken at least very promptly after the conclusion of the trial. I do not think it necessary to discuss those cases in full for in my view they are rendered obsolete by the recent amendments of the Code. The Calcutta case is the leading one. In it, the learned Chief Justice, in arriving at the conclusion that the power was given only to the Judge who tried the case said: "The expressions in the section '*is* of the opinion that there *is* ground', 'committed *before* it or brought under its notice in the course of a judicial proceeding,' seem to indicate with some clearness that it is the Judge alone who tries the case who can summarily, and at once, send the case for enquiry to the nearest Magistrate." Now, however sound these observations might have been in respect of the wording of the section as it then stood they have no application

(1) 84 Ind. Cas. 439; 2 R. 374; (1925) A. I. R. (R.) 28; 26 Cr. L. J. 295.

(2) 34 C. 551; 5 C. L. J. 508; 11 C. W. N. 568; 5 Cr. L. J. 398; 2 M. L. T. 298.

(3) 31 M. 140; 7 Cr. L. J. 54; 17 M. L. J. 584; 3 M. L. T. 79.

(4) 12 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

to the present section, which reads :— *When any Court is, whether on application .....or otherwise, of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to under s.* 195, *sub-s.* (1), *cl.* (*b*) *or cl.* (*c*), *which appears to have been committed, or in relation to a proceeding in that Court.....*" The difference is very significant and, in my opinion, it is clear that the power may now be exercised by any Judge of the Court concerned and not only by the Judge who tried the case. The learned Chief Justice remarked : "If months after the trial the Court may act under s. 476 it is difficult to appreciate the necessity for s. 195." He pointed out that under s. 195 sanction can be granted subsequently and by the successor of the Judge who tried the case, quoting *Dharamdas Kamar* v. *Sagore Santra* (5) as authority for this. The judgments of other learned Judges in that case and in the others mentioned show that they were moved by similar considerations in arriving at their decision. Sanction under s. 195 has now been abolished and s. 476 has been so modified as to allow the Court to act either on its own motion or on application. The application now made under that section occupies exactly the same position as one made formerly under s. 195 and I see no reason whatever why on such an application action should not be taken by the successor of the Judge who tried the case On the question of delay there has not, in my opinion, been any undue delay in filing the application in this case. It was filed in little over a fortnight and that it was in the first instance misconceived was the fault of the Pleader. It may be added in excuse for him that the amendments of the Code had then been in force for only some six or seven weeks. In my opinion, therefore, there is no ground in law for interfering in this case as regards the first appellant. On the facts also I see no ground for interference. I would, therefore, dismiss the appeal of the first appellant Mg. Shwe Pho. I would allow the appeals of the remaining appellants under s. 476 (*b*), Cr. P. C., and direct that the complaint as against them be withdrawn.

Maung Gyi, J.—I concur. I should like to note, however, that in such cases, applications should be made promptly. In the special circumstances of the case, however, I consider that the application was sufficiently prompt.

K. S. D. *Appeal partly allowed.*

(5) 11 C. W. N. 119; 4 Cr. L. J. 454.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 859 OF 1923.
February 6, 1924.
Present:—Mr. Justice Mukerji.
KISHEN LAL AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 332, 333—Right of private defence not pleaded—Court, duty of—Public servant acting in good faith—Private defence, right of, whether exists—Arresting Police Officers, as dacoits—Criminal Procedure Code (Act V of 1898), s. 159—Accused not identified immediately after arrest—Conviction, whether good.

Even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of the fact. [p. 252, col. 1.]

Yusuf Husain v. *Emperor*, 44 Ind. Cas. 675; 16 A. L. J. 169 at p. 171; 19 Cr. L. J. 371; 40 A. 284, followed.

There is no right of private defence against an act of a public servant acting in good faith and under colour of his office, although that act may not be strictly justifiable in law. [p. 252, col. 2.]

The right of private defence against property continues, where robbery is attempted, only so long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues. [*ibid.*]

Both ss. 332 and 333 of the Penal Code require as an ingredient of the offence the presence of an intention on the part of the accused person, namely, to prevent or deter a public servant from discharging his duty. Where, therefore, the accused persons are unaware of the fact that the persons whom they have confined are public servants, they are not guilty of any offence. [p. 252, col. 1.]

Where the accused believed certain Police Officers to be dacoits who had in the attempt to escape arrest used a revolver and thus committed a non-bailable and cognizable offence :

Held, that they were entitled to arrest the men and keep them in confinement so long as it was necessary for making them over to the custody of Police Officers. [p. 252, col. 2; p. 253, col. 1.]

In no dacoity case, would a Court convict a person, who was not identified in the Jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. [p. 250, col. 2.]

Criminal appeal from an order of the Sessions Judge, Meerut.

Mr. *Nehal Chand*, St. *C. Thompson* and Mr. *Durga Charan Banerji*, for the Appellants.

Mr. *Sankar Saran* (Government Pleader), for the Crown.

JUDGMENT.—This appeal relates to a very unfortunate incident which occurred in a village known as Dhariwala in the District of Muzaffarnagar. Twenty-four persons have been convicted by the learned Sessions Judge on charges under ss. 148 and 333 read with s. 149 of the Indian Penal Code. The original charges on which the appellants and some others were committed to the Court of Session were ss. 148 and 332/149 Indian Penal Code. In the Court of Session the charges were amended and instead of s. 332, s. 333 was substituted. But from the judgment of the learned Sessions Judge it would appear that, he took no notice of s. 149 of the Indian Penal Code.

The facts which have been undoubtedly established in the course of the trial are shortly these :—

The Bijnor Police wanted two persons Ganeshi and Bhagwana who were implicated in a case of dacoity. They got some information that these men were staying in Dhariwala, in the District of Muzaffarnagar. A small Council of Police Officers was held at the village of Tissa in the District of Muzaffarnagar on the 19th of May. It was then decided that, the City Kotwal, Ram Ratan Lal, of the District of Bijnor, the three Constables who had accompanied him, namely, Rumal Singh, Chhote Singh and Niaz Ahmad, the Sub-Inspector, Tahawwar Ali of the Police Station of Bhopa in the District of Muzaffarnagar and a Police Constable Shiva Ram of the same Police Station, should go into the village of Dhariwala in search of the two persons who were wanted.

Early in the morning, the party started from where they were staying and arrived at Dhariwala at 8, on the morning of 20th May 1923. The hour is important from various points of view. It is to be noted that in the judgment of the learned Sessions Judge it is mentioned at one place that the party arrived at 6 in the morning. But that is clearly due to an oversight. The party having arrived at Dhariwala left their *tongas* outside the village habitation and proceeded on foot. They met one Nanhwa who was loading a cart of manure. They enquired of him where Ganeshi and Bhagwana were. Nanhwa directed the party to the quarters of *jogis*. One of these *jogis*, namely, Faqira was questioned and he directed the party to the house of one Debi Chauhan. This house was surrounded by the Police. Some of the Police Officers were near the house, some were at some distance. One of the officers entered into the house of Debi. He noticed that an old woman was removing a bundle and he followed her into a hut. What happened thereafter is not very clear. It appears that at about this stage of affairs the Police Officers who were at or near Debi's house were assaulted by a number of villagers. The Sub-Inspector of Bijnor Ram Ratan Lal came in chiefly for the assault. Tahawwar Ali, the other Sub-Inspector got the news and hurried to the rescue. It appears that there was a free fight, for we find that some of the villagers (more or less 14 in number) also received injuries in the course of the scuffle. Sub-Inspector Tahawwar Ali fired some shots and one of these hurt the accused person, Shera. Thereafter 4 out of the Police were overpowered and captured and two ran away. A party went in search of them and caught them. All were then taken to the *zemindar's dera* or collection house, thence they were removed to a hut which has been described as *dobari*. The Police were kept confined the whole day and night. In the course of the night one of the party managed to run away. In the meanwhile, Pullu one of the men who had driven the *tongas*, ran away and gave information. Early in the morning some Police Officers including the Deputy Superintendent of Police of the District of Bijnor and many of the villagers arrived and rescued the Police Officers. Then there was a more or less indiscriminate arrest of able-bodied persons and a parade was held for identification by the Police Officers. Many arrested persons were let go. About 30 were sent up to the custody.

Shera and his brother Mangal who were in the meantime in the hosptial were arrested there. Thus 32 men were placed before the Committing Magistrate—the learned District Magistrate himself. He discharged two and committed 30 to stand their trial before the Court of Session. The learned Sessions Judge acquitted 6 and convicted, as already stated, 24.

The case which has been very fully argued on both sides divides itself into four portions:—

(1) We have to see what was the motive of the attack on the Police Officers :

(2) Next we have to see who were the persons who were connected with the attack.

(3) Thirdly we have to see what are the offences under the Indian Penal Code that they committed.

(4) Last but not least is the question of punishment.

On the first point the learned Sessions Judge has found himself unable to give a clear answer. He begins his judgment by saying: "The facts of this case are not seriously in dispute, but it will never be known why the accused attacked the Police who were merely going to arrest a couple of dacoits in the course of their ordinary duty."

Then he put two alternative probabilities before himself. He thought that there could only be two reasons for the offences, either the Police Officers mal-treated the village people or the accused persons were determined from the very first to prevent a search of their houses "because they were all involved in a series of dacoity cases that had taken place recently." He came to the conclusion that the latter was the more probable reason. Further he said that as the accused persons had not set up any clear case and had contented themselves mostly with pleading *alibis* it was impossible to tell with certainty how the quarrel arose. Having gone through almost the whole evidence that was before the learned Sessions Judge I have come to the conclusion that the theory set up in argument before the learned Sessions Judge, namely, the officers were mistaken for dacoits or robbers who had come to extort property on false pretences, was the true one. The Deputy Superintendent of Police Mr. Hansnain who as I have said, was an officer from Bijnor, said that between Bijnor and Tissa the officers never put on any uniform for the purpose of concealing their identity. The party met people on the way and told them that they formed a marriage party. It is to be noted that the party from Tissa arrived at 8 in the morning in the village. They came on *tongas* drawn by bullocks which they left outside the village. It would have been subversive of the object for which the officers came, namely, the arrest of dacoits who had taken shelter in the village, to have come in their uniforms. It is not the case that all the officers came suddenly on horse back and surprised a certain house where they knew the persons wanted were. They did not know definitely where to find Ganeshi and Bhagwana. They had to make enquiries and they did make enquiries, as I have already stated. If they had been in uniforms it would have been impossible for them not to reveal their identity, with the result that the dacoits whom they wanted would take notice and run away. It seems to me, therefore, to be certain that the officers were without any uniforms. This theory is supported by a good deal of circumstantial evidence. I am not ignoring the fact that all the Police Officers and some other witnesses for the prosecution say that the officers were in uniforms, but I have serious doubts on the point.

The witnesses differ as to where officers were stripped of their uniforms. The next morning, the whole village was raided by a large body of men when arrests were made. It is not said that any of the uniforms were recovered. It would not have been easy for the villagers to do away with the uniforms of six. men. Besides, they were acting or supposed to have been acting in utter defiance of law. Under the circumstances it would not be likely that they would think it necessary to destroy the uniforms.

The prosecution witness Rumal Singh (p. 199 of Judges's notes) says that no uniforms were taken off in the *dera* in his presence. Niaz Ahmad, prosecution witness No. 5, says that the uniforms were taken off at the *dera* (p. 219 *ibid*). The Police Officers were all kept together and this discrepancy is inexplicable. Rumal Singh says that, when the villagers beat the party they said among themselves that the party were dacoits. Niaz Ahmad also says that the crowd which assaulted the Police party called them dacoits. Ram Ratan Lal prosecution witness No. 6 says that when he was first attacked one or two people said that he was a dacoit.

Banwari, prosecution witness No. 16, says that when he went inside the room in which the Police had been kept in confinement he recognised the *thanedar* of Bijnor and that he told the accused Mehar Singh that the party were Police but the answer given was that they were not Police Officers but were dacoits. He further said in his cross-examination that the party were in plain clothes (the word in vernacular is *sada* which would mean plain clothes). The learned Judge has translated it as white clothes.

The person who was first accosted by the Police Officers, namely, Nanhwa was produced on behalf of the defence. He too says that the officers were in plain clothes. He further says that when he was asked the whereabouts of Bhagwana then he thought that they were Police Officers and the Police Officers themselves told him that fact. There is, therefore, a substantial body of evidence to indicate that there were circumstances which made the villagers to suspect that the party of six were robbers who had come to rob the villagers on a pretext of searching for dacoits. When the villagers wanted to arrest the Police Officers there was a free fight (as I have already stated about 14 persons out of the accused were hurt), between the villagers and the Police Officers and in the course of the fight revolvers were fired. This last incident must have confirmed the villagers in their belief that the party were genuine dacoits who had come armed.

As against the theory of the learned Sessions Judge that the village people resented the proposed arrest of Bhagwana and Ganeshi "because they were all involved in a series of dacoity cases," it has been pointed out that there is no evidence to substantiate it. Not a word has been said indicating that Ganeshi and Bhagwana had any relations in the village. There is nothing to show that the village people or some of them were suspected to have been dacoits. Indeed the very fact that the Police Officers did not think it necessary to have a larger party than they themselves formed goes to show that no serious consequences were ever feared. The learned District Magistrate was examined in the Court below and he said that he never heard the name of the village of Dhariwala till the incident occurred. This shows that the village had no bad reputation. The learned Sessions Judge had the accused persons before him for several days and he observes in his judgment that they were men of exceptionally poor physic and *of a very low type of intelligence*. Indeed there is on the record evidence of incidents which show how poor in intellect all these men really are. The learned District Magistrate, when the party of the accused persons were brought before him on the 21st of May 1923, asked them if any of them had received any injuries and none of them told him that they had. The learned District Magistrate put the question only to satisfy himself as to whether the villagers had been illtreated but the villagers had not the intelligence enough to understand him and kept quiet. It was only, says Mr. Darling that after he had seen the medical report that he came to know that several of the accused persons had received injuries. Under the circumstance it cannot be the case that the whole village or a considerable part of the inhabitants were involved in a series of dacoity cases. The incident of an old woman removing something from Debi's house, may have been accidental or due to an anxiety to save property from being taken by the supposed robbers.

Let us now consider the conduct of the villagers, themselves, to find out what they actually thought about the party. After the villagers had overpowered the Police party they took them to the *zemindar's dera* and then confined them in a hut. They mounted guard day and night lest the party should escape. If they had any suspicion that the party were a body of Police Officers they would not have acted as they did. They would have simply beaten them and let them go. There could be no object to be gained in keeping them alive and intact in the hut, mounting guard against their escape, knowing it all the while that the news would get out and a larger body of officers and men would come and take them to task. The presence of the three government or *semi*-government officials, the *patwari*, the *chaukidar* and the *mukhia* also points to the same conclusion. The learned Sessions Judge has at one place in his judgment remarked that the villagers did not know what to do with these men. That can hardly be correct. They knew quite well what they were about. They were guarding them so that authorities might come and arrest the party in confinement. There could have been no idea of killing them and disposing of the bodies, though one of the Police men has suggested it. If such had been the idea, the night was the right time, but the confined men saw the light of the next day safe and alive. That the villagers did not inflict more injury than was inevitable in a free fight, between unequal numbers and subsequent capture, is abundantly clear. The injuries on 5 of the Police Officers (though numerous in some cases) were all "simple." Only one sustained a "grievous hurt", but even that was not serious. They knew that Shera on receiv-

ing the bullet injury had gone to the authorities to make a report. It is in evidence and has been satisfactorily established that Shera and his brother Mangal went away to complain. Of course, the villagers could not tell where Shera and Mangal actually went. Shera and Mangal went directly to the District Magistrate of Muzaffarnagar and laid a written application before him stating a part of the incident. Shera and Mangal have been described as ring-leaders in the affair. But if Shera and Mangal knew that they were in the wrong, they would not have themselves gone to the highest District authority. It is clear, therefore, that the villagers never knowing or suspecting that they had Police Officers in confinement were guarding them so that Police Officers might come and arrest those whom they themselves had arrested. I am, therefore, clearly of opinion that the whole affair is (not a comedy but) a tragedy of errors.

Now let us see who were the people who took part in the affair. On this point unfortunately the judgment of the learned Sessions Judge gives this Court no assistance. He has given reasons, and very good reasons too for acquitting six of the accused persons before him. Then he finishes the case against the remaining 24 accused persons by a single sentence, *viz.*, by saying that he considers that they had taken part in the riot. Fortunately, however, the Counsel for the appellants and the Crown have taken great pains and the Crown Counsel had the assistance of the prosecuting Inspector. I am in full possession, therefore, of the entire body of evidence that is against the individual appellants.

Among the appellants there are three persons who are more or less connected with the Government, namely, the *patwari* Kishan Lal, Gopi, the *mukhia* and Ghasita, the *chaukidar*. As against these, the Police evidence is clearly to the effect that not only they took part in the riot but excited others in causing hurt to the Police Officers. Only in one case, there is one of the Police Officers, namely, Shiva Ram, who says that the *patwari* Kishan Lal interfered in his (Shiva Ram's) being further maltreated. The learned Sessions Judge has not believed any portion of this evidence and very rightly too. He says: "There are three officials, Gopi, Ghasita and Kishan Lal *patwari*. The Police complained that none of these three did anything to save them from injury but rather encouraged the villagers than otherwise. I do not think it very likely that they encouraged the villagers, but they probably found that their position was a helpless one".

I have heard the entire evidence and I can say that I am in a position to fully agree with the opinion formed by the learned Sessions Judge, who saw the witnesses himself. It is clear then that the case against these persons has been very much exaggerated. I am prepared to believe the witnesses so far that these men were found among the body of villagers who had collected about the Police Officers and that some of these came and went where the Officers were kept in confinement. This would be in consonance with the theory set forth above, namely, that the Police men were taken to be dacoits. I forgot to mention, but it is important to do so, even now, that all the Police Officers except Shiva Ram were *utter strangers* to the village. Shiva Ram alone says that, he had visited Dhariwala just a few times before. There would be nothing strange then that, even the *patwari*, the *chaukidar* and the headman should have been ignorant of their identity. Shiva Ram has not said that he met any one in the village who was already an acquaintance of his. If he had met any such person his identity would have been disclosed and matters would not have been so bad.

Having acquitted these three men of taking any deliberate part in the riot or exciting the rioters, the learned Judge convicts the three persons of not making " strenuous efforts to prevent the riot and the subsequent disgraceful torture." This is his language. "Gopi, however, is a man of fairly good position in the village and there is no reason to think that he wanted the Police to be seriously injured. On the other hand, neither he nor the *patwari* nor the *chaukidar* seems to have made strenuous efforts to prevent the riot and the subsequent disgraceful torture and I am not prepared to let them off lightly. It may have been cowardice rather than deliberate wish to injure the Police that brought them into the quarrel, but they are certainly responsible for not trying to moderate the violence of their more ignorant comrades. The *chaukidar* ought to have escaped long before the quarrel became universal and made a report at the

thana." I am afraid the reasons given by the learned Sessions Judge cannot be any sufficient ground for convicting men of offences under the sections of the Indian Penal Code under which they have been convicted. On the learned Judge's finding, therefore, these men must be acquitted. In the circumstances I do not feel called upon to discuss in detail the particular evidence that may be against these men.

Sarjit, Mukh Ram, Debi Sahai son of Bansi and Rahwa as well as Gopi were represented by Mr. Thompson. I have already acquitted Gopi. I will now consider the case of the remaining four. Before I enter into the evidence I will dispose of a point of law. It appears that the depositionsof two of the witnesses,namely, Chhote and Niaz Ahmad (P. W. Nos. 3 and 5) taken before the learned Committing Magistrate were admitted into evidence at the close of their depositions, before the learned Sessions Judge. A question arose how far this evidence recorded by the learned Committing Magistrate could be treated as evidence. It appears that the witnesses failed to identify all the accused persons whom they had identified before the learned Magistrate. It was found that over two months had elapsed between their examination before the learned Magistrate and the date on which they were examined before the learned Sessions Judge and it was likely that the witnesses should forget the faces. Under these circumstances I think it was entirely within the discretion of the learned Sessions Judge to admit the evidence. The evidence was admitted before the cross-examination began and the defence could, therefore, cross-examine the witnesses on the statements that they had made before the Committing Magistrate.

It will be necessary to go into the history of the case before examining what evidence there is against the individual appellants. On the morning of 21st May 1923 when the Deputy Superintendent of Police Mr. Hasnain arrived with a large body of men and rescued the five Police Officers who were still in confinement, he ordered the arrest of all able-bodied men in the village. These men numbering between 70 and 80, were put up in an open space of land and the Police Officers were called upon to identify them. It is in his evidence that those who were identified by less than two of the Police Officers were let go and those who were identified by two or more of the Police Officers were arrested and sent up to Muzaffarnagar. This was, no doubt, a very proper thing to do. But most unfortunately, no record whatsoever was kept of these identification proceedings. Indeed the proper thing to do was to send the men, after identification on the open field, at once to the custody and then to conduct a fresh identification proceeding in the Jail before a Magtistrte and to keep a record. This is always done in dacoity cases. The Police Officers were utter strangers to the village and it would be very difficult for them to remember the faces long after the occurrence. It was, therefore, necessary to keep a record of the identification which took place soon after the incident. The learned District Magistrate started an enquiry into the case on the 5th of June 1923. Then as usual, the accused persons would be brought unveiled to his Court and would be kept outside the Court till the case was called on. The prosecution witnesses would thus have an opportunity to see the accused persons over and over again. In these circumstances the utility of identification in the Court of the Committing Magistrate and later on in the Court of Session is very much diminished. In no dacoity case, a Court would convict a person who was not identified in the Jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. This being the case the evidence in this case loses its entire value. A further difficulty is created in the case by the fact that the witnesses are, generally speaking, unable to say what part what accused person took in the affair. I recognise this would be impossible for the prosecution witnesses to do in most of riot cases or of dacoity cases. But where the safeguard of an earlier identification is non-existent the Court is bound to insist on something being said by a prosecution witness to indicate why and how he happens to remember the faces long after the event. The witnesses, again speaking generally, said before the Courts that, they saw such and such of the accused persons, either in the riot or in guarding the Police Officers in the hut. Thus, the second safeguard against the inaccuracy and deliberate perjury is also taken away. I will quote an example,. As against Debi Sahai son of Bansi there is the evidence of Shiva Ram,

He says: "I can recognize by appearance the following...Debi Sahai son of Bansi." The witness does not say what part Debi Sahai son of Bansi took in the riot.

Coming to individual cases. Sarjit is mentioned by only one witness, namely, Chhote in the Court of the Magistrate. There is no other evidence against him. On this ground alone he is entitled to an acquittal. It is unsafe to base a conviction on the statement of one identification.

As against *Mukhram* there is only one witness, namely, Niaz Ahmad who has purported to identify good many people. It is unsafe to base a conviction on the testimony of one identifying witness, so he too is entitled to an acquittal.

As against Debi Sahai son of Bansi, there is the evidence of one witness only, namely, Shiva Ram. Masita mentions one Debi but that is clearly the other accused person. For Debi, son of Bansi, has always been described as Debi Sahai and not as mere Debi. For the reasons given above, Debi Sahai son of Bansi is also entitled to an acquittal.

As against Rahwa there is no evidence recorded by the learned Sessions Judge. His conviction, if any at all, must be based on the statements of Niaz Ahmad and Chhote recorded in the Court of the learned Magistrate. I consider that it would be unsafe to rely for conviction on the statements of those two witnesses only specially as no record was kept of the initial identifications and the witnesses had an opportunity of seeing the accused persons before the Magistrate.

I will now take the case of the appellants represented by Mr. Bajpai.

As regards Shera he is the man who received the bullet wound. His presence is clearly established. It will be a matter for consideration whether he should be convicted or not and, if so, of what offence.

Mangal's presence is sworn to by no less than five witnesses and I must hold that he too was present at the commotion.

Against Saktu we have got the evidence of Naiz Ahmad alone and I would not convict him.

As regards Shadi we have evidence of three witnesses, namely, Shiva Ram, Rumal and Masita. His presence on the occasion must, therefore, be taken to be practically certain.

As regards Bhagwana we have the evidence of three witnesses, namely, Shiva Ram, Masita and Mukha. His presence too is, therefore, assured. Partap son of Narpat has been mentioned by only one witness, namely, Niaz Ahmad and I would not convict him.

As against Sukha son of Behari we have no less than the testimony of five witnesses, namely, Shiva Ram, Niaz Ahmad, Ran Prasad, Masita and Mukha. His presence is, therefore, assured.

As against Jugna, the only person who mentions him is Niaz Ahmad who has mentioned a lot of people. I would not convict him.

Against Jhabba we have the evidence of two persons, namely, Niaz Ahmad and Masita. Jhabba does not belong to the village of Dhariwala. He is the son-in-law of Shera and he says that he happened to come to the village on the morning of the 21st of May 1923 and was arrested. I doubt his complicity and give him the benefit of it. I would not, therefore, convict him.

As against Mula we have the evidence of only two persons, namely, Shiva Ram and Niaz Ahmad. Acting on the principle already laid down for my conduct I would acquit him also.

As against Debi son of Behari, we have no less than six witnesses, namely, Ram Ratan, Shiva Ram, Chhote, Niaz Ahmad, Ram Prasad and Masita. It will be remembered that he is the man whose house was going to be searched when the resistence took place. There can, therefore, be no doubt about his presence in the fight.

Now come the appellants who are unrepresented in this Court. They are six in number, namely, Mehar Singh, Hardewa Purna, Siria, and the two Sukhrams.

As regards Mehar Singh we have at least six witnesses testifying to his presence in the riot. His presence on the spot is, therefore, entirely assured.

Hardewa, is identified by at least five and his persence may, therefore, be taken as established.

As against Purna there is but the testimony of Niaz Ahmad. I would acquit him.

As against Siria we have three witnesses, namely, Chhote, Niaz Ahmad and Masita who prove his presence. I hold that he was present in the riot.

As against Sukhram son of Chhajju he has but one witness against him, namely, Chhote Singh. I would acquit him.

As against Sukhram son of Sarjit there is

no evidence whatsoever. He must, therefore, be acquitted.

Now the question is whether the nine persons, namely, Shera, Mangal, Shadi, Bhagwana son of Behari, Sukha, Debi son of Behari, Mehar Singh, Hardewa and Siria ought to be convicted of any offence and if so of what offence. I have already held that the whole affair was the outcome of a grim error which has resulted in maltreatment of six officers of the Government. But the question is whether these men are to be sacrificed, simply because six honest Government servants have suffered at their hands or whether the act may be excused on the ground of want of true knowledge on the part of the accused persons. This brings me to the consideration of the law on the subject. The first section to be considered is s. 333 of the Indian Penal Code. It is not necessary to consider at present whether s. 332 is applicable or s. 333. The learned Magistrate has discussed the point very clearly in his judgment and I am entirely at one with him in thinking that s. 332, when it is applied with s. 149 to the circumstances of the present case, is the more appropriate section. However, both the sections require as an ingredient of the offence, the presence of an intention on the part of the accused persons, namely, to prevent or deter a public servant from discharging his duty. If the accused persons were unaware of the fact that the persons confined were public servants the offence has not been committed.

Now coming to s. 148 it is clear that the accused persons were armed with *lathis*, for most of the injuries deposed to by the Civil Surgeon were caused by *lalhi* blows. It does not appear that the *lathis* were actually produced and every *lathi* cannot be a deadly weapon. Section 148 further involves an offence under s. 147 in which there must be a common object and there must be an unlawful assembly. The common object in this case was the arrest of persons believed to be dacoits or robbers who wanted to enter the house of Debi on the supposed pretext of searching for dacoits. The persons, therefore, who opposed these men were acting for the protection of property and the question is whether they exceeded the right of their private defence. Even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of this fact, *vide Yusuf Husain* v. *Emperor* (1). There is no right of private defence against an act of a public servant acting in good faith and under colour of his office, although that act may not be strictly justifiable in law. In this case the Police Officers did nothing as to which it can be said that it was not strictly justifiable in law. The fact that they had not uniforms on will not make their act illegal. But there still exists a right of private defence under Explanation I of s. 99 of the Indian Penal Code in a case where the alleged offender does not know and has no reason to believe that the person doing the act was a public servant. This explanation, therefore, covers the present case.

The only act which is involved in the charge under s. 148 is the commission of the offence of rioting being armed with a deadly weapon. No charge of illegal confinement was laid against the accused persons. The right of private defence against property continues where robbery is attempted, only so long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues. After the Police Officers were ejected from the premises of Debi it would appear that the right of private defence of property ceased. In the course of the ejectment came the fight and a revolver was used. Thus the right of private defence of person came into existence and continued so long as the danger to the persons continued.

Now the question is whether the accused persons had any right to confine the Police Officers after the right of private defence of person and property ended.

This brings me to the consideration of the provisions to be found in the Cr. P. C. as as to the right of arrest by private persons. According to s. 159 of the Cr. P. C. (before it was amended) a private person could arrest any man who in his view committed a non-bailable and cognizable offence and who had been proclaimed as an offender. In this case the villagers believed that the Police Officers were dacoits, armed robbers, who had in the attempt to escape arrest used a revolver. The supposed offence was, therefore, non-bailable and cognizable being an offence under s. 392 of the Indian Penal Code. They were, therefore, entitled to arrest the men and keep them in

(1) 44 Ind. Cas. 675; 16 A. L. J. 169 at p. 171; 19 Cr. L. J. 371; 40 A. 284.

confinement so long as that was necessary for making them over to the custody of Police Officers. I have already stated that Shera and Mangal were despatched to move the authorities. The villagers, therefore, made every attempt to bring the matter to the notice of the proper authorities. They did not know and could not know whether Shera and Mangal went to the Police Station or direct to the District Magistrate but this is really immaterial. The confinement of the Police Officers was not under the circumstances unnecessary. It would have been considered dangerous to carry them bodily to the Police Station of Bhopa. The confinement, therefore, was justified. It follows that no offence under the law was committed by the nine persons whose presence has been established in the riot, by reasonably good evidence.

In this connection the provisions s. 79 of the Indian Penal Code are also very relevant. It lays down that nothing is an offence which is done by any person . ...who by reason of a mistake of fact ..... in good faith, believes himself justified by law in dong it. This rule protects the nine men, who would be otherwise convicted, from conviction, of any offence under the Indian Penal Code.

My finding being that no offence has been committed by Shera, Mangal, Shadi, Bhagwana, Sukha, Debi, Mehar Singh, Hardewa and Siria, they cannot be punished although they took part in the riot and the confinement of the Police Officers. Under the circumstances it is not necessary to consider what would have been the suitable punishment in the case of conviction.

The result is that the appeals of all the appellants succeed. I set aside the convictions and sentences and order the appellants' release.

It is but fair to the six Police Officers concerned in the tragedy to mention that, the trouble that came to them was unprovoked by any unlawful act.

K. S. D. *Convictions set aside.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 36 OF 1924.
November 21, 1924.
Present:—Mr. Justice Godfrey.
MA AIN LON AND ANOTHER—APPELLANTS
versus
MA ON NU—RESPONDENT.

Penal Code (Act XLV of 1860), s. 196, offence under—Production of document in compliance with order of Court.

It is an essential element of the offence under s. 196 of the Penal Code that the document should have been corruptly *used* or attempted to be *used* as true or genuine evidence. [p. 253, col. 2; p. 254, col. 1.]

The production of a document in compliance with an order of the Court does not amount to using the document as genuine within the meaning of the section. [p. 254, col. 1.]

Assistant Sessions Judge of North Arcot v. *Ramammal*, 13 Ind. Cas. 275; 36 M. 387; 10 M. L. T. 563; (1912) M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35 and *In re Muthiah Chetty*, 13 Ind. Cas. 286; 36 M. 392; 11 M. L. T. 21; 22 M. L. J. 181; (1912) M. W. N. 455; 13 Cr. L. J. 46, followed.

Appeal from the order of the District Court, Hanthawaddy, in C. M. Application No. 14 of 1924.

Mr. *Leong*, for the Appellants.

Mr. *Maung Ni*, for the Respondent.

JUDGMENT.—In this matter the appellants appeal against an order by the District Court Henzada under s. 476-B, Cr. P. C., charging them with the offence of corruptly using as genuine evidence in Suit No. 20 of 1923 of the Sub-Divisional Court, Twante, two documents (Exs. 1 and 2) which they knew to be false or fabricated, an offence which is punishable under s. 196, Indian Penal Code. Application has been previously made to the Sub-Divisional Court for sanction for their prosecution in respect of the same offence but this was rejected and it was on appeal from the Sub-Divisional Court's order that the order now complained of was passed. It appears that the suit in the Sub-Divisional Court was a suit filed by the respondent against the appellants for the cancellation of these very documents, which are registered sale-deeds upon the allegation that they had been executed by the respondent in consequence of the false and fraudulent representation made to her by the appellants, and it was after obtaining a decree for their cancellation upon this ground that she applied for sanction for the appellants' prosecution under s. 196, Indian Penal Code.

It is an essential element of the offence charged that the documents should have been corruptly *used* or attempted to be *used*

as true or genuine evidence. Now it is apparent from the nature of the suit filed by the respondent that the production of these documents was a necessary part of her claim to have them delivered up and cancelled. And in furtherance of this she took steps to obtain discovery from the appellants and subsequently, in the course of her examination-in-chief, the respondents were called upon to produce and did produce the documents in question, which they had, as in duty bound, disclosed in their affidavit of documents. The documents were, therefore, put in as exhibits in the case, but instead of being marked as the plaintiff-respondent's exhibits, as they should have been (*cf.*, s. 163, Evidence Act) they were marked as the defendants-appellants' exhibits. Apart from this, however, it is abundantly clear that, in such circumstances, there was no deliberate use of the documents by appellants as evidence at all. They disclosed the documents in compliance with an order of the Court, and they produced them as they had to do when called upon. Independent volition on their part was entirely absent, and it is obvious that they could not have been convicted of an offence under this section: *Assistant Sessions Judge of North Arcot* v. *Ramammal* (1).

It is urged further that, since they have sworn in evidence that the documents were genuine, it must be taken that they have corruptly and fraudulently used them within the meaning of the section. This argument appears to me equally unsound, and I am fortified in that view by the ruling of the Madras High Court in the case of *In re Muthiah Chetty* (2).

For these reasons this appeal must be allowed and the order of the District Court set aside.

K. S. D. *Appeal allowed.*

(1) 13 Ind. Cas. 275; 36 M. 387; 10 M. L. T. 563; (1922) M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35.

(2) 13 Ind Cas. 286; 36 M. 392; 11 M. L. T. 21; 22 M. L. J. 181; (1912) M. W. N. 455; 13 Cr. L. J. 46.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NOS. 508 AND 509 OF 1924.

(CRIMINAL REVISION PETITION NOS. 420 AND 421 OF 1924).

August 21, 1924.

Present :—Mr. Justice Madhavan Nair.

SARDAR KHAN SAHIB—ACCUSED—PETITIONER

versus

ATTAULLA—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of Magistrate—Trial de novo—*Transfer of case to transferred Magistrate, effect of—Procedure.*

When on the transfer of a Magistrate to another station, a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out, and such Magistrate has no jurisdiction, on the case being transferred to him again by the District Magistrate, to proceed with the trial from the point where he had left it.

Jago Singh v. *Emperor*, 53 Ind. Cas. 820; 20 Cr. L. J. 820, followed.

Petitions, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the District Magistrate, Salem, dated the 21st July 1924, in C. M. C. Nos. 31 and 32 of 1924, transferring C. C. Nos. 113A and 113, on the file of the Court of the Sub-Divisional Magistrate, Dharmapuri to the file of the Treasury Deputy Magistrate, Salem.

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

Mr. *M. S. Ratnasabapathi Mudaliar*, for the Complainant.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

ORDER.—These are petitions for revising the order of the District Magistrate of Salem transferring C. C. Nos. 113A and 113 of 1923 from the file of the Dharmapuri, Sub-Divisional Magistrate to the file the Treasury Deputy Magistrate, Salem.

These cases were tried before Mr. Pinto, while he was the Sub-Divisional Magistrate of Dharmapuri, but before the trial was over he was transferred to Salem as the Treasury Deputy Magistrate. Mr. Pinto's successor at Dharmapuri granted the accused a *de novo* trial. The District Magistrate has now ordered the transfer of these cases to the file of Mr. Pinto at Salem on the ground "that the balance of convenience is strongly in favour of the small amount of work still to be done being done by Mr. Pinto at Salem rather than the whole case should be heard again by a new

Magistrate at Dharmapuri." It has been assumed by the District Magistrate that Mr. Pinto could go on with the trial of the cases from the point where he had left it. In the decision reported as *Jago Singh* v. *Emperor* (1), it has been held by a Bench of the Patna High Court in similar circumstances that when, on the transfer of a Magistrate, a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out and such Magistrate has no jurisdiction on his return to the district to proceed with the trial from the point where he had left it. Applying the principle of this decision to the facts of the present case, I am inclined to think that, if Mr. Pinto took up the cases from the point where he left it and went on with the trial his procedure would be illegal and the cases would have to be tried *de novo*. The balance of convenience relied upon by the District Magistrate as a justification for the transfer does not, therefore, really exist. The question as regards the hardship and the inconvenience which the transfer of the cases to Salem will cause to parties and their witnesses all of whom are alleged to belong to Dharmapuri has also not been considered by the District Magistrate.

I, therefore, set aside the order of the District Magistrate transferring the cases to the file of the Treasury Deputy Magistrate at Salem. The Sub-Divisional Magistrate of Dharmapuri will take up the cases on his file and proceed with their trial.

In this view, it is unnecessary to consider the further question raised by the petitioner's learned Vakil that the District Magistrate had no jurisdiction to transfer the cases to the file of Mr. Pinto under s. 528, Cr. P. C. since Mr. Pinto is only a Treasury Deputy Magistrate.

V. N. V. *Order set aside.*
Z. K.

(1) 53 Ind. Cas. 820; 20 Cr. L. J. 820.

RANGOON HIGH COURT.

CRIMINAL REVISION NOS. 502-B AND 427-B OF 1924.

August 11, 1924.

Present:—Mr. Justice Baguley.

KHEM CHAND—PETITIONER

versus

LALU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439—Order of acquittal—Revision—High Court, powers of.

The High Court can no doubt revise orders of acquittal, but the power of reversing acquittals is one that will only be used sparingly and when the interests of public justice demand. [p. 255, col. 2.]

Nga Po Pyaw v. *Nga Po Nwe*, 42 Ind. Cas. 330; 3 U. B. R. 19; 18 Cr. L. J. 970, followed.

It is in every exceptional cases that acquittals are set aside in revision on the application of private persons. [*ibid.*]

Faujdar Thakur v. *Kasi Chowdhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122, referred to.

Criminal Revision against an order of the Second Additional Magistrate of Pyapon, in Cr. Reg. No. 77 of 1924.

Mr. *Patker*, for the Petitioner.

ORDER.—The applicant prosecuted the respondent for cheating with regard to three pairs of diamond bangles. The respondent was convicted by the Magistrate but acquitted, on appeal, by the Sessions Judge. The present application is for the revision of that order of acquittal.

That this Court has power to revise orders of acquittal is undoubted. For authorities on this point, I need only quote *Queen-Empress* v. *Balwant* (1), *Faujdar Thakur* v. *Kasi Choudhuri* (2), *Kangali Sardar* v. *Bama Charan Bhattacharjee* (3), and *Nga Po Pyaw* v. *Nga Po Nwe* (4) The question now arises as to whether I should admit this application for revision. In the last quoted case, there is the dictum, "But in any case the power of reversing acquittals is one that will only be used sparingly and where the interests of public justice demand." And there is a further statement, "it will not do so except in exceptional cases, and applications for the purpose should be discouraged on public grounds."

Mr. Patker, who argued the application, was unable to quote me any case in this Court or in the late Chief Court of Lower Burma in which an acquittal has been set aside in revision on the private application.

In *Faujdar Thakur* v. *Kasi Chowdhury* (2), on page 623, it is mentioned that, in recent times, four or five rules have been issued and all except one, by one Bench. How many of these rules were made absolute is not known to me but it seems clear that it is only in rare and most exceptional cases that acquittals are set aside in revision on the application of private persons. In the present

(1) 9 A. 134 at p. 135; A. W. N. (1886) 322; 5 Ind Dec. (N. S.) 521.

(2) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

(3) 12 Ind. Cas. 985; 38 C. 786; 12 Cr. L. J. 609.

(4) 42 Ind. Cas. 330; 3 U B. R. 19; 19 Cr. L. J. 970.

case there seems to me to be no striking feature at all. The Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view. There is no legal point or question of jurisdiction involved. There are no public grounds put forward which render this a matter of importance. The only point of importance is the fact that respondent got three pairs of diamond bangles worth more than Rs. 3,000 from the applicant and has pawned them to a third party, and, if the applicant can get the respondent convicted in connection with these diamond bangles, he expects to be able to recover them from the third party, without having recourse to a civil suit.

I see no reason why he should use the Criminal Courts to recover property which he cannot obtain by a civil suit. I am asked to exercise the power which is only meant to be used in very exceptional cases, and I do not regard the present case as falling within that category. I dismiss the application.

K. S. D. *Application dismissed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 580 OF 1923.
(CRIMINAL REVISION PETITION Nos. 462 OF 1923 AND CIVIL REVISION PETITION No. 613 OF 1923).
August 19, 1924.
Present:—Mr. Justice Beasley.
IN CR. R. C. No. 580 OF 1923.
NATESA NAICKER—PETITIONER No. 1—PETITIONER
versus
RAGHAVACHARIAR AND OTHEES—COUNTER-PETITIONERS Nos. 1 TO 6—RESPONDENTS.
IN C. R. P. No. 613 OF 1923.
DENARAJA NAICKER—PETITIONER No. 1—PETITIONER
versus
RAGHAVACHARIAR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Sale of crops—Deposit in Court—Proceedings dropped by consent—Disposal of sale-proceeds—Question of title, decision of—Procedure.

During the pendency of proceedings under s. 145, Cr. P. C., the crops on the land were seized and sold and the proceeds deposited in Court. The proceedings were then dropped with the consent of the parties:

Held, that it was not thereafter competent to the Magistrate to decide which of the parties was entitled to the money and to hand it over to him; the proper order to make in the case was to direct the money to remain in deposit pending the decision in a Civil Court as to which of the parties was entitled to it. [p. 256, col. 2.]

IN CR. R. C. No. 580 OF 1923.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, and s. 107 of the Government of India Act, praying the High Court to revise the order, dated the 23rd June 1923, of the Court of the Sub-Divisional First Class Magistrate, Saidapet, in Miscellaneous Case No. 62 of 1922.

IN C. R. P. No. 613 OF 1923.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise the order of the Revenue Divisional Officer, Saidapet, dated the 23rd June 1923.

Mr. *F. Z. Vaz*, for the Petitioners.

Mr. *K. V. Sesha Iyengar* and *R. V. Seshagiri Rao*, for the Respondents.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

JUDGMENT.—The facts of these cases appear to be that an application under s. 145, Cr. P. C., was pending and during the pendency of that application the Sub-Inspector of Police seized certain harvested crops apprehending breach of the peace. The crops were first entrusted to the Village Munsif and subsequently the crops were sold and the sale proceeds amounting to Rs. 340 were deposited and the proceedings under s. 145 were dropped with the consent of both parties. As there was no likelikood of a breach of the peace taking place, the question of possession was not decided. The Magistrate then appears to have decided the question as to which of the parties was to receive the money, which had been deposited, and he decided that the money was to be handed over to the counter-petitioners in Miscellaneous Case No. 62 of 1922. The effect of this was that he really was deciding a question which was the subject of dispute between the parties to be decided later on. In my view he had no right whatever to make the order he did. But the proper order would have been for the money which had been deposited to remain in deposit pending the decision as to which of the parties was entitled. In my view the order of the Magistrate and Revenue Divisional Officer should be cancelled. The respondent will pay the costs of the petitioners in Civil Revision Petition.

V. N. V. *Order reversed.*

Z. K.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No 247 OF 1924.

August 26, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Baguley.

MA SHIN *alias* MA MA GALE AND ANOTHER —DEFENDANTS—APPELLANTS

versus

MAUNG SHWE HNIT AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 1—"Amount or value of subject-matter in dispute," meaning of—Cross-objection as to costs—Court-fees payable.

The words "the amount or value of the subject-matter in dispute" in Art. 1 of Sch. I of the Court Fees Act mean, in reference to a cross-objection as to costs, only the amount or value of the sum claimed as costs.

A cross-objection which relates to costs only must be stamped *ad valorem* under Art. 1 of Sch. I of the Court Fees Act and cannot be treated merely as a petition under Art. 1 of Sch. II to the Act.

Kamal Kamini Debi v. *Mahammad Emadudin Sarkar*, 64 Ind. Cas. 606; 25 C. W. N. 934, dissented from.

Sharoda Soonduree Debee v. *Gobind Monee*, 24 W. R. 179 and *Babaji Hari* v. *Rajaram Ballal*, 1 B. 75; 1 Ind. Dec. (N. S.) 50, followed.

Doorga Doss Chowdry v. *Ramanauth Chowdry*, 8 M. I. A. 262; 1 Sar. P. C. J. 772; 19 E. R. 530, explained.

Special second appeal against the decree of the District Court, Insein, in C. A. No. 4 of 1924.

Mr. *Ankelsaria*, for the Respondents.

JUDGMENT.

Robinson, C. J.—The plaintiffs in this suit sold a piece of land belonging to them to the defendants. A deed of sale was drawn up and executed. The plaintiffs then brought the present suit, alleging that, owing to a mistake, another piece of land belonging to them had been specified in the deed as having been sold, and they sought cancellation of the deed, or rectification by inserting the proper description of the land that was intended to be sold and bought.

The learned District Judge granted the plaintiffs a decree, cancelling the deed on their paying into Court, by a specified date, the amount of the purchase price and the costs of the defendants in both Courts.

From that decree the defendants appeal, and the plaintiffs have filed a cross-objection as to costs only, urging that the lower Appellate Court, having decreed the suit, erred in disallowing the plaintiff-respondents' costs, and directing them to pay the costs of the defendant-appellants. They were called upon to pay Court-fees on the amount claimed by them; they objected, but the matter having been the subject of a decision of a Bench of this Court last year in Civil Regular Appeal No. 166 of 1923, the Taxing Master ordered them to pay the full Court-fees on the amount claimed, and they have done so under protest. They then applied that they be heard by the Court on this question, and they rely on the case of *Kamal Kamini Debi* v. *Muhammad Emad-ud-din Sarkar* (1).

This petition has been directed to be laid before a Bench of this Court, and now comes up for decision.

The learned Judge, in this case quoted above, has dealt with all previous decisions, except some of the very earlier ones. All the decisions cited, as well as the decisions in *Sharoda Soonduree Debee* v. *Gobind Monee* (2) and *Babaji Hari* v. *Rajaram Bollal* (3), take the view that the memorandum of cross-objections must be stamped *ad valorem*.

The learned Judge is unable to follow them, partly because in some no reasons are given, partly because the points were assumed and partly because the *dictum* of their Lordships of the Privy Council in *Doorga Doss Chowdry* v. *Ramanauth Chowdry* (4) was not referred to. Some of the authorities, no doubt, deal with cross-objections as to matters in dispute in a suit as well as to the order as to costs.

I desire to confine this decision to the point immediatedly before us, and it must not be taken as expressing any opinion as regard any other matter.

The questions we have to decide are: Whether a cross-objection which relates to costs, and costs only must be stamped under Art. 1 of Sch. I of the Court Fees Act, or merely treated as a petition under cl. (*d*), Art. 1, Sch. II of that Act.

With the greatest respect, I regret I am unable to agree with the learned Judge in Calcutta. His decision appears to me to be based almost entirely on the *dictum* of their Lordships of the Privy Council in the case of *Doorga Doss Chowdry* v. *Ramanauth Chowdry* (4). He says in that case the question was whether costs of suits could be added

(1) 64 Ind. Cas. 606; 25 C. W. N. 934.
(2) 24 W. R. 179.
(3) 1 B. 75; 1 Ind. Dec. (N. S.) 50.
(4) 8 M. I. A. 262; 1 Sar. P. C. J. 772; 19 E. R. 5

in calculating the appealable value of Rs. 10,000 to the Privy Council, and the Judicial Committee held that "the costs of a suit are no part of the subject-matter in dispute."

Their Lordships of the Privy Council were dealing with an order in Council, and whether special leave to appeal should be granted. The appealable sum was admittedly under Rs. 10,000, and the Lord Chancellor, in refusig leave, pointed out that the interest accruing subsequent to the decree could not be added to the capital sum decreed for the purpose of reaching the appealable amount. And he goes on—"Here the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a suit are no part of the subject-matter in dispute, *and cannot be used for the purpose you seek.*"

These last words *italicised*, are not quoted by the learned Judge in Calcutta, and it is clear, to my mind, that their Lordships were dealing with a special point, and that their *dictum* must not be extended further than the point that was immediately before them. They were laying down what was an obvious proposition that the amount decreed as costs could not be added to make the amount or value of the subject-matter up to Rs. 10,000. In general terms, no doubt, costs do not form part of the subject-matter in dispute: they ordinarily merely follow the result.

Section 16 of Act VII of 1870 required a respondent filing a cross-objection to pay the Court-fee before being heard. That section has now been repealed, and cross-objections have been included in Art. 1 of Sch. I of the Act instead. There is no ground for supposing that it was intended to make any change in the law when this was done; the only change being that Court-fees have to be paid when the cross-objection is filed and not merely before the hearing. In my opinion, it is wrong to assume that the words "amount or value of the subject-matter in dispute," mean, in reference to a cross-objection, "the amount or value of the subject-matter in dispute in the suit." To do that, it would be necessary to add words to the Schedule which do not appear there, and the "amount or value of the subject-matter in dispute" in a cross-objection as to costs only, must, I think, be clearly read as meaning the "amount or value of the sum claimed as costs."

In my opinion, therefore, the decision of a Bench of this Court in Civil First Appeal No. 166 of 1923 was correct, and the order of the Taxing Master following that decision was also correct.

Baguley, J.—I concur.

K. S. D. *Ordar accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1922.

August 6, 1924.

Present:—Mr. Justice Devadoss.

DADA SAHIB (MINOR) BY NEXT FRIEND AND MATERNAL UNCLE HIREBAL BABA SAHIB —PLAINTIFF—APPELLANT

versus

KOLLAPURAM GAJARAJ SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Minor—Guardian, negligence of—Default of appearance, whether amounts to negligence—Minor, whether bound by decree—Family arrangement—Share allotted to persons not legally entitled and not parties, effect of.

Where the guardian of a minor defendant omits to do his plain duty and by reason of such negligence the suit is decided against the minor which would not have been otherwise decreed against him, the guardian's negligence must be held to have contributed to the Court proceeding in the manner it did, and the decree is not binding on the minor. [p. 259, col. 2.]

Where the guardian of a minor defendant had taken out *subpœnas* for his witnesses and had done everything to get the case ready, but was absent on the day of the trial and his Pleader applied for adjournment which was refused and the suit was decreed against the minor:

Held, that as the guardian's absence prevented his Vakil from placing before the Court all the facts necessary in order to enable the Court to grant time and this led to the suit being decreed against the minor, the guardian was guilty of negligence and the decree was not binding on the minor. [*ibid.*]

Chunduru Ponniyya v. *Rajam Viranna*, 70 Ind. Cas. 668; 45 M. 425 at p. 428; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429, relied on.

In the case of a family arrangement arrived at in the course of arbitration proceedings persons who may not be legally entitled to a share in the estate but who are given some benefit under the arrangement are entitled to have the benefit of it even though they were not parties to the submission. [p. 260, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Bellary, in A. S. No. 21 of 1921, preferred against that of the Court of the District Munsif, Bellary, in O. S. No. 123 of 1920.

Messrs. *C. S. Venkatachariar* and *N. C. Vijarashescharіar*, for the Appellant.

Mr. *K. Rajah Iyer*, for the Respondents.

JUDGMENT.—In this second appeal two points are urged by the appellant. The first is that his guardian in O. S. No. 258 of 1916 was guilty of gross negligence and, therefore, the decree in that suit is not binding on him; the second is that the arrangement under which the appellant was given a house was a family arrangement and the appellant is entitled to the benefit of such arrangement.

The plaintiff-appellant brought the suit for a declaration of his right to the plaint shop and to recover possession from the first defendant. The first defendant brought O. S. No. 258 of 1916 for the possession of the plaint property against the plaintiff as second defendant and his father as first defendant, alleging that the father had sold the property to him and that he was entitled to possession of the same. The second defendant was represented by a Court guardian as no proper guardian was available. The Court guardian on the day the case was taken up was absent and the suit was decreed *ex parte*. The present suit is for the purpose of recovering from the plaintiff in O. S. No. 258 of 1916 the possession of the property on the ground that the decree in that suit is not binding on the minor by reason of the negligence of his guardian. The District Munsif found that the plaintiff's guardian in the previous suit was guilty of negligence and that the decree in the suit was not binding on the plaintiff, but he found the second point against the plaintiff and dismissed the suit. On appeal, the Subordinate Judge held that the plaintiff's guardian in the previous suit was not guilty of negligence.

The admitted facts are that on the day the case came on for trial the plaintiff's guardian, who was a Vakil of the Court, was absent and his Vakil asked for time which was refused. It is in evidence that the plaintiff's guardian had taken out *subpœnas* for the witnesses and had done everything to get the case ready for trial, but he himself was absent on that day. The Subordinate Judge holds that the fault was entirely on the part of the Court and there was no negligence on the part of the guardian. I am unable to agree with that conclusion. It was the duty of the guardian to have been present in Court for the purpose of informing the Court of the steps he had taken and of placing before the Court materials which would enable the Court to consider whether the request for adjournment was a reasonable one or not. The guardian's absence prevented his Vakil from placing before the Court all the facts necessary in order to enable the Court to grant time and this has led to the suit being decreed against the plaintiff. It is not every kind of negligence that would be a sufficient ground for setting aside a decree, or for declaring that the proceedings in Court are null and void; but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor which would not have been otherwise decreed against him, it must be held that the guardian's negligence contributed to the Court proceeding in the manner it did. In this case the fact that *subpœnas* had been taken out and that there were circumstances which prevented the witnesses from attending on the day of trial was only known to the plaintiff's guardian, and his absence on that day materially contributed to the course adopted by the Court. The Court is not supposed to be aware of facts which have happened in the office unless such facts are brought to its notice in open Court, and the opportunity for bringing such facts to the notice of the Court was lost on account of the absence of the plaintiff's guardian. In this connection, I may refer to an observation of the learned Judges in *Chunduru Ponniyya* v. *Rajam Viranna* (1). "It must be such negligenee as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care." I hold that the guardian was guilty of gross negligence and, therefore, the decree in O. S. No 258 of 1916 is not binding upon the plaintiff.

As regards the second point, the appellant's contention is that the plaint property was given to him under a family arrangement. The plaintiff's grandfather died leaving considerable property. His father and the other members of the family gave a *muchilika* to some respectable persons for the purpose of dividing the property among them. That *muchilika* is marked Ex. A. By Ex. B, another *muchilika*, the plaintiff's father authorised the *panchayatdars* to allot to the plaintiff the immoveable pro-

(1) 70 Ind. Cas. 668; 45 M. 425 at p. 428; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

perty that may fall to his share. The relevant words of the *muchilika* are:—"Out of the moveable and immoveable properties that might be given towards my share according to the said conditions, the immoveable properties alone may be given to my son minor Dada Sahib. I shall have no right to or interest in them, I shall act as the guardian of the minor." Exhibit C is the award of the arbitrators which set apart the plaint property to the plaintiff. The contention of the respondents' Vakil is that the plaintiff was not a party to the arbitration and, therefore, he is not entitled to get any benefit under the award. No doubt the plaintiff was not a party, but his father who was a party to the submission asked the arbitrators to deal with his share in a particular way, and the Arbitrators after consulting all the members of the family gave this particular property to the plaintiff. They also made provision for one Karim Bi who was not entitled to share in the estate of the plaintiff's grandfather. Under the Muhammadan Law the plaintiff was not a heir to his grandfather's property. The contention of the appellant is that this being a family arrangement, persons who are not parties to the arrangement but who get some benefit under the arrangement are entitled to have their benefit. It is clear from the award that the arbitrators after consulting all the members of the family distributed the family property among the various members and made provision for the maintenance of widows who were not entitled to be given maintenance under the Muhammadan Law. That being so, the question arises whether under an arrangement like this a person who would not otherwise be benefited and who is given some benefit under it should be held to be entitled to such benefit. It is well-settled that in the case of partition deeds, and family arrangements, widows, mothers and other relations who would not be entitled to a share but who are given some benefit under the arrangement are entitled to have the benefit of such arrangement. It is urged by the appellant's Vakil that the arbitrators might be considered as agents of the plaintiff's father and the plaintiff's father authorised such agents to transfer his property to the plaintiff. The award has been registered and, if this argument is good, then the award would amount to a conveyance of the plaint house to the plaintiff. But it is unnecessary to rely on this argument for the support of the appellant's case. I consider the arrangement evidenced by the award to be a family arangement in which the interests of all the members of the family were considered by respectable persons; and in consideration of the circumstances of the family and in consideration of what was beneficial to the members of the family, a certain arrangement was made under which the plaintiff was given the plaint house. Such an arrangement cannot be considered to be invalid merely on the ground that the plaintiff was not a party to the submission.

The respondents' Vakil contends that this is not a case of trust and that in creating a trust, a registered instrument would be necessary. The appellant does not rest his case on the ground that a trust was created in favour of the plaintiff. The plaintiffs' father agreed to act as his guardian for the purpose of receiving the property and being in possession of it on behalf of the minor. The case in *Hira Singh* v. *Ganga Shai* (2) has no application to the present case. There, as their Lordship observe at p. 328*, "It did not appear that Hira Singh or any one having authority to act for him in that behalf had consented to be bound by the terms of the award. He was in possession before the arbitration and continued in possession and he made that possession and not the award the foundation of his claim to a partition. The award was produced by Debi Singh, who was indeed his witness, but who proved that it was signed by Amin Singh and Ganga Sahai, in answer to a question by the Pleader for the defendants. Hira Singh was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it." In that case the contention was that a member of a Hindu family who was deaf and dumb and who was not a party to the award was entitled to the benefit under the award. In that case if some property had been set apart for the maintenance of the person who was deaf and dumb, then such an arrangement would have been upheld; but a person who was a stranger to the award and who did not consent to the submission could not claim the benefit under the award. Here the plaintiff was a minor and the arrangement by all the members of the

(2) 6 A. 322; 11 I. A. 20; 4 Sar. P. C. J. 491; 6 Ind. Dec. (N. S.) 721 (P. C.).

*Page of 6 A.—[*Ed.*]

family was for the benefit of the minor on the ground that his father was leading an immoral and wastefull life. I find the second point in favour of the plaintiff.

In the result, the plaintiff will be entitled to a decree for possession of the suit property. I set aside the decrees of the lower Courts and decree the plaintiff's suit with costs throughout.

V. N. V. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 376 OF 1922.

August 26, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

RAMALINGA ADAVIAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MENAKSHISUNDARAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Chit *fund—Bond by* chit *holder to stake-holder—Provision for payment of future instalments on default in payment of one instalment, whether penal.*

Where the holder of a *chit* in a *chit* fund became entitled to a *chit* amount as the bidder of the highest amount of premium, and he executed a bond in favour of the stake-holders for due and proper payment of the future instalments of *chit* and the bond provided that if default should be made in the payment of any one instalment, the whole of the balance due for all the future instalments was to be payable:

Held, that the stipulation as to payment of the whole of the balance was penal and ought to be relieved against. [p. 262, col. 1.]

Where the real agreement between the parties is to the effect that the whole amount is on the date of the bond a debt due, but that the creditor for the convenience of the debtor allows it to be paid by instalments, intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable is not penal. But if, on the other hand, the debt itself is an instalment debt, arising or becoming due or payable by the debtor on the respective dates fixed for the instalments, the stipulation that on default being made in payment of any instalment, the whole of the balance should become due and payable is in the nature of a penalty. [p. 262, col. 2.]

The question whether the parties to a contract treated the amounts for which the bond is given as *debita in præsenti* although *solvenda in futuro* is a question of intention to be gathered from the terms of the document itself. [p. 263, col. 2.]

(Case-law considered.)

Scope of s. 74 of the Contract Act and illustrations (*g*) and (*f*) to the section discussed. [*ibid.*]

Second appeal against the decree of the District Court, Tinnavelly, in A. S. No. 411 of 1919, preferred against that of the Court of the Subordinate Judge, Tinnavelly, in O. S. No. 20 of 1919.

Mr. *A. Krishnaswamy Iyer*, for the Appellants.

Messrs. *K. V. Krishnaswami Iyer* and *T. M. Kamaswamy Iyer*, for the Respondents.

JUDGMENT.—The short and simple question in this second appeal is whether, on a proper construction of the terms of the document Ex. A, the provision is penal for the payment of the whole of the balance remaining due if default should be made in the payment of any instalment for a period of six months after the date fixed for payment. The plaintiffs are the stake-holders of a *chit* fund and the defendants for the purpose of this appeal may be referred to conveniently as holders of one *chit*. The document was executed by the defendants in relation to the first *chit* to which they became entitled as the bidders that offered to pay the highest amount of premium. The *chit* holders were 10 in number and each *chit* was of Rs. 400 per year. The total amount pooled being Rs. 4,000, the defendants at the auction agreed to a deduction of Rs. 1,500 as premium, and out of the balance of Rs. 2,500 deducting the sum of Rs. 400 payable by them for that *chit* and a further sum of Rs. 100 which was retained by the stake-holders as advance towards the second *chit* payable by the defendants, the actual amount received by the defendants was only Rs. 2,000. But as the sum of Rs. 400 had in any case to be paid by the defendants for the first *chit*, I must take it that the actual amount received by the defendants was Rs. 2,400. Receiving that amount they executed the bond in favour of the plaintiffs for Rs. 3,500. The bond provides as follows : —

"The amount which you have paid and which we have received from you as per particulars for consideration described below is Rs. 3,500. Out of this sum of Rs. 3,500 we shall pay you Rs. 300 for the second *chit* which is due on 30th *Karthigai* 1094 *Andu* (15th December 1918). From the third *chit* forward we shall bring and be paying you on the 30th *Karthigai* of each year at the rate of Rs. 400 per instalment and make an endorsement of payment upon this. If we fail to pay in this way, we shall pay the amount due for the instalment for which we have failed to pay within six months together with interest thereon at the rate of 2 per cent. per mensem from the date of default. If we fail to pay even in this way we shall pay you on demand the whole of

the remaining amount together with interest thereon at the aforesaid rate in a lump sum without reference to future instalments."

For some reason best known, I daresay to the learned Vakil for the appellant, perhaps having regard to the terms of explanation I to s. 74 of the Indian Contract Act, he did not argue that the provision with regard to the payment of interest at the rate of 2 per cent. per mensum or 24 per cent. per annum on the amount of the instalment omitted to be paid on the due date would not be penal. He contended himself with arguing only that the provision with regard to the whole of the unpaid balance becoming due on default being made for six months after the date fixed for payment of any instalment was not penal. In support of his contention Mr. A. Krishnaswamy Iyer, referred to the case of *Wallingford* v. *Directors of the Mutual Society* (1). Though the facts of this case are somewhat complicated yet there is no doubt that the case has been always cited and accepted only as an authority for the position set out in illustration (*f*) to s. 74 of the Indian Contract Act. The learned Lords dealt with the case on the footing that the amounts secured by the bond were *debita in præsanti* although *solvenda in futuro* and the Lord Chancellor at page 696* goes on to say: "And being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments which were originally deferred." Again at page 705,* Lord Blackburn from whose judgment the learned Vakil for the appellant cited passages on which he relied strongly, observes as follows: "The agreement between the parties was, and it is obvious that what they meant to agree was, that £ 6,000 and the £ 5,000 odd in addition as to the premium shall be *debitum in præsenti* by instalments if the instalments are punctually paid, but if there be a default in paying them, then all is to be paid at once. That being the contract between the parties that is not the case of a penal sum. It is not necessary for the House probably to decide that question, but if it were necessary to decide it I should say that it was not a penalty but an actual sum, like the case of a promissory-note payable by instalments, the whole to become due if one of the instalments is not punctually paid." The principle of the distinction would thus be seen to be very thin. If, on a proper consideration and construction of the contract, I should come to the conclusion that the real agreement between the parties was to the effect that the whole amount was on the date of the. bond a debt due, but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal. But if, on the other hand, on a proper consideration and construction of the contract between the parties, I should come to the conclusion that the debt itself is an instalment debt, so to call it, that is to say that the debt itself arises or becomes due and payable by the debtors on the respective date fixed for the instalments, the stipulation that on default being made in the payment of any instalment, the whole of the balance should become due and payable would be in the nature of a penalty. At first sight, no doubt it might seem that there is really no distinction at all between the two and that the difference consists merely in the way of putting it. But it seems to me that legally speaking the distinction is real. The whole principle of the law of penalty is this, as I understand it. The parties who enter into a contract no doubt expect that the contract would be carried out; but they also contemplate the possibility of the contract not being carried out and provide for such a case. If in making provision for breach of contract the promisee stipulates from the promisor on the breach only for such compensation as the Court would deem reasonable in the circumstances, then there is no penalty and the stipulation is not penal. But if, on the other hand, the Court would, on a proper consideration, come to the conclusion that the stipulation was put in not by way of reasonable compensation to the promisee but in order that by reason of its burdensome or oppressive character, it may operate *in terrorum* over the promisor so as to drive him to fulfil the contract, then the

(1) (1880) 5 A. C. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

*Pages of (1880) 5 A. C.—[*Ed.*]

stipulation is one by way of penalty. Applying these principles, it is obvious that if the debt itself should arise on a date fixed, the stipulation that, on default of payment, there and then the whole of the balance should become due and payable would not, by any means, be reasonable compensation for default in paying the instalment that has fallen due and payable only then but be really a stipulation by way of penalty. Several cases have been cited as to the question what constitutes a penalty. The case of *Salem Town Bank, Ltd.* v. *Venkatachari* (2) as well as the case of *Sukkulal Sowcar* v. *Tirumala Rao Sahib* (3) proceeded upon the construction of the particular documents the Court had to consider. The case of *Periasami Thalavar* v. *Subramaniam Asari* (4) contains no discussion of any principle and was decided before the Full Bench decision in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (5). As regards the case of *Vaithinatha Iyer* v. *Govindaswami Odayar* (6), I am unable to appreciate the reasoning of the learned Judge in some parts of the judgment. But for the purposes of the present case it is only necessary to observe that the judgment in that case proceeded on a construction of the document and contract before the Court and it seems to me that it was possible and perhaps proper having regard to the terms of the document in question in that case to hold that the liability was as observed in the case of *Wallinggord* v. *Directors of the Mutual Society* (1) *debitum in præsenti*. It is somewhat inexplicable how in the whole of the judgment in the case of *Vaithinatha Iyer* v. *Govindaswami Odayar* (6), there should have been no reference whatever to the Full Bench decision in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (5). After all, the question whether any particular stipulation is only by way of compensation or by way of penalty should depend upon the construction of the particular document or contract and on the circumstances of each case. I now turn, therefore, to the document before me Ex. A. The question whether the parties to the contract treated the amounts for which the bond is given as *debita in præsenti* although *solvenda in futuro* is a question of intention to be gathered from the document itself. I do not find in the document any such intention. There is no clause in it by or under which the obligor binds himself to pay the whole amount, namely, Rs. 3,500. The obligation undertaken is in terms to pay each instalment as it becomes due, Rs. 300 on the 30th *Karthigai* 1094 *Andu* (15th December 1918) and Rs. 400 on the 30th *Karthigai* of each succeeding year. This aspect clearly distinguishes the present case from such cases as *Wallingford* v. *Directors of the Mutual Society* (1), *Periasami Thalavar* v. *Subramaniam Asari* (4), *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (5) and *Vaithinatha Iyer* v. *Govindaswami Odayar* (6). Therefore the primary obligation under the contract is to pay each instalment as it accrues due. One of the provisions for the breach of that primary contract is that if for a period of six months after any particular instalment becomes due and payable default should be continued to be made, then the whole of the balance should become due and payable. The question is whether this stipulation is or is not by way of penalty. If the requirement that the whole of the balance should be paid up at once can be regarded as reasonable compensation for the breach, the stipulation cannot be deemed to be one by way of penalty. But if, on the other hand, the burden of the stipulation is of such a character that it cannot possibly be regarded as merely intended for compensation to the promisee for breach of contract but has only to be regarded as a stipulation by the terror of which the promisor should feel pressed and compelled to perform the original contract itself, then the stipulation is one by way of penalty. A comparison and consideration of the two illustrations (*f*) and (*g*) to s. 74 of the Indian Contract Act would, it seems to me, yield to us the real principle to be applied in such a case. At first sight, it may seem that there is no reason why if the stipulation for the payment of the entire balance on default in the payment of one instalment in illustration (*f*) is not one by way of penalty it should be so in illustration (*g*). The difference is this. On the facts given in illustration (*g*) the promisor has given to the promisee in the form of a promise to pay an enhanced

(2) 9 Ind. Cas. 197; (1911) 1 M. W. N. 134; 9 M. L. T. 363.
(3) 51 Ind. Cas. 295; 24 M. L. T. 420.
(4) 14 M. L. J. 136.
(5) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.
(6) 67 Ind. Cas. 995; 42 M. L. J. 551; (1922) M. W. N. 203.

amount as consideration for the promisor retaining the instalments not yet fallen due, or in other words, for the use of the monies representing such instalments for the periods covered by the instalments. The stipulation in such a case for the whole amount of the balance becoming due and payable would involve for the promisor not only the liability to pay up the whole of the balance but the loss of the consideration he has already paid for the use of the monies representing each instalment for the respective periods of the instalments. The principle underlying illustration (*f*) is that the whole of the debt being payable immediately the creditor agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. But the principle underlying illustration (*g*) is that the debtor by paying consideration gets the right to retain and use the amount of each instalment until the date of its becoming due and payable. If, therefore, in such a case the debtor commits a breach and fails to pay one instalment no doubt he becomes liable to pay to the creditor damages for such breach but to be called upon to pay the whole of the balance in spite of the fact that he has given consideration for withholding the amounts of the other instalments till their respective due dates would, undoubtedly, be in the nature of a penalty. As some effect has to be given to illustration (*g*) I do not see my way to base it on any other principle. Now with regard to the question whether the facts of the present case bring it within illustration (*f*) or illustration (*g*) the question may be viewed in two ways. Is it a case in which the creditor being entitled to the whole amount allows the debtor to pay it by instalments on condition that if default should be made in the payment of one instalment the whole should become due; or is it a case in which there is no present debt but the debt arises for the amounts of the instalments only on the respective dates fixed therefor. I have already held that on a proper construction of Ex. A there is no present debt created for the whole amount and that the parties agreed that it is only on the due dates the amounts of the instalments should become due and payable. Another way of looking at it would be by seeing whether any consideration moved from the promisor to the promisee for the promisor retaining the amount of each instalment till the date fixed for the payment thereof. Whether the transaction is looked at as a promise by the promisor in consideration of the receipt of Rs. 2,400 to pay a sum of Rs. 3,500 by instalments or as a promise to pay the sum of Rs. 3,500 by instalments the creditor deducting therefrom there and then immediately the amount stipulated by way of interest for the use of the money during the periods of the instalments it seems to me that the principle of illustration (*g*) would apply. The essence of the transaction is that the actual consideration which reaches the hands of the debtor is less (and in this case considerably less) than the total amount which he binds himself to pay by way of instalments and that, therefore, the present case is on principle indistinguishable from illustration (*g*) to s. 74.

I have, therefore, come to the conclusion that the lower Appellate Court was right in treating the stipulation for payment of the whole of the balance as penal. As already stated the learned Vakil for the appellants has not argued that the stipulation as to payment of interest at 24 per cent. per annum is not penal, nor was there any contention advanced on behalf of the appellant that if the stipulation should be held to be penal the basis on which the lower Appellate Court has awarded compensation to the plaintiff for breach is not reasonable or sound.

In the result, therefore, the second appeal fails and should be dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 162 OF 1922.
February 1, 1924.
Present :—Mr Kinkhede, A. J. C.
GANPAT—PLAINTIFF—APPELLANT
versus
MAHADEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 62—Novation, what amount to—New contract illegal, effect of—Old contract, rights under, whether affected—Abandonment, proof of.

In the case of a novation the consideration for the new contract is the discharge of the old contract. [p. 265, col. 2.]

An agreement enforceable by law is a contract. If an agreement is held or declared by law to be

in contravention of the provisions of any Statute, it is not a contract, and, therefore, it cannot serve as *novatio*. What is essential for a novation is the wiping out of the original contract as well as the creation of a new valid contract. [p. 265, col. 2.]

Where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. [p. 266, col. 1]

Where the question is whether one party is set free by the action of the other, the matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. The Court requires as clear evidence of the waiver as of the existence of the contract itself and will not act upon less. An abandonment of the old agreement must be clearly made out. There must be clear and precise evidence of a mutual intention to determine and abandon the contract. [*ibid.*]

Where the intention to substitute a new contract is frustrated by the fact that the new contract is a nullity, the original contract may be enforceable. Much more so, where the agreement itself is a contravention of the Statute and does not ripen into a contract in the legal sense of the term. [p. 266, cols. 1 & 2.]

In the absence of proof of an express abandonment, the rights under the old contract cannot be taken away. [p. 267, col. 2.]

(Case-law discussed.)

Appeal against the decree of the District Judge, Wardha, in Civil Appeal No. 125 of 1921, dated the 22nd December 1221.

Dr. *H. S. Gour* and Mr. *M. B. Niyogi*, for the Appellant.

Mr. *D. N. Khare*, R. B., for the Respondents.

JUDGMENT.—The facts of this case are simple. The plaintiff is the holder of a mortgage, dated 4th February 1907 (Ex. P-1), for a consideration of Rs. 550. He seeks to enforce it by suit. The defence of defendant No. 2 is that the mortgage was superseded by a registered deed of surrender, dated 6th February 1913, (Ex. P-2) and plaintiff cannot, therefore, sue upon it. The defendant No. 2 is the subsequent purchaser of a part of the mortgage security under a sale-deed, dated 10th April 1916, (Ex. P-3). The plaintiff in reply contended that the surrender having been set aside by an application under s. 36 of the C. P. Tenancy Act at the instance of the tenants' next heirs by proceedings in a Revenue Court as per Exs. P-4 and P-5, and the possession of the land having gone out of his hands the consideration failed and, therefore, his right to sue on the mortgage was revived and could be legally enforceable by suit.

The short question to be considered in the case is whether there has been such a legal and complete substitution or novation of contract as might be said to have completely put an end to the rights under the mortgage. The lower Courts have dismissed the suit as not maintainable.. I think the lower Courts have not approached the case from the right point of view of the law of novation.

Section 62 of the Contract Act lays down: "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

The consideration for the new contract is the discharge of the old contract. An agreement enforceable by law is a contract; If the agreement is held or declared by law to be in contravention of the provisions of any Statute it is not a contract and, therefore, it cannot serve as *novatio*. What is, therefore, needed or essential for a novation is the wiping out of the original contract as well as the creation of a new valid contract: *Commercial Bank of Tasmania* v. *Jones* (1), *Nadimulla* v. *Channappa* (2), *Nundo Kisore Lall* v. *Ramsookhee Koer* (3) and *Abdul Kayam Amadajibhai* v. *Bahadur Vithoba* (4).

In a recent Calcutta case of *Mathura Mohan Saha* v. *Ramkumar Saha* (5), the question has been very elaborately discussed by Mookerjee and Chatterjee, Justices, in the light of English decisions and the following well-considered conclusions have been drawn or laid down:

"One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed: *Hunt* v. *South Eastern*

(1) (1893) A. C. 313; 62 L. J. P. C. 104; 1 R. 367; 68 L. T. 776; 42 W. R. 256; 57 J. P. 644.
(2) 5 Bom. L. R. 617.
(3) 5 C. 215; 4 Ind. Jur. 625; 4 C. L. R. 361; 2 Ind. Dec. (N. S.) 747.
(4) 13 Ind. Cas. 858; 14 Bom. L. R. 26.
(5) 35 Ind. Cas. 305; 43 C. 790; 23 C. L. J. 26; 20 C. W. N. 370.

Railway Company (6), *Dodd* v. *Churton* (7), *Patmore* v. *Colburn* (8) and *Thornhill* v. *Neats* (9). But where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction: *Noble* v. *Ward* (10) and *Doe d. Biddulph* v. *Poole* (11).....

"Where the question is whether one party is set free by the action of the other, the matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract....The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract: *Mersey Steel and Iron Company* v. *Naylor Benzon & Co.*(12) and *General Bill Posting Co.* v. *Atkinson* (13)....The Court requires as clear evidence of the waiver as of the existence of the contract itself and will not act upon less: *Carolan* v. *Brabazon* (14)." What is then required is that an abandonment of the old agreement, must be clearly made out. There must be clear and precise evidence of a mutual intention to determine and abandon the contract: *Mathura Mohan Saha* v. *Ramkumar Saha* (5). Where the intention to substitute a new contract is frustrated by the fact that the new contract is a nullity, the original contract may be enforceable: See *Har Chandi Lal* v. *Sheoraj Singh* (15). Much more so, where the agreement itself is a contravention of the Statute and does not ripen into a contract in the legal sense of the term.

In the case of *Har Chandi Lal* v. *Sheoraj Singh* (15), the mortgage of the 13th November 1876 was substituted by other mortgages of 1887. On the execution of these mortgages the mortgagee handed over the mortgage-deed of 1876 to the executant of one of the mortgages of 1887. The mortgagee sued on the later mortgages of 1887 and it was held that they could not be and were not wholly binding, but that the estate was liable under the original mortgage of 1876, which affected not the whole of the property belonging to the mortgagor but only a portion thereof. The mortgagee, therefore, subsequently instituted a suit on foot of a certified copy of the mortgage of 1876 and the question was whether anything had happened which affected the right of the mortgagee to enforce his security under the mortgage of 1876. The defence was that nothing was due under the mortgage which became void when the new contract dated 9th September 1887 was entered into, that the claim was barred by s. 11 and by O. II, r. 2 of the C. P. C.

Their Lordships of the Privy Council have at page 185* of the report observed as follows:—

"It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole *mauza*, for the indebtedness both of Jai Chand and Phul Singh in lieu (*interalia*) of the security of the 13th November 1876. Pursuant to this intention he appears to have handed over the mortgage of the 13th of November 1876 to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on *Musammat* Nandan (widow), and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on *Musammat* Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November.... In their Lordships' opinion, therefore, the mortgage of the 13th November 1876 was in the events which happened wholly unaffected by the mortgages of 1887."

(6) (1875) 45 L. J. C. P. 87.
(7) (1897) 1 Q. B. 562; 66 L. J. Q. B. 477; 76 L. T. 438; 45 W. R. 490.
(8) (1834) 1 Cr. M. & R. 65; 4 Tyr. 840; 3 L. J. Ex. 314; 149 E. R. 996.
(9) (1860) 18 C. B. (N. S.) 831; 125 R. R. 902; 2 L. T. 539; 141 E. R. 1392.
(10) (1867) 4 H. & C. 149; 1 Ex 117; 143 R. R. 534; 35 L. J. Ex. 81; 15 L. T. 672; 15 W. R. 520.
(11) (1848) 11 Q. B. 713; 75 R. R. 607; 17 L. J. Q. B. 143; 12 Jur. 450; 116 E. R. 641.
(12) (1884) 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.
(13) (1909) A. C. 118 at p. 122; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178.
(14) (1846) 3 J. & L. 200 at p. 209; 9 Ir. Eq. Rep. 224.
(15) 39 Ind. Cas. 343; 39 A. 178; 32 M. L. J. 241; 15 A. L. J. 223; 1 P. L. W. 330; 5 L. W. 502; (1917) M. W. N. 290; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Bom. L. R. 444; 44 I. A. 60 (P. C.).

*Page of 39 A.—[*Ed.*]

These observations very fittingly apply to the facts of this case.

The learned Pleader for the respondents made much of the return or handing over the mortgage of 1907 to the mortgagor and to the suit being based on a certified copy. This was exactly the case also in the Privy Council. There the mortgages were sued upon and sought to be declared as binding on the new and larger security but it was held that they were not binding on the heirs of the mortgagor under the mortgage of 1876.

It is argued on behalf of the appellant that as the result of the litigation under s. 36 of the C. P. Tenancy Act, 1898, which was financed by the present defendant No. 2, the wives of the surrendering tenants got the surrender set aside and entered into possession on the ground that the surrender was not *bona fide* but was a transfer made in contravention of the provisions of the C. P. Tenancy Act. In other words, as the intention of the mortgagee to substitute the rights created under the old security by the attempt at acquisition of new rights as owner of some other property not covered by the mortgage, was frustrated by reason of the new transaction being declared a nullity, at any rate treated as a transfer prohibited by the law of tenancy on the ground of its being against the scheme and policy of the Tenancy Act of 1898, it is not just and equitable to allow the defendants to claim the benefit of the transaction as a release of the mortgage of 1907. The original intention of the mortgagee to release the mortgage of 1907, cannot, therefore, in view of the events that have happened to frustrate it and inspite of his having handed over the original mortgage-deed, be held by itself to bar the plaintiff from enforcing the said mortgage.

In *Shankar Sarup* v. *Mejo Mal* (16), their Lordships had to consider the question of how far the substitution of the old mortgage of May 1883 by another of November 1883 affected the rights of the mortgagee to take his stand on the earlier mortgage against the intermediate incumbrancer of June 1883. The question was whether the mortgagee having sued on the mortgage of November 1883 and obtained a decree and caused the property to be sold was postponed to the mortgagee of June 1883 in the matter of the distribution of the assets realized by sale; the High Court upheld the contention of the intermediate mortgagee and gave away the money to him to the exclusion of the mortgagee-appellants.

Their Lordships of the Privy Council, however, say at page 323 * as under :—

"If the bond of November 1883 be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument.....was that the appellants by their suing on the bond of November and not on the bond of May had relinquished their rights under the bond of May. No such inference can legitimately be drawn. ..... In suing on the bond of November they did nothing to imply or to lead others to believe, that they abandoned what, apart from abandonment, was a subsisting hypothecation." Their Lordships set aside the High Court's decree dismissing the suit and restored that of the Subordinate Judge.

Similarly in *Webb* v. *Macpherson* (17), it was pointed out that at page 72 † that "The Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute. In their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge."

What then is needed to be proved is an express abandonment. Otherwise the rights under the old contract cannot be taken away. The relative positions of the parties will have to be examined by the lower Appellate Court in the light of the princi-

(16) 23 A. 313; 5 C. W. N. 649; 3 Bom. L. R. 713; Sar. P. C. J. 72; 28 I. A. 203 (P. C.).

(17) 31 C. 57; 30 I. A. 238; 8 C. W. N. 42; 5 Bom. L. R. 238; 13 M. L. J. 388; 8 Sar. P. C. J. 554 (P. C.).

*Page of 23 A.—[*Ed.*]

*Page of 31 C.—[*Ed.*]

ples set forth above. It will be for that Court to find how far the plaintiff's intention to abandon his rights under the first contract, namely, the mortgage transaction is made out and how far the covenants in the surrender are inconsistent with the continuance of the charge created by the mortgage of 1907. Since the lower Courts have not approached the case from the right point of view of the law of novation and the findings given by them are, therefore not binding on this Court, and as some other points are involved in the case but they have not been decided by the lower Appellate Court, I think, that I must remand the case to that Court for fresh decision of the appeal on its merits.

The appeal is, therefore, allowed with costs. There will be a refund of Court-fee paid on the memorandum of second appeal.

The costs of the lower Courts will be costs in suit.

Z. K. *Appeal allowed; Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 233 TO 235 OF 1921.

August 26, 1924.

Present :—Mr. Justice Srinivasa Iyengar.

RAMASAMI NAICKER AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MEENAKSHISUNDARAM CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Trespass—Damages, assessment of—Principles applicable.

In awarding damages for unlicensed trespass on land, a distinction must be made between a trespasser *bona fide* claiming a title and a wilful trespasser. Against a wilful trespasser, the damages awarded ought in no case to be less than the amount for which, having regard to all the circumstances, a prudent and reasonable landlord would have agreed to let the land for the purpose, or less than the amount which the trespasser would have had to pay as the result of reasonable negotiations for such use or occupation of the land. The amount so arrived at would be the minimum of damages awardable against him, but over and above that the *animus* with which the trespasser commits the wrong, its wilful character, for example, may be taken into consideration for the purpose of awarding higher damages. [p. 269, col. 1.]

A plaintiff, however, who stands by and virtually encourages the wrong is not entitled to damages on the same scale as one who has done his best to prevent the commission of the wrong. [*ibid.*]

Williams v. *Currie*, (1845) 1 C. B. 841; 135 E. R. 774 and *Jegon* v. *Vivian*, (1871) 6 Ch. A. 742; 40 L. J. Ch. 389, relied on.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Ramnad at Madura, in Appeal Suits Nos. 66, 67 and 68 of 1919 respectively, preferred against the decrees of the Court of the Additional District Munsif, Srivalliputtur, in O. S. Nos. 213 of 1916, 428 of 1917 and 440 of 1917.

The Advocate-General, for the Appellants.

Mr. *K. Rajah Iyer*, for the Respondents.

JUDGMENT.—The question raised in this second appeal relates to the principle on which damages should be awarded in respect of trespass on land and the proper measure of such damages. The plaintiffs-appellants are the owners of about 2½ acres of land on which and several other adjoining lands a cattle fair used to be held annually. The predecessor-in-interest of the plaintiffs would appear to have been content to let this land for the purpose of the fair receiving the sum of Rs. 50 as rent every year. But from about the year 1911 the plaintiffs refused to let the land on the same rent. For the years 1911 and 1912 the plaintiffs obtained in a decree *ex parte* damages against the defendants at Rs. 300 per annum for trespass on the suit land consisting in their using the land for the cattle fair without any agreement with the plaintiffs and without their permission. In the first two suits the plaintiffs have claimed from the defendants damages at the rate of Rs. 300 per annum for two years in each of the suits and in the last suit Rs. 550 as damages for one year. The Court of first instance granted the plaintiffs damages at Rs. 50 per annum and the lower Appellate Court had confirmed the same. The learned Advocate-General for the appellant has argued that the principle on which the lower Courts awarded damages only at Rs. 50 per annum was wrong in law and that a different measure of damages should have been adopted. I am unable to understand on what particular principle the lower Appellate Court proceeded to fix the damages at Rs. 50 per annum. Apart of course from its statement of agreement with the Court of first instance in that matter in one part of the judgment it almost seems that the learned Subordinate Judge was inclined to adopt, as the true measure of damages, the number of cattle that were on the plaintiff's land. At another place he has indicated that if the accounts of the lessees could have been

produced, that might have furnished to him a measure of damages he could have adopted. Reference is also made to the sum of Rs. 50 having been accepted by the plaintiffs' predecessor-in-interest as rent, as also to the said amount being reasonable rent, having regard to the rents charged in the neighbourhood. The amount of rent which the plaintiffs' predecessors were content to receive in previous years could possibly not be a measure of damages at any rate for the succeeding years. The rents paid or received in respect of the adjacent lands were the result of contracts. In *Williams* v. *Currie* (1) Justice Maule observes as follows:—"If we were to hold that the Jury, in estimating the damages for an unlicensed trespass of this sort, are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would in effect be placing a wrong doer upon precisely the same footing as one who enters with the owner's permission." The learned Judge proceeds further to indicate that the wilfulness of an act of trespass and that the trespass was done for the pecuniary benefit of the defendants would be matters to be taken into consideration in assessing damages. In the case of *Jegon* v. *Vivian* (2), before the House of Lords, the Lord Chancellor generally approves of the principle that in awarding damages a distinction may be made between a trespasser *bona fide* claiming a title and a wilful trespasser, and goes on to observe that the Court never allows a man to make profit by a wrong. I do not, however, understand by the last statement that the wrong doer is or should be placed exactly in the same position as an agent or trustee and made to account for all the profits he has made. I construe that statement of the law merely to signify that a wilful trespasser should not be placed in a better position than a person who had to enter into an agreement with the landlord in respect of the use or occupation of the land, that is to say, in other words, the damages awarded against a wilful trespasser ought in no case to be less than the amount which having regard to all the circumstances, a prudent and reasonable landlord would have agreed to let the land for the purpose or less than the amount which the trespasser would have had to pay as the result of the reasonable negotiations for such use or occupation of the land. The amount so arrived at would be the minimum of damages awardable against him, over and above that, there is high authority for holding that, as in the case of certain personal wrongs, the *animus* with which a trespasser commits the wrong, may be taken into consideration for the purpose of awarding higher damages than would otherwise have been. In this case I have no hesitation in holding that the trespass was wilful. I am bound, therefore, to award as and by way of damages to the plaintiffs in the circumstances not only the reasonable amount which, if there had been negotiations between the parties, would have been fixed as rent but also a further amonnt for the wilfulness of the trespass. But at the same time, in the present case there is the undoubted fact that the plaintiffs knowing that the trespass was about to be or certain to be committed stood by and allowed the trespass to be committed year after year in the undoubted hope that they would be able to recover from the defendants the large amount of damages for which they had obtained a decree *ex parte* in the previous suit. The conduct of the plaintiffs who complain of the wrong is an undoubted element to be taken into consideration in awarding damages and I have no hesitation in laying it down that the plaintiffs who stands by and virtually encourage the wrong are not entitled to damages on the same scale on which damages might be granted to a plaintiff who had done his best to prevent the commission of the wrong. Taking all these circumstances into consideration, the conclusion, I have arrived at, is that the plaintiffs in this case would be entitled in the first place to such amount as having regard to all the circumstances might be deemed to be the amount for which on negotiations between the parties the plaintiffs might have agreed to let and which the defendants might have agreed to pay in respect of the suit land in the years in question, and in addition thereto such further damages for the wilfulness of the trespass taking into consideration at the same time the conduct of the plaintiffs in not preventing the trespass but standing by and allowing the trespass to be committed. The process is difficult of imagining, the plaintiffs and the defendants coming together, negotiating reasonably and arriving at a reasonable amount of rent but it has got to

(1) (1845) 1 C. B. 841; 135 E. R. 774.
(2) (1871) 6 Ch. A. 742; 40 L. J. Ch. 389.

be done. I have come to the conclusion that a sum of Rs. 100 per annum would represent such amount. I should have been disposed to grant as and by way of further damages for the wilfulness of the trespass a sum of Rs. 50 per annum, but having regard to the plaintiffs standing by and allowing the trespass to be committed with the anterior object of claiming damages, I award only Rs. 25 in addition for each year. In the result, instead of Rs. 50 per annum awarded by the lower Courts I award Rs. 125 per annum. The decrees of the lower Courts will be varied accordingly in all the cases. The respondents will pay the appellants' costs in this Court and in the lower Appellate Court.

Decree modified.

V. N. V.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST APPEAL NO. 158 OF 1924.

July 8, 1924.

Present:—Mr. Justice Daniels.

BISHEN SAHAI—DEFENDANT—APPELLANT

versus

CHHOTEY LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (v), Sch. I, Art. 1—Cross-objection—Ad valorem *Court-fee.*

In a cross-objection claiming possession of an immoveable property, an *ad valorem* Court-fee is payable on the value of the subject-matter in dispute and not on five times the land revenue in accordance with s 7 (*v*) of the Court Fees Act. [p. 271, col. 2.]

Ishdatt Tiuari v. *Tameshwar Tiwari*, 83 Ind. Cas. 780; 45 A. 537; (1924) A. I. R. (A.) 175, followed.

Stamp Reporter's Report.—In time up to this day. Stamp insufficient according to valuation by Rs. 189.

[*Objection from Mr. Durga Prasad.*

1. That the plaintiffs-respondents had filed a suit in the Court of the Subordinate Judge of Farrukhabad claiming possession of 8 items of property.

2. That the Subordinate Judge by his judgment dated 15th January 1924 dismissed the plaintiffs-respondents' suit with regard to 6 items of property and decreed the plaintiffs' claim with regard to 2 items.

3. That the defendants have filed the above appeal relatiug to the two items of decreed against them.

4. That among the items of property with regard to which the plaintiffs' claim was dismissed are three items of property, *viz.*, properties (1)—(3) which form the subject-matter of the cross-objection.

5. That the respondents in the cross-objections which relate to items Nos. 1 to 3 claimed in the plaint have paid a Court-fee which they had paid with regard to the said items in the Court below, calculating the Court-fee on five times the amount of Government revenue payable in regard to each of those three items, [*vide* s. 7 cls. (*v*) (*b*) of the Court-Fees Act].

6. That the aggregate Court-fee so payable amounts to Rs. 36, the same that was paid in the Court below.

7. That the Stamp Reporter has reported that an *ad valorem* fee is payable on the cross-appeal on its valuation of Rs. 4,000 and has found a deficiency of Rs. 189.

8. That the respondents submit that the proper Court-fee payable should not exceed the Court-fee they would have had to pay had they appealed from the portion of the decree adjudged against them and desire that the question of the duty payable in the cross-objection might be determined by the Taxing Judge or otherwise as the Court might consider proper.]

By Stamp Reporter.—This objection is similar to the one filed by Mr. N. P. Asthana in F. A. No. 182 of 1924 (just submitted for decision). The point raised is identically the same in both the cases and the authorities reported in *Lakhan Singh* v. *Ram Kishen Dass* (1) and *Daraga Raut* v. *Parema Kuer* (2) apply to this case also with full force.

By Taxing Officer.—The office have reported that there is a deficiency of Rs. 189 in Court-fee stamps on the cross-objection filed by the respondents in this appeal.

The salient facts of the case under consideration have been pointed out in the objection to the office report made by the Counsel for the respondents.

The office rely on two rulings, one of this Court reported at *Lakhan Singh* v. *Ram Kishen Dass* (1) and one of the Patna High Court reported as *Durga Raut* v. *Parema Kuer* (2), where it is held that according to Art. 1 of Sch. I of the Court Fees Act the cross-objection must pay an

(1) 43 Ind. Cas. 179; 40 A. 93; 15 A. L. J. 886.
(2) 45 Ind. Cas. 568; 3 P. L. J. 197; 4 P. L. W. 368.

ad volarem fee on the value of the subject-matter in dispute.

But the respondents do not dispute these rulings. They admit that they must pay an *ad volarem* fee. The whole issue is whether the value of the subject-matter in dispute is Rs. 4,000 or Rs. 475-15-0 *i.e.*, five times the Government revenue, on which they have in fact paid.

The office here quote a judgment of Piggott, J., of this Court (unreported) in S. A. No. 1553 of 1922. There the issue referred by the Taxing Officer was whether "the *ad valorem* fee should be reckoned in accordance with s. 7, cl. v of the Court Fees Act" or "on the jurisdictional value of the cross-objection." In that case the First Court dismissed the plaintiff's suit; the lower Appellate Court decree the plaintiff's suit in part and allowed his claim for property to the extent of Rs. 100-10-0. The cross-objections asked for the restoration of the First Court's decree. The learned Judge ordered that they should pay an *ad valorem* fee on this sum of Rs. 100-10-0. For they had made this sum of Rs. 100-10-0 the valuation for purposes of jurisdiction and had only paid Court-fees on Rs. 19-6-0, being five times the Government revenue of the property decreed.

There would seem then to be here a clear ruling that the Court-fee to be paid on a cross-objection should be assessed according to the jurisdictional value, though this is not stated in so many words. But it is possible, as pointed out by the Counsel for the respondents, that the learned Judge accepted this value, because such a small share of the property in suit was not separately assessed to Government revenue [s. 7 v cl. (*b*)] but, as the subject-matter, had strictly to be assessed under s. 7 v cl. (*d*), *i.e.*, at its market value. I think that this is a possibility which should be taken into consideration. If it was actually the case, then it cannot be said that the judgment gives a definite ruling on the issue stated above.

In these circumstances I refer to submit the question to the Hon'ble Taxing Judge for a decision whether the judgment above mentioned must be accepted as definitely ruling that the *ad valorem* fee on a cross-objection should be reckoned in accordance with s. 7, v or should be reckoned on the jurisdictional value of the cross-objection.

Dr. *Sundara Nath Sen*, for the Appellant.

Mr. *Durga Prasad*, for the Respondents.

JUDGMENT.—The question for decision in this Reference is whether in the case of a cross-objection claiming possession of an immoveable property the Court-fee is payable *ad valorem* on the value of the property or should be calculated on five times the land revenue in accordance with s. 7 (v). As is well-known the word "cross-objection" was introduced in the Court Fees Act for the first time by Act V of 1908. It appears in Art. 1 of First Sch. which relates to *ad valorem* fees. It was decided in 1917 by Tudball, J., in *Lakhan Singh* v. *Ram Kishen Das* (1) that an *ad valorem* fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Art. 17 of Sch. II. The reason is that Art. 1, Sch. I makes all plaints, appeals and cross-objections chargeable with an *ad valorem* fee unless otherwise provided for in the Act. Plaints and memorandums of appeal of a declaratory nature are otherwise provided for in Art. 17 of Sch. II; cross-objections are not. The appellant's Counsel seeks to distinguish this ruling because in s. 7 appeals are not separately mentioned. He argues, therefore, that the word "suits" in s. 7 must be held to include cross-objections as well as appeals. This argument is historically unsound. Appeals have always been valued in accordance with s. 7, whereas until Act V of 1908 cross-objections paid a Court-fee of Rs. 2 only as applications. The point now raised appears to be precisely covered by the ruling of Piggott, J. in *Ishdat Tiwari* v. *Tameshwar Tiwari* (3). In that case a decree had been given to the plaintiffs for the possession of property to the value of Rs. 100 and the cross-objections were directed against this portion of the decree. The argument raised on behalf of the objector was that Court-fee was payable on five times the land revenue, but Mr. Justice Piggott held that it must be paid *ad valorem* on the value of the subject-matter. I accordingly hold that the office report is correct and that the objector must pay an *ad valorem* fee. I allow him two months' time within which to make good the deficiency.

S. D. *Reference answered.*

(3) 83 Ind. Cas. 780; 45 A. 537; (1924) A. I. R. (A.) 175.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 200 OF 1922.

August 27, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Jackson.

AMMATHAYI AMMAL—DEFENDANT—APPELLANT

versus

SIVARAMA PILLAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage-suit—Application for final decree—Limitation—Pendency of proceedings as to mortgagor's title—Suspension of time—Execution sale—Saleable title, whether guaranteed.

The Limitation Act is complete in itself and any ground for extension of time or for the suspension of time must be sought for within the four corners of the Act itself. [p. 275, col. 2.]

Article 181 of Sch. I to the Limitation Act applies to an application by the plaintiff for the passing of a final decree in a mortgage-suit. [p. 272, col. 2.]

Pattabirama Naidu v. *Subramania Chetti*, 45 Ind. Cas. 76; 7 L. W. 438, *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah*, 69 Ind. Cas. 366; 42 M. L. J. 51; (1922) M. W. N. 11; 30 M. L. T. 228; (1922) A. I. R. (M.) 65; 16 L. W. 198 and *Ahmed Khan* v. *Gaura*, 43 Ind. Cas. 518; 40 A. 235; 16 A. L. J. 143, followed.

In a mortgage suit where a preliminary decree is passed and time is fixed for payment of the decree amount, the plaintiff must apply for the passing of a final decree within the time allowed by law, that is, three years from the date fixed for payment, whether the mortgagor has title to the mortgaged property or not and whether the personal remedy is or is not outstanding. [p. 273, col. 2.]

The period prescribed by Art. 181 of Sch. I to the Limitation Act cannot be extended in favour of the plaintiff merely by reason of the pendency of proceedings in Court with regard to the title of the mortgagor. [*ibid.*]

When time has once begun to run, it cannot be suspended by reason of any proceedings in Court unless an injunction or a stay order has been obtained staying the proceedings, or the facts can be brought within one of the sections of the Limitation Act which lay down the conditions under which the running of time is suspended. [*ibid.*]

Mahomad Kala Mea v. *Harperink*, 1 Ind. Cas. 122; 36 C. 323 at p. 334; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 19 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.), *Hemendra Mohan Khashnabis* v. *Noresh Chandra Bhattacharjee*, 62 Ind. Cas. 418; 25 C. W. N. 376; 33 C. L. J. 260, *Lakhan Chunder Sen* v. *Madhusudam Sen*, 35 C. 209 at p. 218; 7 C. L. J. 59; 12 C. W. N. 326; 3 M. L. T. 90 (P. C.), on appeal *Nrityamoni Dassi* v. *Lakhan Chunder Sen*, 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.) and *Muthu Korakki Chetty* v. *Mahamad Madar Ammal*, 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1, distinguished.

Mani Singh Mandhata v. *Nawab Bahadur of Murshidabad*, 50 Ind. Cas. 202; 46 C. 694; 36 M. L. J. 210; 17 A. L. J. 202; 23 C. W. N. 531; 29 C. L. J. 355; 25 M. L. T. 341; 21 Bom. L. R. 611; 1 U. P. L. R. (P. C.) 16; (1919) M. W. N. 318 (P. C.), relied on.

In an execution sale, all that a Court does is to sell the right, title and interest of the judgment-debtor. It does not guarantee that the judgment-debtor has a good saleable title. [p. 273, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in A. S. No. 81 of 1921, (A. S. No. 55 of 1921, District Court, South Arcot), preferred against the decree of the Court of the District Munsif, Vridhachelam, in I. A. No. 869 of 1920 in O. S. No. 746 of 1915.

Messrs. *T. S. Ramaswami Iyer* and *V. Sundaram Iyer*, for the Appellant.

The Advocate-General, for the Respondent.

JUDGMENT.—The plaintiff brought the suit on a hypothecation bond executed in his favour by the defendant. A preliminary decree was passed on 6th November 1916. Four months' time was allowed for payment. The plaintiff applied for a final decree on 5th November 1919. His application was dismissed for non-payment of *batta* on 10th January 1920. He applied again for the passing of a final decree on 10th September 1920. The defendant contended that the application for the final decree was barred by limitation under Art. 181. The District Munsif disallowed the objection of the defendant and passed a final decree. The defendant appealed and the Subordinate Judge dismissed the appeal. He now prefers this second appeal.

It is contended by Mr. T. S. Ramaswami Iyer who appears for the appellant that Art. 181 of the Limitation Act applies to applications for the passing of a final decree. It is well settled that Art. 181 applies to an application by the plaintiff for the passing of a final decree. *Vide Pattabirama Naidu* v. *Subramania Chetti* (1), *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah* (2), and *Ahmed Khan* v. *Gaura* (3). The time for applying for the passing of a final decree began to run from the 6th March 1917, and it is urged by the appellant that the application having been made on 10th September 1920 more than three years after the time began to run, the application is barred.

Mr. T. M. Krishnaswamy Iyer who appears for the respondent urges that his client could not have applied to the District

(1) 45 Ind. Cas. 76; 7 L. W. 438.

(2) 69 Ind. Cas. 366; 42 M. L. J. 51; (1922) M. W. N. 11; 30 M. L. T. 228; (1922) A. I. R. (M.) 65; 16 L. W. 198.

(3) 18;40 A. 235; 16 A. L. J. 143.

Munsif for the passing of a final decree as there was an adjudication by a Court that the hypotheca did not belong to the defendant, mortgagor. The defendant's husband brought a suit O. S. No. 674 of 1916 on 13th June 1916 against the present plaintiff as 1st defendant and the defendant herein as the 2nd defendant for a declaration that the hypotheca was his. That suit was decreed in plaintiff's favour on 26th April 1917. The 1st defendant, that is, the plaintiff in the present suit, filed an appeal to the District Court which was dismissed. He preferred Second Appeal No. 979 of 1919 and the High Court held that the plaintiff in that suit had no title to the property and that it was the property of the defendant herein and dismissed the suit. The contention of Mr. Krishnaswami Iyer is that, as there was a valid decree in favour of the plaintiff in O. S. No. 674 of 1916 that the property which was mortgaged to the plaintiff herein was his and that the mortgagor had no title, he could not have asked the District Munsif to pass a final decree in his favour and to have the property sold, and that he could only apply after the decree in that suit was set aside by the High Court. His contention is that during the pendency of Suit No. 674 of 1916, there was a suspension of his right to apply for a final decree and time did not begin to against him. He relies upon an observation of their Lordships of the Privy Council in *Mahomad Kala Mea* v. *Harperink* (4): "It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment." His argument is that the Executing Court could not convey a good title to the purchaser and, therefore, the Court could not sell the hypotheca as the property of the mortgagor, when there was the decision of a competent Court that the hypotheca did not belong to the mortgagor. This argument assumes that the Court when it sells property guarantees the title of the judgment-debtor. All that the Court does is to sell the right, title and interest of the judgment-debtor. It does not guarantee that the judgment-debtor has a good saleable title.

(4) 1 Ind. Cas. 122; 36 C. 323 at p. 334; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 19 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

In mortgage suits a preliminary decree is passed and time is fixed for payment of the decree amount. The plaintiff has to apply for the passing of a final decree within the time allowed by law, that is, three years from the date of the time fixed for payment. The question is whether the period given in Art. 181 can be extended in favour of the plaintiff by reason of the pendency of proceedings in Courts with regard to the title of the mortgagor. Whether the mortgagor has title to the mortgaged property or not, the plaintiff has to apply for the passing of a final decree within the time fixed. If a personal remedy is outstanding, he can pursue the personal remedy only after getting the mortgaged property sold by the Court. In order to enable him to do that, he must apply for a final decree. It is only after the passing of the final decree and after having brought the mortgaged property to sale that he could proceed against the person of the mortgagor if any portion of the decree remains unsatisfied. In this case the personal remedy was outstanding as is clear from the decree. The plaintiff, therefore, even if he got nothing by the sale of the hypotheca, could have proceeded against the other properties of the mortgagor for the amount of his decree. But even if the personal remedy was not outstanding, it is the duty of the plaintiff to apply for a final decree within the time allowed by law.

Mr. Krishnaswamy Iyer's contention is that his client had lost the right to apply by reason of the decision in O. S. No. 674 of 1916 and it was only after that decision was upset in second appeal that his right to apply for a final decree was revived. It is difficult to accept this contention. When time has once begun to run, it cannot be suspended by reason of the proceedings in Courts unless an injunction was obtained against proceeding with his application or a stay order had been obtained staying the proceedings. In this case no injunction was obtained against the plaintiff and no stay was ordered of the proceedings in the suit out of which this second appeal arises. Mr. Krishnaswamy Iyer relies upon *Hemendra Mohan Khashnabis* v. *Noresh Chandra*

Bhattacharjee (5) for the position that his right to apply was lost on the passing of the decree in O. S. No. 674 of 1916 during the time in which that judgment was in force. In that case the facts were these: A third mortgagee obtained a preliminary decree and the last day for payment was 31st July 1911. Payment not having been made, he made an application for a final decree on 2nd October 1915. Prior to that date the second mortgagee instituted a suit to enforce his security in which the High Court expressed the opinion on 10th March, 1914, that the third mortgagee could not sell the property before he had paid up the second mortgagee. The second mortgagee was paid on 22nd May 1915. Mookerjee, the Officiating Chief Justice and Fletcher, J., held that assuming Art. 181 of the Limitation Act was applicable to the case, the application dated 2nd October 1915 was not barred by limitation. In that case the High Court had expressed the opinion rightly or wrongly on 10th March, 1914 that the third mortgagee could not sell the property before he paid up the second mortgagee. Further the sum due to the third mortgagee could not have been determined till the sum payable to the second mortgagee for redemption had been settled. The third mortgagee was, therefore, not in a position to apply for final decree by reason of the decision of the High Court in the suit brought by the second mortgagee. In the present case the plaintiff was not asked to do anything before he could apply for a final decree. The case in *Hemendra Mohan Kashnabis* v. *Noresh Chandra Bhataacharjee* (5) is, therefore, distinguishable on the facts from the present case. In *Lakhan Chunder Sen* v. *Madusudan Sen* (6) the facts were :— A Hindu died leaving three sons. The sons of the third son instituted a suit for possession of their shares against the first son and the second son. The first and second sons died pending the decision of the suit and their sons were brought on record. Decree was passed on 20th April 1903 in favour of the plaintiffs and it was further declared that the sons of the 2nd defendant were entitled to the share they claimed. The sons of the 1st defendant appealed. On 22nd February 1904, the Appellate Court confirmed the decree in favour of the plaintiffs, that is, the sons of the third son and set aside the decree so far as it related to the sons of the second son. The sons of the second son instituted a suit on the 14th November 1904 against the sons of the first son and the sons of the third son for possession, partition and accounts. The High Court held that during the time the suit of the third son was pending, that is, between 20th April 1903 and 22nd February 1904, the right of the plaintiffs to bring an auction was suspended. The learned Chief Justice observes at page 217 * : "It seems to us, however, that this was a decree which, so long as it stood undischarged, was susceptible of execution at the hands of the present appellants, and whilst that decree existed, it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit." This judgment was affirmed on appeal by the Privy Council. *Vide Nrityamoni Dassi* v. *Lakhan Chunder Sen* (7). In that case the right of the parties was under litigation. The sons of the second son were granted relief on the first suit and, therefore, they could not bring a second suit for getting the relief which they had already obtained. No such considerations apply to the present case.

Reliance is placed by the respondent upon the Full Bench ruling in *Muthu Korakki Chetty* v. *Mahamad Madar Ammal* (8). In that case there was a Court sale on the 26th April 1913. An application was made on the 3rd January 1914 to set it aside on the ground of fraud and it was set aside on the 25th June 1915 as to part of the properties sold. The auction-purchaser applied for delivery on the 17th February 1917 for delivery of the remaining properties. The Full Bench held that the application was not barred by limitation. In that case the sale itself was sought to be set aside on the ground of fraud and, though the Court had confirmed the sale, yet when an application to set it aside was made on the ground of fraud it was bound to entertain the application and consider it on the merits, and as long as that applica-

(5) 62 Ind. Cas. 418; 25 C. W. N. 376; 33 C. L. J. 260.

(6) 35 C. 209 at p. 218; 7 C. L. J. 59; 12 C. W. N. 326; 3 M. L. T. 90 (P. C.).

(7) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(8) 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1.

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tion was pending, it could not order delivery of property under the sale when the sale itself was being impeached on the ground of fraud. It was only after the dismissal of the application for setting aside the sale that the Court could order delivery of the property. The facts of that case are distinguishable from the facts of this case as here there was no obstacle in the way of the plaintiff which could have prevented him from applying for an order for sale. Moreover the wording of Art. 181 is different from that of Art. 180. In the case of Art. 180 the time to apply for delivery is when the sale becomes absolute. But under Art. 181 the time begins to run from the date on which the right to apply accrues. The right to apply accrued on the expiry of the time fixed for payment, that is 6th March 1917. The Article does not say that the right to apply accrues only when the title becomes clear. The Full Bench decision in *Muthu Korakki Chetty* v. *Mahammad Madar Ammal* (8) turned upon the wording of the Art. 180 and upon the fact that the purchaser could not apply for the delivery of the property when the sale itself was being sought to be set aside on the ground of fraud. But the observations of the learned Officiating Chief Justice in that case are against the contention of the respondent. Referring to *Lakhan Chunder Sen* v. *Madhusudan Sen* (6) and *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (7), Abdur Rahim, the Officiating Chief Justice observes: "But it is hardly to be inferred from such observations that the Privy Council intended to lay down any rule or rules for exclusion of time other than those mentioned in various sections of the Limitation Act, such as 12, 14, etc. Or that when time has once begun to run, it will be suspended otherwise than according to the provisions of s. 9 or any other similar provision of the Limitation Act itself." He further observes at page 201*: "I must, however, observe that it would almost look that in my judgment in *Secretary of State* v. *Raja Vadreva Ranganayakama*, Appeals Nos. 113 and 402 of 1917, (unreported), I tried to deduce from these cases a principle of general and unlimited application to the effect that where the rights of the parties have been subjected to determination by the Court, it is from the date of the determination of such rights that limitation should be computed. But on further consideraion, I am persuaded that any such deduction would be unjustified, if it be meant thereby to introduce a rule of exclusion or suspension of time covering a larger ground than that traversed by ss. 12, 14, 15, 16, 9 and other similar provisions of the Limitation Act." It is clear from that judgment that the Court cannot introduce a new period of limitation on any ground of equity. The Limitation Act is complete in itself and any ground for extension of time or for the suspension of time must be sought for within the four corners of the Act itself. After the case was argued Mr. N. Rajagopalachariar, the Assistant Law Reporter, brought to my notice *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad* (9). In that case the appellant was declared to be a disqualified proprietor and her estate was taken charge of by the Court of Wards under the Bengal Act IX of 1879. By a deed of transfer dated 7th June 1890 part of the estate was sold by the Collector as manager to the father and predecessor-in-title of the respondent, and the purchaser obtained possession on 30th April 1891. On 1st August 1911 the Court of Wards withdrew from the management of the estate. The appellant brought a suit on 12th May 1912 to recover possession of the portions sold. It was held that her suit was barred by limitation and that limitation did not cease to run because she was declared to be a disqualified owner and the estate was in charge of the Court of Wards. Their Lordships of the Privy Council observe at page 699*: "The Limitation Act, it is true, recognizes and enumerates certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation. But the plaintiff's disqualification under s. 6 (*a*) of the Court of Wards Act is not one of them, nor has any case been made which could suspend or modify the ordinary law of limitation as applicable to this case." Though the appellant in that case could not have brought a suit by reason of s. 6 (*a*) of the Court of Wards Act during the time the estate was under the Court of Wards, yet the Privy Council held that that would not extend the period of limitation in her favour.

If once time has begun to run it cannot

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(9) 50 Ind. Cas. 202; 46 C. 694; 36 M. L. J 210; 17 A. L. J. 202; 23 C. W. N. 531; 29 C. L. J. 355; 25 M. L. T. 341; 21 Bom. L. R. 611; 1 U. P. L. R. (P. C.) 16; (1919) M. W. N. 318 (P. C.).

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be suspended by reason of the proceedings in any Court unless the facts could be brought within one of the sections of the Limitation Act which lay down the conditions under which the running of time is suspended. In this case the time for applying for final decree began to run from the 6th March 1917, and the decree in the second suit was not passed till the 26th April 1917. Time having begun to run against the plaintiff it could not have been suspended by reason of a subsequent decision. In *Soni Ram* v. *Kanhaiya Lal* (10), it was held by the Privy Council that there was nothing in Act XV of 1877 which would justify the Board in holding that once the period of limitation had begun to run in the case it could be suspended. Section 9 of the Limitation Act of 1908 expressly enacts that where once time has begun to run no subsequent disability or inability to sue stops it. Oldfield, J., in *Muthu Korakki Chetty* v. *Mahamad Madar Ammal* (8) expressed the same opinion that "once a cause of action has arisen it is not suspended by later events." In *Huro Pershad Roy* v. *Gopal Das Dutt* (11), the Privy Council held that a landlord who could have brought a suit for the rent for a certain *Fasli* was not entitled to bring a suit after the expiry of one year, on the ground that his suit against the tenants in respect of the arrears of rent for the previous year was pending. Their Lordships observe at page 259* : "Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the Statute might not have run." It is quite clear from the authorities that if time once begins to run it cannot be stopped or suspended by reason of any disability that may have happened or occurred subsequently. In this case, as I have already pointed out, the plaintiff was not debarred from applying for the passing of the final decree. The contention of the appellant, therefore, prevails.

In the view I have taken, it is unnecessary to decide in this case the question whether a second application, even if within three years, is barred by reason of the dismissal of a previous application for the passing of a final decree.

In the result the appeal is allowed, and the plaintiff's application for the passing of a final decree is dismissed with costs throughout.

V. N. V. *Appeal allowed.*

(10) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

(11) 9 C. 255; 12 C. L. R. 129; 9 I. A. 82; 6 Ind. Jur. 546; 4 Sar. P. C. J. 363; 4 Ind. Dec. (N. S.) 820 (P. C.).

*Page of 9 C.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 36 OF 1924.

September 10, 1924.

Present:—Mr. Dalal, J. C.

BALBIR—OBJECTOR—APPELLANT

versus

CHEDI LAL—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 72—Lunatic, guardian of, appointment of—Heir, whether can be appointed guardian—Hindu Law—Joint family—Guardian, whether can be appointed in respect of family property.

A member of a joint Hindu family cannot be appointed guardian by a Court of another member of the family in respect of property belonging to the whole family. Under the Hindu Law the active eldest member of the family is manager of the joint family property without any order of Court. [p. 277, col. 1.]

The provisions of s. 72 of the Guardians and Wards Act imposing a restriction to the appointment of the legal heir of a lunatic to be the guardian of his person cannot be attended to in a case where near relations alone can be appointed guardians of the person of the lunatic. [*ibid.*]

Appeal against an order of the Second Additional District Judge, Lucknow, at Unao, dated the 19th May 1924.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *Raj Narayan Shukla*, for the Respondent.

JUDGMENT.—Ram Prasad is a lunatic and his wife's father Chedi Lal has been appointed guardian of his person and of the property which is Ram Prasad's self-acquired property. A brother Balbir was left in charge of the joint family property as he was bound to be unless a separation was ordered by the lower Court. Balbir has now applied and desires to be appointed guardian of the person and the entire property of the lunatic. The lower Court had two objections to him—(1) That he claimed the self-acquired property to have been put in the hotchpot by the lunatic and become joint family property, and (2) that so far Balbir had not taken proper care of the lunatic.

As regards the first objection Mr. Ishri Prasad stated in this Court that the appel-

lant does not claim the property gifted to the lunatic to be a portion of the joint family property. In fact, if the objector is appointed guardian at his request, that would be the strongest proof of the property being separate because a member of a joint family cannot be appointed by a Court Manager of the property belonging to the whole family. Under the Hindu Law itself the active eldest member is Manager of joint family property without any order of Court. As to want of attention it is very difficult in a village to have a lunatic property attended to. It is not shown how Chedi Lal has done better so far in this direction.

The provisions of s. 72 imposing a restriction to the appointment of legal heir of a lunatic to be a guardian of his person cannot be attended to in a case of this nature, when near relations only can be appointed guardians of the person. Another view is that Balbir would not be the next heir of the separate property and so his appointment will not offend against the provisions of that section.

I do not think that so far Chedi Lal has made out a better title to appointment than the person who would be the natural guardian of the lunatic, the nearest male relation. I am informed that the lunatic, has no son but a daughter. If Balbir proves himself worthy of trust, the lunatic being a ward of the Court the Court will have the opportunity of removing Balbir. To my mind the best arrangement would be to appoint Balbir guardian of both the person and property and make him liable to pay a certain monthly allowance to the wife of the lunatic for her and the lunatic's support. The payment of such an allowance can be enforced by the Court whose ward the lunatic will be. The learned Judge has stated that so far Balbir has not wasted the property of the lunatic. I set aside the order of the lower Court and appoint Balbir guardian of the person and the separate property of the lunatic with the following directions:—

(1) That within two months of to-day's date he shall file in the lower Court a list of the separate property of the lunatic with an affidavit that he declares such to be the separate property of the lunatic.

(2) That he shall pay to the lunatic's wife every month Rs. 8 per mensem.

(3) That he shall keep an account both of the separate and joint property and furnish it every year to the lower Court on the 1st of July.

No order is passed as to costs of this litigation.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 122 OF 1922.

August 29, 1924.

Present:—Mr. Justice Devadoss.

KANDASAMI CHETTY—PLAINTIFF—APPELLANT

versus

ADIMOOLA CHETTY (DIED) AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Chattels—Sale and re-purchase of other chattels—Mortgagor's lien, whether attaches to purchased goods.

The right of a hypothecatee of chattels does not attach to goods or chattels purchased with the sale-proceeds of the chattels or goods hypothecated, unless there is a contract that the hypothecatee should have a right against the goods substituted for the goods sold. [p. 278, col. 2.]

The lien of a hypothecatee of goods does not attach to the goods in the hands of a *bona fide* purchaser for value without notice of the hypothecation. [*ibid.*]

Sreeram Narasiah v. *Bommireddi Venkataramiah*, 47 Ind. Cas. 976; 42 M. 59; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454, followed.

Second appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in A. S. No. 52 of 1921, (A. S. No. 154 of 1920 on the file of the District Court, South Arcot) preferred against the decree of the Court of the District Munsif, Cuddalore, in O. S. No. 190 of 1919.

Messrs. *K. Rajah Iyer* and *P. K. Janakirama Aiyar*, for the Appellant.

Mr. *M. S. Venkatrama Iyer*, for the Respondents.

JUDGMENT.—The plaintiff in this case attached before judgment two bulls belonging to his judgment-debtor Veera Pillai. The defendants put in a claim petition that they had a hypothecation right over the bulls and their claim petition was allowed in their favour. The plaintiff has brought the suit for a declaration that he is entitled to execute the decree obtained by him against Veera Pillai and that the bulls are not subject to any charge in favour of the defendants. Both the lower Courts have held that the hypothecation of the bulls in favour of the defendants prevailed over the right

of the plaintiff to attach the bulls and dismissed his suit. The judgment-debtor had two bulls which he hypothecated to the defendants. He sold these bulls in a shandy for Rs. 115 and purchased, four or five days after, the bulls in question for Rs. 125. Mr. Raja Iyer on behalf of the appellant contends that the hypothecation right of the defendants does not attach to the bulls purchased by the judgment-debtor with the sale proceeds of the bulls hypothecated. That the hypothecation of chattels is valid is now well settled by *Sreeram Narasiah* v. *Bommireddi Venkataramiah* (1). In the case of a mortgage of immoveable property the mortgage right attaches to the property which is substituted for the mortgaged property. In *Venkatarama Iyer* v. *Esumsa Rowthen* (2) it was held that the mortgagee was entitled to a charge on the property which through no fault of his had taken the place of the mortgaged property. Krishnaswamy Iyer, J., who delivered the leading judgment in the case relied upon the principle contained in s. 73 of the Transfer of Property Act and held that the mortgagee is entitled to a charge on the property which has taken the place, in substitution, of the property actually mortgaged. At page 434* he observed: "It is well-known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken." When properties are acquired under Land Acquisition Act by the Government and some other property is given in substitution, the charge in favour of the mortgagee attaches to the property so substituted. But in order that the charge may attach to the newly acquired property it must be clear from the evidence that the newly acquired property was the property sought to be substituted for the property actually mortgaged. Otherwise the mortgage charge on the mortgaged land would not attach to the property newly acquired. In *Nidhi Lal* v. *Mazhar Husain* (3), the facts were: *N* was in possession of six shops in a market place, two as mortgagee and the other four as proprietor. The Municipal Committee of that place decided to establish the market in a fresh place, and to use the sites of the old market for other purposes, and arranged with *N* to take the sites of his six shops in the old market place and gave him in lieu of them sites for six shops in the new. Under this arrangement he built six shops in the new market place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage money and cost of constructing the shop. The Court held that the claim could not be allowed, inasmuch as it could be justified only by a proof of an agreement binding upon the parties at the time when the transaction occurred, that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made. As observed by the learned Chief Justice: "the plaintiffs' claim was a mere vague attempt by the mortgagor to get hold of some shop or other, without knowing or caring which one out of the six it is to be."

The question before me is whether this right of the mortgagee to proceed against the substituted property as being subject of his charge does apply to the case of hypothecation of chattels. In the case of hypothecation of chattels, possession is not given to the hypothecatee. If possession is given to the hypothecatee, the transaction would become a pledge. In the present case the old bulls which were hypothecated to the defendants were sold by the hypothecator, and he purchased two new bulls, four or five days after the sale of the old bulls, for Rs. 125. The contention of the respondents is that the new bulls having been purchased with the sale-proceeds of the old bulls, the right of the hypothecatee must extend to the new bulls. A good title can be acquired by a *bona fide* purchaser of bulls without knowledge of the hypothecation—that is very clear from *Sreeram Narasiah* v. *Bommireddi Venkataramiah* (1) where it is held that the lien of the hypothecatee does not attach to goods sold to a *bona fide* purchaser. *Chithambara Chetti* v. *Muthaya* (4) is against the contention of the respondent. In that case *M* pledged his ship to *C* as security for a bond debt of Rs. 1,500 re-payable by

(1) 47 Ind. Cas. 976; 42 M. 59; 35 M. L. J. 450; 8 L. W 517; (1918) M. W. N. 718; 24 M. L. T. 454.

(2) 5 Ind. Cas. 92; 33 M. 429; 7 M. L. T. 143; 20 M. L. J. 330.

(3) 7 A. 436; A. W. N. (1885) 68; 4 Ind. Dec. (N. S.) 675.

(4) 5 M. 330; 6 Ind. Jur. 514; 2 Ind. Dec. (N. S.) 230.

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two instalments. *S* seized the ship in French Territory for a debt due by *M* and the French Court sold the ship. *C* made a claim on the proceeds of the sale in the hands of the Court. The Court held that "whether or not his lien was destroyed by the sale of the ship in French Territory, *C* was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French Court." The learned Judges observe at page 333*:

"Plaintiff had no right whatever in the sale proceeds of the ship at the date of the sale or at the date of the claim made by him which defendant resisted. Those proceeds, in so far as they were more than available for defendant's claim, belong to *Manjirasa*. All that plaintiff could claim of *Manjirasa* was payment at the due date which had not arrived. He could not say of anything belonging to *Manjirasa*, save what had been pledged to him, that he was entitled to it or had acquired any right to it."

They also held that the mere fact of the proceeds being in French Court would not make any difference as to the principle of their decision.

It is clear from these decisions that the mortgagee's right does not attach to the sale proceeds of the property hypothecated.

Mr. Venkatarama Iyer who appears for the respondents contends that hypothecatee is entitled to pursue his remedy against the property in whatever form it may exist, in other words, he has got the right to go against the proceeds in the hands of the hypothecator. His argument is that if the pledged property is converted into some other property, the hypothecatee is entitled to have his charge on the property so converted: and he relies upon two cases, *Taylor* v. *Plumer* (5) and *Sinclair* v. *Brougham* (6). The case of *Taylor* v. *Plumer* (5) was one of trust. There was a fiduciary relationship between the parties and the factor or the agent converted the goods in his possession into money and security, and the Court held that the principal was entitled to proceed against such security which was purchased with proceeds of the principal's goods in the hands of the agent. If it is a case of trust, the trust property can be pursued in the hands of strangers. In the present case there was no trust at all. The judgment-debtor was only a hypothecator and the defendants were only hypothecatees and, therefore, the case of *Taylor* v. *Plumer* (5) has no application to the present case.

In *Sinclair* v. *Brougham* (6), Viscount Haldane in the course of his judgment observed with regard to *Taylor* v. *Plumer* (5): "Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money." Mr. Venkatarama Iyer wanted to rely upon the observations of Viscount Haldane at page 420* wherein he said: "It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship." He wanted to apply that dictum as governing the present case. But at page 419* Viscount Haldane quoted Bramwell, L. J.'s observations in *Ex part, Cooke*; *In re, Strachan* (7) which explain the principle of *Taylor* v. *Plumer* (5):—"Because the money was paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal." Thesiger, L. J., observed in *In re Hallett's Estate* (8): "All cases where it has been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that

(5) (1815) 3 M. & S. 562; 2 Rose 457; 16 R. R. 361; 105 E. R. 721.

(6) (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315.

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(7) (1877) 4 Ch. D. 123; 46 L. J. Bk. 52; 35 L. T. 649; 25 W. R. 171.

(8) (1880) 13 Ch. D. 696; 42 L. J. Ch. 415.

*Pages of (1914) A. C.—[*Ed.*]

they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que* trust, or principal and agent."

In this case sale was four or five days before the purchase of new bulls. Since the bulls hypothecated were sold the hypothecatee could proceed against the hypothecator only as a debtor, for the sale gave the purchaser a good title and the hypothecatee could not proceed against the bulls in the hand of the *bona fide* purchaser. If the purchaser had notice, no doubt, the hypothecatee could proceed against the bulls, for the purchaser purchased with the knowledge that there was a charge in favour of the hypothecatee against the bulls. But supposing the bulls were sold to a purchaser with such notice, can the hypothecatee proceed against the bulls pruchased with the sale proceeds of the old bulls? Mr. Venkatarama Iyer answers "he has right of election." I do not see how the right of election comes in for they were sold to the purchaser with notice of the hypothecation right in which case he cannot proceed against the bulls as well as against the sale proceeds in the hands of the hypothecator. And if the sale was to a person without notice of the hypothecation right, the buyer acquires a good title and the hypothecatee can only look to the hypothecator for payment of his money; in other words the relationship of debtor and creditor arises the moment the bulls are sold to a person without notice. In this case the bulls were sold four or five days before the new bulls were purchased. I do not think the right of hypothecatee of chattels attaches to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged. No doubt the case would be different if there was a contract that the hypothecatee should have a right against the goods substituted for the goods actually sold. In the case of hypothecation of stock-in-trade of a going concern there is always a term in the deed of hypothecation, or there is a contract, that the hypothecatee should have charge on the goods which are purchased to re-place the place of goods sold. No such contract has been proved in this case. Therefore, I have no hesitation in holding that the right of the defendants as hypothecatees does not attach to the bulls purchased by the judgment-debor partly with the sale proceeds of the bulls hypothecated.

In the result the appeal is allowed and the judgments of the lower Courts are reversed and the plaintiff will have a decree.

Both the defendants will pay plaintiff's costs.

The first respondent having been given up, the proper order would be that the 2nd defendant who is the 2nd respondent here will pay the costs of this second appeal, and the costs in the lower Courts will be paid by the 2nd defendant and the legal representatives of the 1st defendant.

V. N. V. *Appeal allowed.*

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 92 OF 1923.

September 16, 1924.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

PHERAI AND ANOTHER—DEFENDANTS—APPELLANTS]

versus

PUDAI RAM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 66, 80—Bond providing for re-payment of principal after fixed period—Interest payable monthly—Default in payment of interest—Principal becoming due—Suit to recover principal and interest—Limitation, commencement of.

The amount of a bond was expressed as payable within six months and interest thereon was to be paid month by month, and it was provided that in the event of default in payment of interest for any month compound interest was to accrue on the unpaid amount and the lender was to have a right to file a suit at once for the recovery of principal and interest without waiting for the stipulated period of six months. No interest was paid under the bond. In a suit to recover principal and interest:

Held, (1) that the suit was governed by Art. 80 of Sch. I to the Limitation Act; [p. 281, col. 1.]

(2) that the money due under the bond became payable on failure to pay the first month's interest and that limitation began to run from the date of the first default and the fact that it was also stated in the bond that the money was payable five months later did not entitle the creditor to ignore the former date as the starting point of limitation and select the later one because it suited his convenience better. [p. 282, col. 1.]

(Case-law discussed.)

It is not open to the parties to an agreement to contract themselves out of the Law of Limitation by inserting in their agreement alternative starting points for limitation. [*ibid.*]

Second appeal against a decree of the Sub-Judge, Sultanpur, dated the 14th November 1922, in an appeal preferred against a decree of the Munsif, Sultanpur, dated the 21st August 1922.

Mr. *Ali Zaheer*, for the Appellants.

Mr. *Naimullah*, for the Respondent.

JUDGMENT.—This is a defendant's appeal from an order of the Subordinate Judge of Sultanpur granting the plaintiff a decree on foot of a bond.

The bond in suit was for Rs. 368 payable within six months, and was to bear interest at the rate of 6 pies per rupee per mensem. This interest was to be paid month by month, and in the event of failure to pay in any month, compound interest was to accrue on the unpaid interest, and the plaintiff was to have a right to file a suit at once, without waiting for the stipulated period of six months. Admittedly interest was never paid.

The Trial Court, on the authority in *Harnarain* v. *Beni Pershad* (1) and referring also to *Sheo Narain* v. *Ram Din* (2) held that the suit was barred by limitation, inasmuch as it had not been brought within three years of the date of the first default of payment of interest.

The lower Appellate Court, following *Durga* v. *Tota Ram* (3), *Ram Parshad* v. *Qadro* (4), *Mubarak Ali* v. *Gopi Nath* (5) and *Hori Lal* v. *Thamman Lal* (6), has taken the view that the creditor had, under the terms of the bond, an option either to sue on the occurrence of default in payment of interest monthly, or to wait for the time fixed in the bond for re-payment arrived, and that he was under no obligation to sue on the happening of the earlier contingency.

The only question argued before us has been that of limitation. The learned Counsel for the appellants contends that the case is governed by Art. 80 of the First Schedule to the Limitation Act. The learned Pleader for the respondent argues that Art. 66 governs the case. It is common ground that if time begins to run from the date of failure to pay the first instalment of interest, the suit is beyond time.

Article 66 deals with "a single bond where a day has been specified" and allows three years from the day so specified. Article 80 refers to a "suit on a Bill of Exchange, promissory-note or bond, not herein expressly provided for" and provides a period of three years from the day "when the bond..... becomes payable."

(1) 8 O. C. 77.
(2) 11 Ind. Cas. 526; 14 O. C. 129.
(3) 19 Ind. Cas. 738; 16 O. C. 45.
(4) 40 Ind. Cas. 232; 20 O. C. 132; 4 O. L. J. 341.
(5) 45 Ind. Cas. 613; 5 O. L. J. 73.
(6) 70 Ind. Cas. 85; 9 O. L. J. 416; 4 U. P. L. R. (O.) 103; (1923) A. I. R. (O.) 19; 26 O. C. 121.

The rulings relied upon by the lower Appellate Court are almost all those of a Single Judge of this Court who has consistently held the opinion that in a case like the present one, it is open to the plaintiff to exercise his option and to waive the cause of action which accrues to him on the earlier of the two alternative dates for starting limitation. This view is in conflict with that of another Judge of this Court expressed in *Har Narain* v. *Beni Pershad* (1) and has not been adopted by any Bench of this Court in a case where the facts at all closely resemble those in the case now before us. It is true that two decisions by a Bench of this Court in *Basant Singh* v. *Ram Pal Singh* (7) and *Prag Din* v. *Bhagwati Sahai* (8) have been cited on behalf of the respondent, but these are both clearly distinguishable. The first was a case governed by Art. 135, relating to a mortgage-deed in which the staring point for limitation was "when the mortgagor's right to possession, determines." Obviously this right did not determine till the mortgagee indicated his intention to take possession, and thus exercise one of the options given to him in the deed. The second case was one in which interest only could be, and was, claimed. This question of limitation is one on which the various High Courts in this country seem to have differed considerbly from each other and between themselves. For many years the opinion on the subject in Allahabad fluctuated but until in *Shib Dayal* v. *Meharban* (9) a Full Bench, after reviewing all the previous recorded rulings of the Court, came unanimously to the conclusion that limitation begins to run from the date of the first default in payment of interest, and that it makes no difference whether the right to sue for re-payment before the stipulated period is optional or compulsory. It is true that in that case the deed in suit was a mortgage-deed, and, that the Article providing a period of limitation was Art. 132, but in all other respects, including the provision for compound interest, the terms of the deed were remarkably similar to those of the deed in suit. Article 132 provides a period of 12 years from the time "that the money sued for becomes due." The Court, answering the question when the money became due, pointed out that it did

(7) 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (O.) 45.
(8) 66 Ind. Cas. 687; 8 O. L. J. 418.
(9) 69 Ind. Cas. 981; 45 A. 27; 20 A. L. J. 819; (1923) A. I. R. (A.) 1 (F. B.).

so as soon as it became payable by the mortgagor to the mortgagee, that is to say, as soon as it could be legally recovered by the mortgagee. "As soon as the first default was made, a right accrued to the mortgagee to sue for the whole sum with interest. Whether he chose to avail himself of it or not, is another matter. On default having been made, the money certainly did become due at once, the mere circumstance that the creditor had the option of not calling in the money cannot wipe out the fact that the money had in fact become due." It was further pointed out that this was the accepted view of the Law in England.

It appears to us that this view of law, which is in consonance with that taken by a distinguished Judge of this Court in *Har Narain* v. *Beni Pershad* (1) (a case which has never yet been overruled or expressly dissented from) is the right one. The proposition that it is open to the parties to an agreement to contract themselves out of the Law of Limitation by inserting in their agreement two alternative starting points for limitation, is not one that commends itself to us. In the present case, the money became payable on failure to pay the first month's interest, and the fact that it was also stated in the deed to be so payable five months later cannot entitle the creditor to ignore the former date as the starting point of limitation, and select the later one because it suits his convenience better. Had the creditor chosen to file his suit as soon as the first default was made, it would not have been open to the debtor to plead that the suit was premature. The creditor had on that date a good cause of action. Reference has been made on behalf of the respondent to the doctrine of waiver. The bond in suit however did not provide for the re-payment of the money in instalments, and Art. 75 of Sch. I of the Limitation Act which applies to such bonds, is the only one which recognises the right of the payee to waive his right to sue on the expiration of the first term of payment. The omission of such a provision from the other articles relating to suits on bonds, appears to us clearly to indicate the intention of the Legislature to deny any right of waiver in other cases.

It has been pointed out to us that the doctrine laid down in *Shib Dayal* v. *Meharban* (9) has not been accepted in other High Courts, and in *Narna* v. *Ammani Amma* (10), the Madras High Court has followed the view taken by Banerji J., in his dissenting judgment in *Gaya Din* v. *Jhuman Lal* (11). It is not necessary for us to discuss this case. We are content to say that we prefer the view taken by the majority of the Judges in *Gaya Din* v. *Jhuman Lal* (11) and adopted later by the unanimous Full Bench of the Allahabad High Court in *Shib Dayal* v. *Meharban* (9).

We hold that this suit was brought beyond time, and that the plaintiff's claim must, therefore, be dismissed. We accordingly allow the appeal and dismiss the plaintiff's suit with costs in all the Courts.

Z. K. *Appeal allowed.*

(10) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 17; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865.
(11) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 363 OF 1922.
August 29, 1924.
Present :—Mr. Justice Devadoss.

DHENUVAKONDA VENKATASUBBAYYA—PLAINTIFF—APPELLANT
versus
Unde Rajah Sri Raja VELGOTI GOVINDA KRISHNA BAHADUR, RAJAH OF VENKATAGIRI—DEFENDANTS—RESPONDENTS.

Madras Proprietary Estates Village Service Act (II of 1894), s. 15 (2)—Notice to proprietor by person other than Collector, validity of—Appointment by Divisional Officer, validity of—Suit to recover office—Burden of proof.

Under s. 15 of the Madras Proprietary Estates Village Services Act, a statutory duty is cast upon the Collector to give notice to the proprietor of his action under s. 7 of the Act. Any notice by any subordinate of his, such as a Sub-Collector, does not fulfil the conditions laid down in cl. 2 of s. 15, and is ineffective. [p. 283, col. 1.]

When a person comes before the Court claiming a village office on the ground of his having been validly appointed, it is his duty to make out that he has been validly appointed. [p. 283, col. 2.]

A Revenue Divisional Officer gave notice to a proprietor under s. 15 of the Madras Proprietary Estates Village Service Act and the nomination by the latter of the defendant to a village office was vetoed by the said officer on the ground that it was not made within the prescribed time after receipt of notice and the plaintiff was nominated to the office, but the order was set aside by the Collector on appeal by the defendant. In a suit by the plaintiff for recovery of the office;

Held, that there being no proper notice to the proprietor by the Collector under s. 15, his nomination of the defendant was not out of time; [*ibid.*]

(2) that the appointment of the plaintiff was unwarranted and illegal; [*ibid.*]

(3) that whether or not an appeal lay to the Collector, the plaintiff who was not entitled to the office was not entitled to any relief against the defendant who was in possession of it. [*ibid.*]

Second appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A. S. No. 50 of 1921, preferred against that of the Court of the Additional District Munsif, Bapatla, in O. S. No. 215 of 1919.

Mr. *A. Ramachandra Iyer*, for the Appellant.

Messrs. *A. Krishnaswami Iyer* and *K. Krishnaswami Iyengar*, for the Respondents.

JUDGMENT.—The point urged by Mr. Ramachandra Iyer in this appeal is that the proprietor in this case the Maharaja of Venkatagiri, did not send up nomination lists within six weeks allowed him under s. 15 of the Madras Act II 1894. The Collector of the District found on enquiry as appears from his proceedings filed as Ex. I, "that no such formal requisition was issued from his office, and the arrangements made in the marginally noted 21 villages, which fall under para. 2 of s. 15 of the Act are *ab initio* void, and are, therefore, hereby concelled." Under s. 15 of the Act it was the duty of the District Collector acting under s. 7 to give notice to the proprietor of his action and the proprietor shall thereupon dispense with the services of the officers no longer required and retain those whom he might consider to be best qualified to discharge the duties of the offices and report his action within six weeks, to the Revenue Officer in charge of the division. The statutory duty is cast upon the Collector to give notice to the proprietor of his action under s. 7. It cannot be stated that any notice by any subordinate of his fulfils the conditions laid down in cl. 2 of s. 15. As a proper notice is required to be given by cl. 2 of s. 15, the statutory obligation of the Collector cannot be dispensed with and nobody else can, in his place, give a valid notice, as required by cl. 2. In this case, a notice was given by the Sub-Collector on 13th May 1913 to the proprietor of what had been done by the Collector, and the proprietor was asked to make certain nominations. He sent up his nominations on 18th August 1913. The Sub-Divisional Officer vetoed the nominations on the ground that the nominations were not made within six weeks of the receipt of notice by the proprietor. The proprietor and the nominees preferred an appeal to the Collector who set aside the orders of the Sub-Divisional Officer as being void. It is argued by Mr. Ramachandra Iyer that there is no appeal against the appointment made by the Sub-Divisional Officer in the case of a reduction of the village establishment and he relies on *Krishnaswami Naidu* v. *Akkulammal* (1). No doubt the Collector cannot hear an appeal against an appointment made under s. 15 of the Act by the Revenue Officer in charge of the division. But in this case the appellant seeks to recover the office from the second defendant who had been appointed subsequently on the nomination of the proprietor. The Collector, no doubt, set aside the order of the Sub-Divisional Officer as being void. Whether that order is sanctioned by law or not, when the appellant comes before the Court claiming the village office on the ground of his having been validly appointed, it is his duty to make out that he has been validly appointed. Seeing that no notice was given as required by s. 15, cl. 2, by the Collector to the proprietor before 21st August 1913, the nomination sent up by the proprietor on 22nd August 1913 was not out of time. As observed by the learned Judges in the case reported as *Tanguthur Narasimham* v. *Singaraju Ramiah* (2), it is quite open for the Collector to call up nomination on a new office being created or reduction of the village establisnment being effected. No notice having been given by the Collector before 18th August 1913, the proprietor was not called upon to make any nomination and any nomination made by him on 22nd August 1913 could not be considered, therefore, to be out of time and the action of the Sub-Divisional Officer in vetoing the nomination of this officer and making an appointment without reference to the nomination of the proprietor is certainly unwarranted and illegal; and the appointment of the plaintiff one of the persons who were so appointed by the Sub-Divisional Officer cannot be valid. When the plaintiff has not been validly appointed he cannot claim the office from another person who is in

(1) 50 Ind. Cas. 185; 9 L W 90 at p. 95; 24 M. L. T. 489; (1919) M. W. N. 29.

(2) 54 Ind. Cas. 728; 38 M. L. J. 126; (1920) M. W. N. 233.

possession of it. The Subordinate Judge has correctly decided the case. In the result the appeal fails and is dismissed with costs.

It is brought to my notice that the plaintiff died and his legal representative has been brought on the record. Mr. Krishnaswami Iyengar says that even if the plaintiff had right of action his legal representative had no right of action. It is not necessary for me to consider this point in view of my decision on the other point.

V. N. V. *Appeal dismissed.*
Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 561 OF 1921.
July 2, 1924.
Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

AJAIB SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SHAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaratory suit by reversioner against alienation—Reversioner figure-head for alienor—Declaration, grant of.

A decree declaring that the alienation in suit shall not affect the plaintiff's reversionary rights should not be passed in a case where the minor on whose behalf the suit is brought is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his own act.

Dad v. *Lal*, 82 Ind. Cas. 626; 6 L. L. J. 334; 5 L. 389; (1925) A. I. R. (L.) 24; 1 L. C. 267, followed.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 31st July 1920, reversing that of the Sub-Judge, First Class, Lahore, dated the 23rd March 1917.

Lala *Mehr Chand Mahajan*, for the Appellants.

Dr. *Nand Lal* and Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—In 1906 defendants Nos. 1 to 4, who are brothers, effected two sales of land in favour of defendants Nos. 5 to 10. A suit has been brought in the names of the minor sons of the first three defendants, the plaintiffs' maternal uncle acting as their next friend, for a declaration that the sales shall not affect their reversionary rights. The Trial Court passed a decree in the plaintiffs' favour, but the Additional Judge on appeal, finding that the sales were effected for necessity, dismissed the suit. The plaintiffs have presented a second appeal.

One of the issues in the case was whether the suit was collusive and had been brought at the instance of the vendors, and the learned Additional Judge, has found in the defendants' favour on this point, remarking that the suit is obviously collusive and that the real plaintiffs are the alienors themselves, who after allowing a number of years to elapse have chosen this method of avoiding the bargain they had previously made. Without going into other matters we think that on that finding alone the appeal fails. The same point recently arose in *Dad* v. *Lal* (1) and a member of this Bench was a party to the judgment in that case, from which we quote the following passage: "A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interests But, in our opinion, it would not be proper to pass such a decree in a case like the present in which the minor is merely a figure head and the real plaintiff is the alienor himself, who has caused the suit to be instituted for the purpose of undoing his own act."

Following that decision we dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 82 Ind. Cas. 626; 6 L. L. J. 334; 5 L. 389; (1925) A. I. R. (L.) 24; 1 L. C. 267.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 30 OF 1924.
September 4, 1924.
Present:—Mr. Justice Duckworth.

MAUNG SAN TIN—APPLICANT
versus
MA PHET PU AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Pre-emption, who can claim—Younger son, whether co-heir.

Under Burmese Buddhist Law it is only amongst co-heirs that the right of pre-emption can exist. [p. 285, col. 2.]

A younger son is not a co-heir along with his mother and cannot, therefore, exercise the right of pre-emption with respect to property left by his deceased father. [*ibid.*]

Application for review of the judgment of Duckworth, J., passed in Special Civil Second Appeal No. 227 of 1923, reported as 84 Ind. Cas. 287.

Mr. *Ganguli*, for the Applicant.

Mr. *Sanyal*, for the Respondents.

JUDGMENT.—It appears from the affidavits filed by Messrs. Ganguli and S. Mukerjee, senior, that I passed orders, in this appeal, without hearing Mr. Ganguli for the 1st respondent, Maung San Tin. I do not question these affidavits. I was myself under the impression that the appeal had been properly heard, and the Bench Clerk's order on the diary seems to corroborate me. However, as stated, I accept the facts, as set out in the affidavits and nothing more need be said about the matter.

The proper remedy of Mr. Ganguli's client would, I think, have been to apply to have the judgment set aside, as having been passed *ex parte*.

Instead of doing that, he applied for a review of judgment.

I am not at all sure that this was the proper remedy, but I admit the application, acting under the Court's inherent power to remedy injustice, and this course has not been questioned by the other side.

On the merits, Mr. Ganguli argues that I was in error, in my judgment, in holding that the case of *Mo Thi* v. *Tha Kwe* (1) was no longer good law, and that, though the widow has an absolute disposing power, this is subject to a right of pre-emption, even by a younger son, when the property is not divided; and that the widow's absolute power of disposal is not affected by the exercise of this special right of pre-emption.

I cannot agree.

In effect, *Mo Thi* v. *Tha Kwe* (1) has been overruled by *Maung Ye Nan O* v. *Aung Myat San* (2).

The real point is whether San Tin, as a younger son, was, after his father's death, a co-heir with his mother. The *orasa* son Po Nan probably *was* a co-heir, but I cannot agree that San Tin was so.

Mr. May Oung (now May Oung, J.) has dealt with this matter at page 158 of his work on Buddhist Law (Adoption, Pre-emption, Gift and Religious usage), and he seems to consider that there are doubts as to whether, in such a case as this, the younger children can be considered as co-heirs. He nevertheless, appears to think that *equitably* they should be allowed a right of pre-emption, since they can claim partition on the widow's re-marriage.

This, with all respect, is not a true criterion, and I cannot accept such a view. I think that it must be held that the younger son is not a co-heir. This really settles the question, for it is only amongst co-heirs that the right of pre-emption can exist, *i. e.*, persons on whom an estate has devolved.

Further, the widow could not be said to have an *absolute* right of disposal, if it was subject to such a qualification as that she must offer the property first to her younger children. Her right would then no longer be *absolute*.

For these reasons, I see no grounds for interference with my original judgment.

The application for review is dismissed with costs, Advocate's fee three gold *mohurs*.

K. S. D. *Application dismissed.*

(1) 4 L.B.R. 128; 14 Bur. L. R. 205.
(2) 31 Ind. Cas. 512; 8 L. B. R. 446; 8 Bur. L.T. 167.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1517 OF 1920.
May 4, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

AMAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NUR MUHAMMAD KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (f)—Partition—Deed of relinquishment filed in proceedings—Deed relating to other property—Registration, whether compulsory.

A deed of relinquishment relating to immoveable property of the value of more than a hundred rupees is not absolved from registration simply because it was filed in certain partition proceedings when it appears that the property covered by it was kept wholly separate from the partition.

Second appeal from the decree of the Additional District Judge, Karnal at Ambala, dated the 20th March 1920, modifying that of the Senior Subordinate Judge, Karnal, dated the 21st July 1919.

Dr. *Gokal Chand Narang*, for the Appellants.

Mr. *Shamair Chand* and Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—One Nur Muhammad Khan sued for possession of certain land sold to him by means of a registered sale-

deed by one Rashid Ahmad, a convert to Islam whose name originally was Kidar Nath. On the other hand, the descendants of Rashid Ahmad's brother Partap Singh brought a suit for a declaration that they owned the land so sold, and that the sale-deed was fictitious, and in the alternative asked for pre-emption on payment of Rs. 150. The suit of Partap Singh's sons is based on a deed of relinquishment of the year 1873 which has not been registered, and both suits depend upon the admissibility of this document, the sons of Partap Singh having appealed in both cases.

The main contention of the appellants is that at the time the deed was executed the property of the late Nagar Mal, the father of Partab Singh and Rashid Ahmad, was being partitioned between his three sons, that this deed of relinquishment formed an integral portion of the partition proceedings and that in virtue of execution of this deed the partition was effected in the way it was. On going through the record we come to the same conclusion as the learned District Judge that this deed had nothing whatsoever to do with the partition. It related to property extraneous to Nagar Mal's property and that property was kept wholy separate from the partition. The execution of this document in no way formed part of the consideration for the method of partition and it is not absolved from registration as having been acted upon in a judicial or a semi-judicial proceeding.

The second contention is that it creates no rights in the property because it dealt with the reversionary rights to Bishambar Das' property in the sense that property was held at that time and for many years after by his widow. It purported, however, to be a clear relinquishment by Rashid Ahmad of all his rights in his uncle's estate and as such, in our opinion, required registration.

The third contention which was never taken in the Trial Court is that the property is not worth more than Rs. 100. It consists of nearly 90 *bighas*, the bulk of which is now cultivated. We do not know how far it was cultivated in the year 1873. *Prima facie* it was worth considerably more than Rs. 100. It was never urged that it worthless, and the point was merely taken as a last resort in the District Judge's Court. We find that the property was worth more than Rs. 100 and, therefore, on all these grounds we find that the document required registration and not having been registered is inadmissible in evidence.

We, therefore, dismiss both appeals with costs.

K. S. D. *Appeals dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 327 OF 1924.

September 5, 1924.

Present:—Mr. Justice Lentaigne.

MAUNG GYE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG AUNG PYO—PLAINTIFF—RESPONDENT.

Buddhist Law, Burmese—Adoption—Appathitta *child, right of*

Where there is no natural or *kittima* child, the *appathitta* child is allowed half the estate of the adoptive parent and the other half goes to the relatives of the deceased. [p. 290, col. 2.]

Second appeal against the decree of the District Court, Prome, in Civil Appeal No. 34 of 1923.

Mr. *Kya Gaing*, for the Appellants.

Mr. *Ba Thein*, for the Respondent.

JUDGMENT.—The plaintiff-respondent instituted the suit now under appeal in the Township Court of Prome against the appellants for recovery of a house and its site valued at Rs. 500 which constituted the only property left by one Ma Pu, a Burmese Buddhist, who died on the 12th waning *Pyatho* 1283. Ma Pu left no children, and, according to the plaint, the plaintiff was her first cousin and her nearest relation; but it was admitted that there were also two children of another first cousin, and they were joined as third and fourth defendants as they did not wish to be joined as heirs. In their written statements the third and fourth defendants admitted the facts in the plaint, and they have been treated as having no further interest in the estate.

The case has been treated solely as a contest between the nearest collateral as heir of Ma Pu and the appellants Maung Gyi and his wife; and though Maung Gyi, the first appellant, was a relation of Ma Pu, it is admitted that he was a more distant relation than plaintiff and that his

only claim to inherit Ma Pu's estate must depend on his claim to be a *kittima* adopted son of Ma Pu, or in the alternative, as an *appathitta* adopted son of Ma Pu, if that claim is admissible. It is clear that Maung Gyi has continued in occupation of the property in suit since the death of Ma Pu. It is shown also that Maung Gyi, who is now twenty-six years of age, had in recent years looked after Ma Pu and had lived with her since he was a child of about four or five years of age. Originally Maung Gyi and his brother Maung Lat were taken into Ma Pu's house because their father was poor, and it is stated by a defence witness that the house which had belonged to Aung Pe the father of Maung Gyi, was bought by Ma Pu from Aung Pe who also came and lived in that house for three or four years with Ma Pu and his children, but eventually Aung Pe moved into another house and the children remained with Ma Pu. The plaintiff, however, alleges that the house was inherited by Ma Pu from her mother. Aung Pe died when Maung Gyi was about twelve years of age.

A *Pongyi*, U Eindaka, who managed a school, has deposed that about twenty years ago Ma Pu placed Maung Gyi and Maung Lat at his school and told him that she had adopted them (*Mweza de*); but when his registers were referred to, it was discovered that he had entered the name of the parent of the children as Aung Pe the natural father, and not as Ma Pu the alleged adoptive mother. Subsequently Maung Lat died. Plaintiff's fifth witness Maung Po Ka admits that Ma Pu *shin-pyooed* Maung Gyi, but he says that he is unable to say whether Maung Gyi was her adopted son or not; that he used to call her "aunt," and before his marriage he used to eat out of the same dish as Ma Pu.

Maung Gyi also states that Ma Pu performed his marriage ceremony when he was twenty years of age, and as he is now twenty-six that would be six years ago. It is clear that Ma Pu was present at the marriage of Maung Gyi, because Ma Yok So, a witness for the plaintiff, refers to a conversation which she had with Ma Pu when Ma Pu came back from the "Marriage Feast of Maung Gyi" in which she asked Ma Pu what property she had given and Ma Pu replied that she had no property to give. A defence witness, U Sa Nyein, states that at the marriage Ma Pu had a conversation with him in which the question of bringing property to the marriage was discussed and that Ma Pu said that though she had got a house, she must sell the house and maintain herself before her death; and that she also said:—"They are responsible if I have got no property and they can enjoy if I have got property."

Maung Gyi is a clerk according to his own account, but his wife describes herself as a cigar-maker and in the plaint Maung Gyi is described as a Tobacco seller. He claims to have had to feed Ma Pu since he was twenty, that is for the six years since his marriage. He also states that he spent about Rs. 300 when Ma Pu was ill. He admits that plaintiff came and attended Ma Pu for one month before her death and brought in a physician about ten days before her death. The plaintiff claims to have spent about Rs. 60 for buying eatables and fees, but he also admits that she had been ill for a year. That Maung Gyi had previously employed a Doctor, Saya Thin, is corroborated by that witness who states that he attended Ma Pu four or five times and that Maung Gyi's wife paid his fees, but he did not know with whose money she paid him; and he also states that his wife told him that the sick woman was the mother of Maung Gyi. I have just set out the less controversial facts.

The additional evidence, as to whether Maung Gyi was a *kittima* adopted son, consists of the evidence of Maung Paw, a goldsmith, who states that he saw Maung Gyi and Ma Pu living together when Maung Gyi was about three years old; and he told her that she was all right, having children, and that she replied that it was troublesome when they were young, but that they would give help when they grew up, and that they were adopted sons to inherit. He also says that it was known in the quarter that Maung Lat and Maung Gyi were adopted sons of Ma Pu. Ma Mya Thi, a teacher, who is now aged thirty-five, states that they were known in the quarter as adopted sons of Ma Pu, and she describes a remark addressed to Ma Pu by the natural father when this witness was about twelve in which Aung Pe said to Ma Pu: "You may suffer if they become bad and you may enjoy if they turn out good," which

is an indefinite remark and one which might be applicable even to an *appathitta* adoption.

That the relationship subsequently appeared to be one either of *kittima* adoption or bordering on that relationship is apparent even on the evidence produced by the plaintiff. U Tha Gywe, a cooliegaung, who is the seventh witness for the plaintiff, was present when there was a dispute between Ma Pu and Maung Gyi, and Ma Pu was reproving Maung Gyi as being obstinate and speaking against her. He states that being under the impression that Maung Gyi was her adopted son, he asked her whether she had adopted him to inherit her estate, and she replied, "No, not to inherit but to grow up." That evidence of a witness for the plaintiff would clearly establish the fact that Maung Gyi was at least an *appathitta* son. He then admitted that Ma Pu was angry at the time and later on he said that he did not know whether Ma Pu was telling the truth or not, and he also admitted that some people used to tell their children that they would not inherit, when they were angry.

It is also clear that Maung Gyi and his wife were themselves in doubt shortly before Ma Pu died as to whether Maung Gyi would be able to establish his claim to inherit Ma Pu's estate and that shortly after the plaintiff had begun to come to Ma Pu's house during her last illnesss, Maung Gyi and his wife were pressing Ma Pu to transfer the house into Maung Gyi's name, the suggestion in Court being that she had promised to do so at the time of the marriage. Both sides give evidence about these conversations. Maung Gyi's wife alleges this and Maung Hla Gyi, a clerk aged twenty-five, deposes that Maung Gyi said to Ma Pu—"Aunt, Aunt. It is said that Maung Pyo comes frequently because he wants to get the properties. Please make the matter clear;" and that Ma Pu replied—"Don't speak about it, who will inherit these properties besides you after my death." The plaintiff's witnesses Ma Yok So, a Bazaar seller, who claims to have sold goods together with Ma Pu; and likewise Ma Kin, who claims to have lived with Ma Pu for about eight years, both state that Ma Pu told them about these requests and that Ma Pu said she would not sell or transfer to Maung Gyi. The latter witness Ma Kin adds that Ma Pu said the house belonged to the deceased. This witness, however, admits that she went to engage a Pleader for the plaintiff. Plaintiff's witness Ma Sok also claims to have lived with Ma Pu for two years and says that Ma Pu told her that Maung Gyi had demanded the title-deeds and Ma Pu had also told her that Maung Gyi was not adopted to inherit.

The plaintiff Maung Pyo makes a very significant admission referring to the funeral expenses of Ma Pu; he says: "I did not incur any expense for Ma Pu's funeral, because Maung Gyi said that he would mortgage the house to get money to meet the funeral expenses. I *agreed* and told him not to spend more than Rs. 150; Maung Gyi did not mortgage the house. I don't know whether Moung Gyi spent his own money or mortgaged the house to meet funeral expenses." Now this is a complete contradiction of a statement made by the plaintiff at the beginning of his evidence where he alleged that the funeral expenses of Ma Pu were performed with her money. Maung Gyi swears that he defrayed the funeral expenses and this statement is shown to be true by the above admission of the plaintiff. I think also that this admission by the plaintiff that he had recognised the right of Maung Gyi to mortgage the house for the funeral expenses is clear evidence that the plaintiff must have recognised that Maung Gyi was an heir of Ma Pu, and it also shows that the plaintiff is not acting honestly when he claims to be entitled to recover the house from Maung Gyi without any offer to recompense Maung Gyi for the expenses which he had incurred.

It is obvious that the witnesses in this case were not examined as fully as they should have been and that the case for Maung Gyi was not put before the Court in as clear a way as it should; because we do not find any examination of Maung Gyi about this conversation with plaintiff, etc., which was subsequently admitted by the plaintiff. The last witness for the defendant, U San Nyein, was merely examined about the conversations as to the house at the time of Maung Gyi's marriage and though he also had lived in Ma Pu's house as a tenant for some years, he was not asked any direct questions on the subject of adoption; but he states that after Ma Pu's death plaintiff asked him to go and

consult a Pleader as to whether plaintiff could make a claim, because Maung Gyi was Ma Pu's nephew and adopted son; and that he told plaintiff that the adopted son had a better claim than a nephew.

On this evidence the Township Court held that the defendant Maung Gyi was a *kittima* adopted son and dismissed the suit with costs. On first appeal the District Court reversed that decision holding that the evidence was insufficient to prove a *kittima* adoption. I have set out the effect of the evidence above and I agree with the finding of the learned District Judge that the evidence in this case is not sufficient to establish a *kittima* adoption according to the standard required in the more recent decisions.

The learned District Judge recognised the fact that it was established that Maung Gyi was an *appathitta* child, but he referred to a decision in an unofficial report which was to the effect that where a plaintiff has based his suit on a claim to be a *kittima* adopted child and without any claim in the alternative for a declaration as an *appathitta*, it is not open to an Appellate Court to allow the plaintiff to amend his plaint and insert the alternative claim for relief as an *appathitta* child; and following this decision, he has granted the plaintiff-respondent in this case a decree as prayed with costs in both Courts.

The learned District Judge has, however, overlooked the fact that Maung Gyi is a defendant and that in that case it is not a question of altering the cause of action in the suit. The cause of action of the plaintiff-respondent remains the same whether the defence is based on a claim to a *kittima* adoption or to an *appathitta* adoption, and the question which the Court has to decide is whether the plaintiff is entitled to relief against the defendant. Even on the admissions of the plaintiff in his evidence in this case, it is apparent that the plaintiff had in effect recognised Maung Gyi as an heir of Ma Pu after her death and had consented to Maung Gyi incurring all the funeral expenses and mortgaging the house if necessary for that purpose. It is clear, therefore, that it would be most inequitable to allow the plaintiff to take the whole estate and to deprive the defendant of his right as heir which is shown to have been recognised even on the admissions of the plaintiff in addition to depriving the defendant of all rights to reimbursement of the funeral expenses, etc. Maung Gyi was also apparently allowed to contiune in possession of the house and the suit is one for possession. Having regard to this admission which shows that Maung Gyi must be treated as an heir, it is in the interests of the plaintiff that the amendment should be allowed, because the plaintiff cannot be allowed to eject a person shown to have been recognised as an heir by the plaintiff, unless the plaintiff shows that he was mistaken or takes the equitable course of according to such heir the rights as an heir. It is, therefore, in the interest of the plaintiff that the more limited right of defendant as an *appathitta* should be recognised in order that the plaintiff may be granted a decree for plaintiff's share, if any.

In the case of *Ma Sa Yi* v. *Ma Ma Gale* (1), the plaintiff had sued as a *kittima* child and when it was held that she had failed to establish her claim as a *kittima*, it was pointed out by Birks, J., that she could not succeed as an *appathitta*, because she had lived apart from the adoptive parents for the last eleven years; but Fox, J., (afterwards Sir Charles Fox), held that she had made no alternative claim as an *appathitta* daughter and that consequently he did not consider it necessary to consider what her share of inheritance possibly might be, if she had made such alternative claim. A doubt as to the admissibility of such an amendment on appeal had also previously been expressed in an Upper Burma decision. Later on, it appears to have been held in Lower Burma that if the claim as *appathitta* has not been made as an alternative claim in the plaint, it is not open to the plaintiff to obtain the amendment on appeal. In theory there can be no doubt that the two forms of adoption are distinct causes of action; but I suspect that many cases of recognised *kittima* adoption are cases in which the relationship had started as an *appathitta* adoption and had ripened into such affection that there was a subsequent notorious recognition of a *kittima* adoption. If the development has not been sufficiently notorious as to be capable of clear proof, the adopted child may honestly make the claim as *kittima* and discover, when it is too late, that the failure to weaken the claim as

(1) 7 Bur. L. R. 295.

kittima child by pleading in the alternative a claim as an *appathitta* has created a technical bar under the rule of procedure restricting the cases in which a plaint can be amended on appeal, which in effect bars the recovery of the smaller share as an *appathitta*. The question has occurred to me whether the theoretical distinction between the two forms of adoption and the two causes of action has not been relaxed in practice in some cases or whether there may not be other special circumstances which would justify an Appellate Court to make allowance for *bona fide* mistakes, in applying a mere rule of procedure. In the first instance I had thought of referring this question to a Bench, but, on reconsideration, I have come to the conclusion that the case now before me should be distinguished from the previous dicisions on the ground that different considerations may arise, as they do arise in this case, for allowing a greater latitude in favour of an amendment in the case of the written statement of a defendant.

I have been unable to find any reported case in which a decree has been passed in favour of an *appathitta* child for a share of inheritance; but I believe that this is, to a great extent, due to the fact that the claim is invariably made by the child on the basis of a *kittima* adoption and without any alternative plea based on a claim to be an *appathitta*; and that consequently the omission of the Courts to decide the point is due to the rule as to the amendment of a plaint to which I have referred above. The alternative claim could only be of importance in the cases where there is no natural or other *kittima* adopted child; and in such cases the greater affection existing between the adopted child and the adoptive parents would, in some cases, have resulted in the child being able to produce evidence of a notorious recognition as a *kittima* child.

The rights of an *appathitta* in a case like the present one where there is no natural or *kittima* child are summarised in s. 198 of the Kinwun Mingyi's Digest and there is also the passage in s. 25 of Book X of the *Manugye*; and the rule is laid down that in such a case the *appathitta* child is allowed half the estate and the other half goes to the relatives of the deceased. The question is also discussed in Mr. Justice May Oung's "Buddhist Law" at page 144. He also discusses other questions touching this form of adoption at pages 122, 123 and 129. Following these authorities, I hold that the defendant Maung Gyi is an *appathitta* adopted son of Ma Pu and is entitled to have his written statement amended so as to make such defence in the alternative; and that he is entitled to half the estate and house now in suit and that the plaintiff as representing himself and the other relatives, if any, is only entitled to the other half.

Before the division is made, I think that an enquiry should be made as to the funeral expenses incurred by Maung Gey and that the amount of such expenses should be re-imbursed to Maung Gyi before the shares are estimated.

For the above reasons, I set aside the decree of both the lower Courts and instead I direct that the plaintiff be granted a decree declaring that Maung Gyi is entitled to a half share in the estate in suit and that the plaintiff as representing himself and any other person entitled as relative of Ma Pu, deceased, is entitled to the other half share in the estate in suit; but that before such partition is made, an enquiry be held by the Township Court as to the amount contributed and spent by Maung Gyi on the funeral expenses of Ma Pu, and that such amount be re-imbursed to Maung Gyi out of the value of the house; and that after such enquiry has been held and such re-imbursement made, the shares in the estate be estimated and a final decree be passed by the Township Court for the purpose of granting the plaintiff's possession of his share or recovery of its equivalent in money.

As regards costs I award the defendant half his costs in this Court and I think that each party should bear his own costs in the lower Courts.

K. S. D. *Decree modified.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 300 OF 1924.
June 23, 1924.
Present:—Mr. Justice Abdul Raoof.
ARJAN DAS—PLAINTIFF—APPELLANT
versus
RAM LABHAYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), Sch. I, Art. 1—Balance

struck and signed by debtor—Acknowledgment—Intention.

The question whether a document comes under Art. 1 of Sch. I of the Stamp Act is one which depends in each case on the writer's intention. [p. 291, col. 1.]

Ambica Dat v. *Nityanund Singh*, 30 C. 687 and *Galstaun* v. *Hutchison*, 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945, referred to.

If an acknowledgment is written with the intention of supplying evidence of debt it comes within Art. 1 of Sch. I to the Stamp Act. [*ibid.*]

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 30th October 1923, affirming that of the Subordinate Judge, Fourth Class, Bhera, District Shahpur, dated the 22nd March 1923.

Lala *Anant Ram Khosla*, for the Appellant.

Mr. *Sagar Chand*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of a sum of money on the basis of balance struck in the account-book of the plaintiff and signed by the defendant. The Court below has found that the second balance was struck on the 28th of December 1910, but as it was unstamped it could not be admitted in evidence. As the third balance was based upon the second balance the Court held that the suit was not maintainable as it was barred by time. It is contended before me that the acknowledgment relied upon was not an acknowledgment within the meaning of Art. 1, Sch. 1 of the Indian Stamp Act as it did not supply evidence of the debt sued for. The learned Vakil for the appellant in support of his contention has relied upon *Ambica Dat* v. *Nityanund Singh* (1) and *Galstaun* v. *Hutchison* (2). Those cases lay down that whether a document comes under Art. 1 of Sch. I of the Stamp Act is a question which depends in each case on the writer's intention. If an acknowledgment is written with the intention of supplying evidence of debt it admittedly comes within Art. 1. In my opinion the acknowledgment in question fulfils all the condition laid down in Art. 1. The balance could have been struck with no other object than supplying evidence of a debt. It is contended by the learned Vakil that the writing can be looked at even without being stamped for purposes of s. 19 of the Limitation Act. But this is begging the question. The view taken by the lower Court is correct.

(1) 30 C. 687.
(2) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.

I accordingly dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 94 OF 1924.
September 6, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Baguley.

ALLAN BROTHERS & CO.
—APPELLANTS
versus
SHAIK JOOMAN SONS & CO.—
REPRESENTED BY THE OFFICIAL ASSIGNEE—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 52, 53—Civil Procedure Code (Act V of 1908), s. 36—Execution of decree—Order directing payment by instalments and execution of mortgage as security—Subsequent insolvency of judgment-debtor, effect of—Decree-holder, whether entitled to obtain mortgage.

The Court passed an order under O. XX, r. 11 (2) of the C. P. C., directing that the decree against the judgment-debtor shall be payable by monthly instalments and that he shall give as security a mortgage on certain immoveable property. Subsequent to this order the judgment-debtor was adjudicated insolvent:

Held, (1) that the adjudication could not affect the position of the decree-holder who was entitled to obtain from the judgment-debtor the mortgage ordered prior to the adjudication; [p. 293, col. 1.]

(2) that the order that the mortgage be executed was one which might be executed as if it were a decre by reason of the provisions of s. 36 of the C. P. C. [*ibid.*]

Chandra Kumar De v. *Kusum Kumari Roy*, 84 Ind. Cas. 721; 28 C. W. N. clxxxvii (187); 40 C. L. J. 180; (1925) A. I. R. (C.) 57, referred to.

Miscellaneous appeal against an order of the High Court in its Civil Regular Suit No. 609 of 1923.

Mr. *Patel*, for the Appellants.

Mr. *Clifton*, for the Respondent.

JUDGMENT.

Robinson, C. J.—The facts that lead up to this appeal are somewhat complicated, and must be set out in some detail in order to appreciate the matters now in question.

The appellants obtained a decree against the respondent, and applied for attachment, in execution, of the goods in his shop. These, according to the respondent, were worth Rs. 1,25,000. Respondent then applied that the decree be made payable by instalments of Rs. 2,500 a month. The matter

came up before my brother Beasley, and an order was passed under O. XX, r. 11 (2) on the 6th of February, 1924, that the decree shall be payable by instalments of Rs. 10,000 per mensem, and that the respondent should give as security a second mortgage on 23A, Phayre-street. The result of this order was that the application for attachment remained in abeyance.

A week later, respondent alienated eighteen properties. Appellant then applied to have been adjudicated an insolvent. My brother Rutledge held that he should not pass an *ex parte* order of adjudication; but he appointed a Receiver of the goods in the shop, and issued notice to the respondent. Respondent then applied to set aside the order appointing a Receiver, alleging that he had been compelled by his creditors to alienate the properties. This was accepted, and the application to adjudicate was rejected. But the learned Judge in his order states that the previous orders in execution as to payment by instalments and the execution of a second mortgage as security should stand. They, of course, could not be effected. Respondent then, as the goods in the shop had not been attached, instructed Messrs. Balthazar & Son to sell the stock-in-trade. Appellant then applied to my brother Beasley, urging that further security should be given by instructing Balthazars to credit the proceeds of the sale of the goods in stock to the appellant's decree.

The matter came on for hearing on the 3rd of March and Counsel for the respondent applied for an adjournment, and gave an undertaking that the sale-proceeds would be deposited in Court. Thereupon, respondent cancelled his instructions to Messrs. Balthazar & Son to sell and advertised a great reduction sale of his stock-in-trade.

On the 24th of March my brother Beasley passed an order, setting out that his previous order for payment of the decree by instalments and for executing the mortgage should stand, and appointed Mr. Joakim, Receiver, to take possession of the stock-in-trade, to sell it and pay the proceeds into Court.

The stock-in-trade was sold on the 17th of April, and, on the 28th of April, respondent applied to be adjudicated an insolvent. The stock-in-trade realized some Rs. 26,000, and, on the 14th of May, the Receiver deposited Rs. 23,000 out of this sum in Court. Appellant then applied that this money be paid to him; and the matter was placed before the Judge. He also applied that the second mortgage on 23A, Phayre-street, should be executed.

Respondent having been adjudicated, the Official Assignee objected. His Counsel urged that the matter could not be heard by the Executing Court, but should be transferred to the insolvency division.

It was heard by my brother May Oung, who then passed an order refusing appellant's application that a mortgage be executed, and postponing decision as to what was to be done with the Rs. 23,000. He also directed that the balance, still with Mr. Joakim after deducting his commission, charges, etc., should be paid to the Official Assignee. Later, he passed an order directing that the Rs. 23,000 should be paid to the appellant.

From that order the present appeal is filed in respect of the balance money, which was ordered to be paid to the Official Assignee, and in respect of the execution of a mortgage.

The Official Assignee has not appealed against the order as to the payment of the Rs. 23,000 to the appellant; and it is very properly admitted that the balance of the sum realized by the sale of the stock-in-trade should also be paid to the appellant. The Official Assignee will accordingly be directed to pay this sum to the appellant.

As regards the mortgage, it is urged that, having obtained an order for security in the form of a second mortgage on 23A, Phayre-street, the appellant deliberately refrained from accepting the mortgage and, instead, applied to adjudicate respondent.

The reason of that conduct is, I think, clear. The Insolvency Court could not pass any orders as to the mortgage, for orders to that effect had already issued, and appellant feared that this question of mortgage might affect his application in insolvency.

Appellants applied to review my brother Beasley's order by a petition, dated the 25th of February 1924. After setting out all the conduct of the respondent, the application was to cancel the order for payment of the decretal amount by monthly instalments, and to order execution as originally prayed, or, in the alternative, to order that the sale-proceeds of the stock-in-trade be deposited in Court to the credit of the decretal amount. They were, no doubt, at

that time seeking to be relieved of the burden put upon them by the original order for payment of the decree by instalments, and, if that had been granted, the order as to the execution of a second mortgage by way of security would also have gone by the board. But that application was not granted; the order was that the previous order as to instalments and as to a mortgage should stand.

It is urged that the original order, which would convert the appellants into secured creditors; was made with the respondent's consent, and that they could not have acquired the position of secured creditors without that consent.

The order was, however, varied by directing that the sale-proceeds of the stock-in trade should be credited to the appellants' decree. That was not made with the respondent's consent; therefore the appellants could not become secured creditors, and their own remedy was to enforce their original decree. I think the argument is mistaken.

The order of the 6th of February, by which the appellant was granted the position of a secured creditor, has not only not been set aside, but has been confirmed, and, if the appellant acquired the position of a secured creditor by virtue of that order, he has not lost it since. At the time the order was passed, respondent was not adjudicated an insolvent; and the fact that he has subsequently been adjudicated cannot affect the position of the appellant.

The order that is now sought, namely, that a mortgage be executed as previously directed, is an order which may be executed as if it were a decree by reason of the provisions of s. 36 of the C. P. C. [*Chandra Kumar De* v. *Kusum Kumari Roy* (1).]

The provisions of ss. 52 and 53 of the Presidency-Towns Insolvency Act also apply in favour of the appellant.

The mortgage was ordered prior to the adjudication; the appellant has never lost the right to have that order executed in his favour; and this appeal must be accepted, and the insolvent must execute the mortgage as directed, and, on his failure to do so, the Court will order the mortgage to be executed.

As to costs, the respondent must pay the appellant's costs of this appeal. Advocate's fee will be fixed at five gold *mohurs*.

Baguley, J.—I concur.

K. S. D. *Appeal accepted.*

(1) 84 Ind. Cas. 724; 28 C. W. N. clxxxvii (187); 40 C. L. J. 180; (1925) A. I. R. (C.) 57.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2261 OF 1921.
April 23, 1924.
Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

JAI LAL—PLAINTIFF—APPELLANT
versus
SHEO CHAND—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Oral sale—Separate receipt for part of consideration money—Endorsement on old sale-deed—Registration, whether necessary.

Where a sale is effected orally and a receipt for a part of the consideration money is executed, and an endorsement is made on the back of an old sale-deed relating to the site in suit at the time when it is handed over to the vendee, the two put together cannot be styled as a sale-deed which requires registration. [p. 294, col. 2.]

Gurmukh Singh v. *Pohlo*, 120 P. R. 1894 and *Buta Singh* v. *Gurdit Singh*, 10 P. R. 1896, referred to.

Second appeal from a decree of the District Judge, Delhi, dated the 23rd July 1921, reversing that of the Senior Subordinate Judge, Rohtak, dated the 23rd December 1920.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Sagar Chand*, for Sheikh *Niaz Mohammad*, for the Respondent.

JUDGMENT.—The parties to the appeal are related and their relationship appears from the pedigree-table given at page 14 of the paper-book. The plaintiff claimed possession of a house on the following allegations:—That he being a minor lived under the guardianship of the defendant Sheo Chand, that the defendant took into his possession and under his control all of his moveable and immoveable property, and that the defendant has made over to the plaintiff, all the property placed in his control with the exception of the house in suit. The suit was resisted by the defendant on the ground that the plaintiff never lived under his guardianship, that, as a matter of fact, the plaintiff had married Raj Mal's widow by *karewa* and was living with her, that a sale was orally made by the plaintiff on the 4th February 1918 in respect of the site of the house for Rs. 160, that the plaintiff was major at the time

of the sale, that after purchasing the vacant site the defendant had spent Rs. 840 in constructing the house, and that the plaintiff was not, therefore, entitled to claim possession either of the house or of the site. The Trial Court framed the following issues with reference to the pleadings of the parties :—

1. Did plaintiff sell the site of the house in dispute to defendant for Rs. 160 ?

2. Was plaintiff minor at the time of the sale and under defendant's guardianship, and is the sale invalid on that account ?

3. Did plaintiff's father construct the house on the site referred to ?

4. If defendant did it, what is its value and is he entitled to be recouped for the same ?

5. To what relief is plaintiff entitled?

The finding by the First Court on issue No. 1 was that the plaintiff had sold the site of the house for Rs. 160.

On the question of minority the Court found that, at the time of the oral sale, the plaintiff had attained majority, but that as he had only recently become major, the sale must have been obtained by undue influence. Taking this view the Court granted a decree for possession of the site conditional on payment of Rs. 160 by the plaintiff. On appeal by the defendant to the lower Appellate Court the decree of the Trial Court has been set aside and the suit has been dismissed *in toto*. The plaintiff has come up to this Court in second appeal and he is represented before us by Mr. Shamair Chand.

The first contention put forward by the learned Counsel before us is that the sale of the site was really effected by means of the endorsement on the back of the old sale-deed dated the 6th January 1909, under which the plot had been purchased by Bu Ali, father of the plaintiff. He has also contended that the receipt for a part of the consideration money was evidenced by a document and that both these documents were inadmissible in evidence for want of registration. The Appellate Court, however, has distinctly found that the sale in this case was effected orally. Mr. Shamair Chand in support of his contention has relied upon two cases decided by the Punjab Chief Court and reported as *Gurmukh Singh* v. *Pohlo* (1) and *Buta Singh* v. *Gurdit Singh* (2). His main contention is that when the terms of a transaction are orally settled and those terms are reduced to the form of a document the oral terms must be taken to have merged in the instrument subsequently executed and that, therefore, unless and until such instrument is registered, no evidence can be given of the oral transaction. Such is not, however, the case in the present case. Admittedly the terms of the oral sale were never reduced to the form of a sale-deed. A receipt for a part of the consideration money was executed and when the old sale-deed was handed over to the vendee, an endorsement was made on the back of it. These two put together cannot be styled as a sale-deed. This plea, therefore, has no force and must be disallowed.

The second contention urged before us by the learned Counsel is that it lay upon the defendant to prove in this case that he had obtained the sale in a *bona fide* manner. In support of this contention he relied upon the provisions of s. 111 of the Evidence Act which provides that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. The essential element to be proved under this section is that one of the parties stood in the position of active confidence. This is a question of fact which has to be decided with reference to the evidence given in the case. Some evidence was given in this case to prove that the defendant stood towards the plaintiff in the position of active confidence. That evidence was not accepted by the lower Appellate Court and in fact the lower Appellate Court has recorded a finding which leaves no room for doubt on this point. This is what the lower Appellate Court says:—"In my opinion the evidence shows that at the time of the sale the plaintiff had been living separately from Sheo Chand for some time, cohabiting with Raj Mal's widow in her house and was not under Sheo Chand's influence." This finding at once takes this case out of the rule laid down in s. 111 of the Evidence Act. Mr. Shamair Chand, however, has asked us to come to the conclusion that the plaintiff must have been under the influence of the defendant because it is shown that after the death of his father he did go to live with the defendant. He also throws

(1) 120 P. R. 1894.
(2) 10 P. R. 1896.

out a suggestion that as the plaintiff was only a 12 years' boy living with his uncle, the uncle must have been looking after his affairs. This is a suggestion unsupported by anything in the findings of the lower Appellate Court. The plaintiff, therefore, completely failed to make out the case set up in the plaint and he was not entitled to any decree at all.

We, therefore, dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 442 OF 1923.

September 10, 1924.

Present:—Mr. Justice Young.

MAUNG MAUNG AND ANOTHER—APPELLANTS

versus

MAUNG SHWE GOE AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Pre-emption—Co-heirs—Sale of undivided share—Offer to co-heirs—Second offer, whether necessary.

If a person wishes to sell his share in an undivided ancestral estate, he must first offer it to all the co-heirs. [p. 295, col. 2.]

Maung Ye Nan O v. *Aung Myat San*, 31 Ind. Cas. 512; 8 Bur. L. T. 167 at p. 171, *Nga Myaing* v. *Mi Baw*, (1874) S. J. 39; see also (1877) S. J. 76 and *Maung Shwe Nyun* v. *Ma So*, U. B. R. (1897-01) Vol. II, 155, relied on.

The offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and if these conditions are carried out, there is no necessity for a second offer to the heirs when they have once refused to buy. [p. 296, col. 1.]

Appeal from the decree of the District Court, Mergui, in Civil Appeal No. 54 of 1923.

Mr. *Mc Donnell*, for the Appellants.

Mr. *Anklesaria*, for the Respondents.

JUDGMENT.—The only question raised in this appeal was whether, in a case of pre-emption, it was sufficient for the vendor to offer the property to his children and then on refusal to sell it to a stranger at the same price, or whether he was bound having offered it to a stranger to offer it again to his children at the same price.

In s. 97 of Part 2 of what is known as Sparks' Code, the correct title of which is Civil Code of the Province of Pegu sanctioned by resolutions of His Honour the President in Council recorded on the 4th November 1859 and 17th January 1860 and which Sir Charles Fox, C. J., in the Full Bench case of *Maung Ye Nan O* v. *Aung Myat San* (1), laid down was at the time equivalent to legislation and professed to be a Code of Burmese Law and the *lex loci*, we read that if a person wished to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs.

In *Nga Myaing* v. *Mi Baw*, (2), Sandford, J. C., held as follows; "A sharer in undivided ancestral property, if he wishes to sell his share must first offer his share to his co-heirs and consequently a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their rights."

In Upper Burma the same view of the law was taken by Thirkell White, J. C., who held that if a person wishes to sell ancestral property, whether it had been divided or not, he must first offer it to his co-heirs before offering it to strangers [*Maung Shwe Nyun* v. *Ma So* (3)].

May Oung, J., in his work on Buddhist Law at page 150, says: "If an heir wishes to sell, he must first offer the property to his co-heirs: if he should sell it without making such offer, the co-heirs may, if they claim with reasonable promptitude, recover it by paying the same price as that paid by the purchaser."

The learned author, however, goes on to say: "One other possible argument in favour of the present Lower Burma view seems to have been missed. It is only when an estate is undivided that the advent of a stranger into the group of co-owners is really objectionable. For instance the estate may consist of a family dwelling house—if a stranger were to acquire the right of a co-owner, he might insist on occupying at least a portion of it: or if it were cultivable land, the stranger might not agree to lease it to a person chosen by the members of the family or to accept a certain rental . . . . These and other difficulties might arise to the annoyance and discomfort of the heirs." Amongst the other difficulties that might arise would be those arising from the personality of the pur-

(1) 31 Ind Cas. 512; 8 Bur. L. T. 167 at p. 171; 8 L. B. R. 466.

(2) (1874) S. J. 39; see also (1877) S. J. 76.

(3) U. B. R. (1897-01) Vol. II, 155.

chaser. The heirs or one of them might object to the particular person to whom it was proposed to sell the property and sooner than see it pass into his hands might be willing to buy it himself, though before unwilling. This would entail a renewed offer when the personality of the offer was ascertained. The definition of pre-emption for Muhammadans as laid down by Mahmood, J., in *Gobind Dayal* v. *Inayatullah* (4) seems to provide for this, for he says that pre-emption is a right which the owner of certain immoveable property possesses as such for the *quiet enjoyment* of that immoveable property to obtain *in substitution* for the buyer, proprietary possession of certain other immoveable properties, not his own on such terms as those on which such later immoveable property is sold to another person.

But, however, desirable it may be to lay down the law in similar terms, Sir Charles Fox in the Full Bench case of *Maung Ye Nan O* v. *Aung Myat San* (1) laid down that the right of pre-emption amongst co-heirs must be recognised by our Courts to the extent laid down in s. 97 of Sparks' Code, Part 2, and to this extent only, and that if any one claimed to have it further extended, he must prove in one or more of the recognised ways of proving a custom that the right is now greater than it was declared to be in that Code. Sparks' Code speaks only of one offer made to the co-heirs first, and not of any offer to be made to them after the land has been offered to a stranger and no attempt has been made to prove a custom to the latter effect. I must, therefore, hold that unless and until a custom extending the law as laid down in Sparks' Code is proved, my task is merely to construe that section and I take the section to mean that the offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and that, if these conditions are carried out, there is no necessity for a second offer to the heirs when they have once refused to buy.

In the present case the father offered the property to the heirs in September and on their refusal sold it to a stranger by a registered deed dated the 3rd October 1922. This all seems to me to be part of one and the same transaction, and I hold that the offer was sufficient and dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(4) 7 A. 775 at p. 799; 4 Ind. Dec. (N. S.) 611.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3047 OF 1918.
July 17, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Fforde.

KARAM SINGH—PLAINTIFF—APPELLANT
versus
Musammat RUPWANTI *alias* SARUP WANTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will—Bequest of entire property—Gift of undisposed residue, effect of—Adoption—Self-acquired property, whether becomes joint.

A gift of an undisposed residue of property already absolutely bequeathed does not cut down the previous absolute gift to a life-interest. [p. 297, col. 1.]

Sures Chandra v. *Lalit Mohan Dutta*, 31 Ind. Cas, 405; 22 C. L. J. 316; 20 C. W. N. 463, *Richards* v. *Jones*, (1898) 1 Ch. 438; 67 L. J. Ch. 211; 78 L. T. 74; 46 W. R. 313 and *Mohan Lal* v. *Niranjan Das*, 60 Ind. Cas. 619; 2 L. 175, followed.

Where, therefore, a Hindu by his Will left the whole of his property to his wife absolutely and directed that after the death of his wife his adopted son should be the owner of all property:

Held, that the wife acquired an absolute estate and the adopted son got nothing under the Will. [*ibid.*]

Under the Hindu Law, self-acquired property does not become joint immediately on the adoption of a son. [p. 297, cols. 1 & 2.]

First appeal from a decree of the Senior Subordinate Judge, First Class, Delhi, dated the 15th August 1918.

Mr. *Badr-ud-Din Qureshi* and Lala *Hukam Chand* for Dr. *Nand Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respendents.

JUDGMENT.—This appeal has been argued at considerable length and with a much ingenuity by Mr. Badr-ud-din Kureshi. There is really only one point to be determined, *i. e.*, whether or not Ramun Mal had an interest in the property which was attached. This point depends upon the true construction of the Will of his adoptive father Prabhu Dayal. The relationship of the parties is shown by the following pedigree-table:—

Lala Gulab Singh,
|
Prabhu Dayal = *Musammat* Janki.
|
Ramun Mal (adopted son).

On the 27th February 1902, Prabhu Dayal executed his last Will whereby he left the whole of his property subject to a specific bequest, which we need not particularly deal with, to his widow absolutely but in so devising he used expressions which, it is urged by Mr. Badr-ud-din Kureshi, had the effect of leaving a limited interest and not an absolute one. Further, after disposing of the whole of the property in this manner he made the following provision in favour of his adopted son:—

"After the death of *Musammat* Janki, my wife, my adopted son Ramun Mal shall like myself be owner of all the moveable and immoveable property then existing."

Mr. Badr-ud-din Kureshi contends that these expressions create a life-interest in *Musammat* Janki with interest in remainder in Ramun Mal and that such an interest is one which can be attached under a decree for execution. We cannot accept this contention. It is quite clear on the authority of *Sures Chandra* v. *Lalit Mohan Dutta* (1), *Richards* v. *Jones* (2), *Mohan Lal* v. *Niranjan Das* (3) and a number of other decisions that such a gift of the undisposed residue of property already absolutely bequeathed does not cut down the previous absolute gift to a life-interest. We are satisfied that, upon the true construction of the Will, the gift to *Musammat* Janki was an absolute one. Being such, it could only be reduced to a limited estate by clear and unambiguous words cutting down the first bequest. We do not find such words in the alleged gift over to Ramun Mal. Accordingly we hold that *Musammat* Janki acquired an absolute estate and Ramun Mal received nothing under the Will.

Mr. Badr-ud-din Kureshi has further argued that the Will itself is invalid inasmuch as Prabhu Dayal had no disposing power over the property bequeathed as it was co-parcenary property and could not be alienated. We entirely disagree with the contention. It is perfectly clear that the property which has been dealt with by this Will was the self-acquired property of Prabhu Dayal and as such he had power to dispose of it as he thought fit. Mr. Badr-ud-din Kureshi's argument that under the Hindu Law self-acquired property becomes joint immediately upon the adoption of a son is not supported by any authority and in fact is in direct contradiction to the views of the text writers.

For the reasons we have given we are satisfied that the conclusion arrived at by the Court below is correct. As the property attached in execution is not the property of Ramun Mal the suit of Karam Singh, the execution creditor, must fail. We accordingly dismiss the appeal of Karam Singh with costs.

K. S. D.

Appeal dismissed.

(1) 31 Ind. Cas. 405; 22 C. L. J. 316; 20 C. W. N. 463.

(2) (1898) 1 Ch. 438; 67 L. J. Ch. 211; 78 L. T. 74; 46 W. R. 313.

(3) 60 Ind. Cas. 619; 2 L. 175.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 29 AND 30 OF 1922.

August 27, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Jackson.

PERI RAMASAMI AND OTHERS—DEFENDANTS Nos. 1, 2, 4 TO 9—APPELLANTS

versus

CHANDRA KOTTAYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Promise to pay amount due, whether necessary—Mortgage—Co-mortgagees—Payment to one co-mortgagee, whether discharge of liability—Contract Act (IX of 1872), s. 62—Novation—Parties—Practice—Appellate Court—New case of fraud—Precedents—Subordinate Courts, duty of.

To constitute an acknowledgment within the meaning of s. 19 of the Limitation Act it is not necessary that there should be a promise to pay the amount due. All that is necessary under the section is that there should be an acknowledgment of present liability before the claim is barred by limitation. [p. 299, col. 1.]

A payment to one of two joint-mortgagees is a valid discharge of the mortgage liability. But a mere undertaking to pay the amount at some future date is not equivalent to payment. [*ibid.*]

Barber Maran v. *Ramana Goundan*, 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327 and *Mannava Annapurnamma* v. *Uppala Akkayya*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333 (F. B.), relied on.

In is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. [*ibid.*]

An Appellate Court is not justified in setting up a case of fraud when such a case was not set up by the parties either in the pleadings or in the evidence before the First Court. [p. 298, col. 2.]

A Court subordinate to a High Court is bound to follow the rulings of that High Court and is not entitled to rely upon the decisions of other High

Courts and to decline to follow the decision of the High Court to which it is subordinate. [p. 298, col. 1.]

Second appeal against the decrees of the Court of the Subordinate Judge, Masulipatam, in A. S. Nos. 25 and 26 of 1921, preferred against those of the Court of the District Munsif, Avanigadda, in O. S. Nos. 428 and 429 of 1918.

Mr. *N. Rama Rao*, for the Appellants.

Mr. *C. V. Ananta Krishna Iyer*, for the Respondent.

JUDGMENT.

Devadoss, J.—These appeals arise out of two suits brought by the plaintiff on mortgage-bonds dated 4th November 1897 and 28th January 1902. The District Munsif dismissed the plaintiff's suits. On appeal the Subordinate Judge passed decrees in favour of the plaintiff. Exhibit A dated 4th November 1897 was executed by the defendants Nos. 1 and 2 and their deceased father and brother in favour of the plaintiff and the 3rd defendant. Exhibit A (1) was executed on 28th January 1902 by defendants Nos. 1 and 2 and their deceased father in favour of the plaintiff and the 3rd defendant. On 28th June 1906 the defendants Nos. 1 and 2 and their father executed Ex. 1 in favour of the 3rd defendant undertaking to pay the balance due in respect of Ex. A and Ex. A (1) during a period of 10 years from 15th March 1906. The first point urged for the appellant is that Exs. A and A (1) were discharged by payment to the 3rd defendant; and reliance is placed upon two decisions of this Court reported as *Barber Maran* v. *Ramana Goundan* (1) and *Mannava Annapurnamma* v. *Uppala Akkayya* (2). The Subordinate Judge has declined to follow these rulings on the ground that the other High Courts have taken a different view and that one of the Judges of this Court expressed his disapproval of the Full Bench ruling in *Mannava Annapurnamma* v. *Uppala Akkayya* (2). We must express our strong disapproval of the Subordinate Judge's conduct in declining to follow the decision of this Court. A Court subordinate to the High Court is bound to follow the ruling of the High Court and is not entitled to rely upon the decisions of the other High Courts and to decline to follow the decision of this Court. The decision in *Mannava Annapurnama* v. *Uppala Akkayya* (2) is a Full Bench ruling and even if it was not, it was not the function of a Subordinate Court to criticise the ruling. Coutts-Trotter, J., who expressed the opinion that the decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (2) was opposed to the current authorities in England did nevertheless follow the ruling in *Mannava Annapurnamma* v. *Uppala Akkayya* (2). The Subordinate Judge found that there was a gross fraud on the part of the defendants Nos. 1, 2 and 3 and, therefore the payment to the 3rd defendant did not bind the plaintiff. The plaintiff did not set up a case of fraud in the pleadings and no evidence was adduced as regards fraud in the First Court and the Subordinate Judge was not justified in setting up a case of fraud when a case was not set up by the parties either in the pleadings or in the evidence before the First Court. No issue was taken as regards the question of fraud and no opportunity was given to the defendants to show that there was no fraud. On the other hand it is quite clear from Ex. 1, that defendants Nos. 1 and 2 and their father did acknowledge their liability not only to the 3rd defendant but also to the plaintiff and, therefore, at that time there could not have been any intention to defraud the plaintiff. The 3rd defendant and the plaintiff are the adoptive mother and adopted son and the evidence is that they lived together for 20 years till 4 or 5 years ago and Ex. 1 was executed in 1906 evidently at the time when the 3rd defendant and the plaintiff were living together and there is no suggestion that at that time there was any intention on the part of the 3rd defendant or of defendants Nos. 1 and 2 to defraud the plaintiff. The Subordinate Judge has, therefore, erred not only in setting up a new case of fraud not set up in the pleadings but also in coming to the conclusion that there was gross fraud when there was no evidence to support the finding. In his anxiety to get round the decisions in *Barber Maran* v. *Ramana Goundan* (1) and *Mannava Annapurnamma* v. *Uppala Akkayya* (2), he has set up a case of fraud.

It is next urged by the appellants that the suit is barred by limitation. Mr. Rama Rao who appears for the appellants contends that Ex. 1 does not contain an acknowledgment of the liability of defendants Nos. 1 and 2 under Exs. A and A (1). From a reading of the document, it is quite clear that the executants of the document did acknowledge the liability not only to the

(1) 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327

(2) 19 Ind. Cas. 12; 36 M. 544; 13; M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333 (F. B.).

3rd defendant but also to the plaintiff under the two documents. It is not necessary that there should be a promise to pay the amount due. All that is necessary under s. 19 of the Limitation Act is there should be an acknowledgment of the present liability before the claim is barred by limitation. There is no substance in this contention and we disallow it.

The judgment of the lower Appellate Court can be supported on other grounds than that of fraud. Exhibit 1 is a mortgage-deed executed by defendants Nos. 1 and 2 and their father undertaking to pay the balance of the amounts due under Exs. A and A (1). This document was afterwards sued on and money was realised. Exhibit 1 cannot be taken to be a discharge of Exs. A and A (1). In *Barber Maran* v. *Ramana Goundan* (1), it was held that a payment made to one of two joint-mortgagees was a valid discharge of the mortgage liability. If money had been paid to the 3rd defendant certainly that would have been a valid discharge of the liability under Exs. A and A (1). But a mere undertaking to pay the amount at some future date is not equivalent to payment. It is quite clear from the decisions in *Barber Maran* v. *Ramana Goundan* (1) and *Mannava Annapurnamma* v. *Uppala Akkayya* (2), that it is only payment made to one of the joint promisees that could give a discharge to the promisors, but where the promisor undertakes to pay the amount at some future date it is not eqivalent to a discharge. Supposing in this case the defendants Nos. 1 and 2 had given a promissory-note to 3rd defendant for the amounts due under Exs. A and A (1) and if she had negotiated it to a third person and third person realised the amount sometime after, could it be said that the 3rd defendant was paid the amount due under Exs. A and Ex. A (1)? It is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. Exhibit 1 cannot be considered as a supersession of the contracts evidenced by Exs. A and A (1). It is only an undertaking by the promisors to pay the amount to one of the promisees. We hold that in order to bring the case within the rulings in *Barber Maran* v. *Ramana Goundan* (1) and *Mannava Annapurnamma* v. *Uppala Akkayya* (2), there ought to be a payment of the amount due to one of the joint promisees in order to effect a discharge of the liability to the joint promisees. Taking this view we hold that Ex. 1 was not a discharge of Exs. A and A (1) and the liability under the two mortgages remained on the date of Ex. 1 and the plaintiff is, therefore, entitled to bring a suit for his share of the mortgage amounts. In the view we have taken, it is unnecessary to consider whether the decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (2) is good law or not. It was contended on behalf of the respondent that the decision of the Privy Council in *Shrinivasdas Bavri* v. *Meherbai* (3) has considerably shaken the authority of the decision in *Mannava Annapurnamma* v. *Uppala Akkaya* (2). It is unnecessary for us to express any opinion on this point.

In the result the second appeals fail and are dismissed with costs.

Jackson, J.—I agree and will only add that in any case I should feel bound by a Full Bench ruling in *Mannava Annapurnamma* v. *Uppala Akkaya* (2). In *Shrinivasdas Bavri* v. *Meherbai* (3), it is held that a release deed purporting to be by one of two mortgagees both in his own right, and also as heir and legal representative of the other mortgagees deceased can only be evidence as against the parties to the deed. The respondent did not thereupon proceed to argue that this discharge by one mortgagee alone would be in itself valid, so the point established by *Mannava Annapurnamma* v. *Uppala Akkayya* (2) was never raised in *Shrinivasdas Bavri* v. *Meherbai* (3).

V. N. V. *Appeals dismissed.*

Z. K.

(3) 39 Ind. Cas. 627; 41 B. 300; 21 M. L. T. 236; 32 M. L. J. 175; 19 Bom. L. R. 151; (1917) M. W. N. 258; 21 C. W. N. 558; 25 C. L. J. 311; 44 I. A. 36 (P. C.).

MADRAS HIGH COURT.

REFERRED CASE No. 10 OF 1924.

September 11, 1924.

Present:—Mr. Justice Venkatasubha Rao and Mr. Justice Jackson.

K. M. P. R. N. M. FIRM—PLAINTIFFS PETITIONERS

versus

M. SOMASUNDARAM CHETTY & Co.,—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 53—Sale

on credit—Suit to recover price—Limitation, commencement of—Evidence Act (I of 1872), s. 98—Techincal words—"Thavani", meaning of—Oral evidence, whether admissible.

Under s. 98 of the Evidence Act, evidence of the meaning which words bear in mercantile transactions can be given, and where a particular word has obtained a technical meaning in a particular trade or when used in a particular context, the Courts when construing that word are bound to take into account that meaning. [p. 301, cols. 1 & 2.]

The word "*thavani*" has acquired in transactions in piece-goods amongst dealers in Godown Street and Coral Merchant Street in the City of Madras a particular significance and is equivalent to a *credit period*. [p. 301, col.2.]

In a contract for sale of piece-goods in the City of Madras, the vendor sent the vendee a bill and at the top the following words appeared, "Debit interest at ¾ per cent. per mensem after sixty days *thavani*":

Held, that the sale was a *credit* sale and not a *cash* transaction; and that under Art. 53 of Sch. I to the Limitation Act, limitation for the suit commenced to run only on the expiry of the period mentioned, when the price became payable. [p. 300, col. 2; p. 302, col. 1.]

Rayner v. *Rayner*, (1904) 1 Ch. 176; 73 L. J. Ch. 111; 52 W. R. 273; 89 L. T. 681 and *Holt & Co.* v. *Collyer*, (1881) 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 29 W. R. 502, relied on.

Reference made, under s. 69 of the Presidency Small Cause Courts Act of 1882, by the Registrar, Court of Small Causes in New Trial Application No. 115 of 1923, preferred against the decree in Suit No. 10565 of 1921.

Mr. *S. Subramania Iyer*, for Mr. *S. Rangasami Iyengar*, for the Petitioners.

Messrs. *K. Bashyam Iyengar* and *T. K. Srinivasa Thatha Chariar*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—This is a Reference under the Presidency Small Cause Courts Act made on a difference of opinion between the learned Chief Judge on the one hand and the 2nd and 3rd Judges on the other.

The suit is for the balance due for the price of piece-goods sold. The plaintiffs are a firm of traders carrying on business at Coral Merchant Street, George Town, Madras and the defendants are also traders carrying on business in another portion of the City, Godown Street. The defendants have raised the plea that the suit is barred by limitation. The decision of this issue turns upon the question whether the sale was a credit sale as contended for by the plaintiffs or it was a cash transaction as alleged by the defendants.

The contract is not in writing and the parties have agreed that according to the usage of the trade, certain terms are implied in contracts of this description and that those terms are :—

(1) that the price charged is that payable on the expiry of 70 days from the date of sale;

(2) that after that period the seller is entitled to charge interest on the price at 9 per cent. per annum; and

(3) that if the purchaser pays the price or any part of it within the said 70 days, he is entitled to a discount at 12 per cent. per annum on the amount actually paid for the unexpired portion of the 70 days from the date of payment.

So far there is no dispute. But the plaintiffs contend that the price is payable only on the expiry of the period mentioned, in other words, that the sale is for credit. The defendants urge that the price becomes payable on the date of the sale, in other words, that it is a cash transaction.

The learned Chief Judge (Trial Judge) on the evidence adduced as well as on his interpretation of Exhibit A which is the bill sent by the plaintiffs to the defendants, came to the conclusion that the sale was for credit and applied Art. 53 of the Limitation Act. The witness examined for the plaintiff deposes: "The agreement was that the defendant should have a credit period." Within that period of "*thavani*" no demand could be made, likewise, a defence witness also says: "It is intended that no suit can be instituted until the period of *thavani* expires. I am not aware of any such suit being brought within the *thavani* period." This witness, however, prevaricates and tries to go back upon the statement he has made. Whatever this may be, the Trial Judge is entitled to find the terms of the contract on the evidence and his finding on a question of fact is final.

But the Judge bases his decision to some extent also on the terms of the bill to which I have made reference. After the sale, the sellers sent Ex. A to the purchasers and at the top of it the following words appear "Debit to M. Somasundaram Chetty and Co., Godown Street (defendant) interest at ¾ per cent. per mensem after 60 days *thavani*." By common consent, 60 days means 70 days and incidentally I may take this opportunity to observe that it reflects little credit on those engaged in piece-goods trade at Madras who glibly say that when they note down 60 days, they always mean 70 days. This habit has grown through several decades into a vice and the sooner it is given up the better.

Now, returning to the bill, the learned

Judges of the Small Cause Court have put to themselves the question. What is the meaning of this word *thavani*? The Trial Judge has held that it means "credit period." If he is correct, the sale is clearly a credit sale and the suit is within time. But the other two Judges are of the opinion that the word *thavani* means "a fixed period or a stipulated space of time." According to them, the period is mentioned in the bill merely for the purpose of the calculation of interest. In their view, the object of fixing a period is to provide that interest shall be calculated only on the expiry of this stipulated space of time. Their explanation for the term relating to discount is, that it has the effect of inducing the purchaser to promptly pay up the amount. I think it is necessary to extract the following passage from the judgment of the learned Chief Judge: "I need hardly say that the particular meaning to be attached to a term of a contract is one which has to be decided with reference to the facts of each case and upon the evidence in this case which I have considered carefully. I incline to the view that the *thavani* period in this case was the period of credit given to the purchaser." The learned Judge was certainly entitled to find on the evidence that the word *thavani* was used by the parties to the suit in the sense of a "credit period." If it has obtained a technical meaning and is used in that sense in a particular context, the document must be interpreted in the light of that meaning. That the word *thavani* has acquired various meanings in various lines of business, admits of no doubt. It is sufficient to refer for this purpose to *Ponnuswami Chetty* v. *The Vellore Commercial Bank Ltd.* (1), *Narayanan Chetty* v *Supiah Chetty* (2), *Muthiah Chettiar* v. *Ramanathan Chettiar* (3) and *Ramanathan Chetty* v. *Subramanian Chetty* (4). Oral evidence may be given under s. 98 of the Indian Evidence Act to show the meaning of technical, local and provincial expressions. Under this section, evidence of the meaning which words bear in mercantile transactions can be given. The dictionary meaning or the word *thavani* is said to be "a term or a fixed term" but if the word has obtained a technical meaning in a particular trade or when used in a particular context, the Courts when construing that word are bound to take into account that meaning. The learned Chief Judge says that on the evidence he finds that the word *thavani* is equivalent to a credit period, and speaking for myself with experience of such transactions extending over two decades, I am glad to find that the effect of the evidence as stated by the Chief Judge, confirms what I have always believed to be, the meaning of this word occurring in this context.

The 2nd and 3rd Judges were influenced by the observations of Mr. Justice Coutts-Trotter as he then was in a suit decided on the Original Side of the High Court. He said in that judgment: "All that *thavani* means so far as I can gather from the expert witnesses and from the dictionary that was produced is a fixed period or a stipulated space of time; so that the word credit which appeared to me to be almost fatal to the defendants' case is not there at all." The learned Judge was not in that case called on to find what the technical meaning of the word *thavani* was and for that purpose no witnesses were examined. He relied upon the dictionary meaning of the word and the testimony of an interpreter of the Court who, of course, gave a meaning to the word which he took from the dictionary. The case is not an authority in regard to the sense in which that word is used in the piece-goods trade as carried on in Godown Street. It is clear from the observations of all the three Judges that by usage certain terms are implied in transactions in piece-goods among Godown Street dealers and the learned 2nd Judge also adds that in Coral Merchant Street, business is now done in conformity with the Godown Street usage.

In *Rayner* v. *Rayner*(5), C. A. Vaughan Williams, L. J., says that the meaning of a word is relative to the circumstances and occasions and date on which the word is used and that it is the duty of the Judge to inform his mind not only by reference to dictionaries of good reputation but also by evidence of the meaning ordinarily given to it amongst those who use it. In *Holt & Co.* v. *Collyer* (6), Fry, J. observes: "That before evidence can be given of the secondary

(1) 56 Ind. Cas. 384; 38 M. L. J. 70; 11 L. W. 28; (1920) M. W. N. 75; 27 M. L. T. 81.

(2) 58 Ind. Cas. 639; 38 M. L. J. 437; 11 L. W. 418; (1920) M. W. N. 248; 43 M. 629.

(3) 43 Ind. Cas. 972; 7 L. W. 330; (1918) M. W. N. 242.

(4) 28 Ind. Cas. 688; 28 M. L. J. 372; 17 M. L. T. 266.

(5) (1904) 1 Ch. 176; 73 L. J. Ch. 111; 52 W. R. 273; 89 L. T. 681.

(6) (1881) 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 29 W. R. 502.

meaning of a word the Court must be satisfied from the instrument itself or from the circumstances of the case that the word ought to be construed not in its popular or primary signification but according to its secondary intention." In that case a person who had entered into a covenant not to use a house as a beer-house, opened a grocer's shop there at which he carried on the sale of beer to be drunk off the premises, as ancillary to his grocer's business. Evidence to show that the word 'beer house' was understood in the trade in a technical sense was rejected. The reason is stated by Fry, J., the lease was an ordinary lease by a landlord, who was not shown to be a brewer or connected with the brewing trade, to a person who was not, in any way engaged in the business of selling beer. In these circumstances if there be a technical signification to that word in the brewing trade there was no reason to suppose that the parties who were not connected with that trade so used it and on that ground the evidence offered was rejected. The present case is very different. The word *thavani* has been used by traders in piece-goods in a document relating to that trade and there can be no doubt that evidence can be given to show that the word is used in a particular sense. This again is a question of fact and the learned Trial Judge is entitled to find the meaning of the word as used in the document.

Supposing the word as used in the document really means a fixed period or a stipulated space of time, the defendants can found no argument on that. If that is the meaning of the word, the sale may be either a cash or a credit sale, and even assuming for a moment that Ex. A is the contract, which it is not, oral evidence can be given under proviso 5 of s. 92 to show that by the usage of the trade an incident not expressly mentioned in the contract(here that the sale is on credit) is a term of that contract. The learned Trial Judge is even then justified in finding that the sale is a credit sale. I answer the question submitted to us by the Small Cause Court by saying that the view taken by the learned Trial Judge is right.

Jackson, J.—This Reference has been made by three Judges of the Presidency Small Cause Court under s. 69 of the Act.

They state that the question of law on which they differ is whether the cause of action in a certain suit dates from a sale (in which case the suit would admittedly be time-barred) or whether it dates from the expiry of 70 days allowed for credit after the date of the sale (in which case the suit would not be time-barred). This is a question of fact rather than of law; and the Reference has really been made because the learned Judges have differed in construing a document which in their opinion affects the merits of the case. This document Ex. A is correctly described by them as being a bill, which contains a bill head to this effect. "Interest at 3/4 per cent. per mensem after 60 days period (*thavani*)." The mere construction of this bill presents no difficulty. Its heading is an announcement to the effect that after 60 days interest will be charged. But at the end of their Reference the learned Judges speak of this bill heading as if it were the suit contract. The bill is not a contract and its wording does not import a period of credit for the payment of the price. "*Thavani*" is a colourless expression meaning only "period." In itself it has no more significance than the latin word "per." It does not in itself convey the idea of credit. I agree with my learned brother that any particular sense in which the word may have been used must be proved *aliende*. I would answer the Reference of the Small Cause Court in the above terms.

V. N. V. *Reference answered.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 488 OF 1923.
July 24, 1924.
Present :—Mr. Justice Kanhaiya Lal.
Syed SALAMAT ALI—PLAINTIFF—APPELLANT
versus
Babu GAJ KUMAR CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 198 (2)—Title determined by Revenue Court—Subsequent suit, whether barred—Res judicata.

In a suit filed by a person against another who denies that the relation of landlord and tenant exists between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court.

Shahzade Singh v. *Muhammad Mehdi Ahmad Ali Khan*, 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. 8, distinguished.

Second appeal against the decree of the District Judge, Allahabad, dated the 22nd of December 1922.

Mr. *G. Agarwala*, for the Appellant.

Dr. *M. Waliullah* and Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to plot No. 281-A *khasra* situated in *mahal khas patti* Wahid Ali of the village Rajapur. The plaintiff is a co-sharer in *patti* "*ghairkhwahindgan*" of *mahal khas* of the said village. His allegation was that the defendant Gaj Kumar Chand had purchased a part of the share of Mubarak Ali but had no right to the plot in dispute.

It appears that a previous suit had been filed by Gaj Kumar Chand against Pitai for arrears of rent in respect of the plot in question to which Salamat Ali was also impleaded as a co-defendant. That suit was resisted both by Pitai and Salamat Ali. Pitai pleaded that he had held the land at one time as a non-occupancy tenant on behalf of Salamat Ali and that he had surrendered the holding afterwards and was not, therefore, liable for rent to any party. Salamat Ali set up his own title to the land. That suit was dismissed by the Court of first instance but decreed by the Collector on appeal against Pitai alone. His finding was that Pitai was really in possession on behalf of Gaj Kumar Chand. There was a further appeal by Salamat Ali to the District Judge who came to the conclusion that Salamat Ali was the owner of the plot in question, and that Pitai was not in possession and could not be made liable for the payment of rent.

The above decision was held by the Trial Court in the present suit to operate as *res judicata*. The lower Appellate Court has, however, found otherwise and dismissed the claim of the plaintiff in regard to that plot. In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. Section 198 cl. (2) of the Agra Tenancy Act provides for the determination of the same question in a separate suit. No relief was claimed in the previous suit against Salamat Ali. The plaintiff had claimed arrears of rent from Pitai. Pitai had denied that the relation of landlord and tenant existed between him and the plaintiff. He had further denied that he had been in possession. The Revenue Court proceeded to enquire whether he was in possession and on whose behalf and to whom he was liable to pay the rent of the plot in question. The Trial Court found against Gaj Kumar Chand. The Collector on appeal gave him a decree for arrears of rent against Pitai alone. On a further appeal to the District Judge that decree was reversed. The decision of the question of title in those circumstances between Gaj Kumar Chand and Salamat Ali cannot be treated as final or *res judicata* in view of s. 198, cl. (2) of the Agra Tenancy Act. Section 199 has no application because Pitai did not claim proprietary title in himself and for the same reason the decision in *Shahzade Singh* v. *Muhammad Mehdi Ahmad Ali Khan* (1) is also inapplicable. The lower Appellate Court finds that the plaintiff has failed to prove that he was the owner of the disputed plot. It further finds that the plot in dispute was in *patti* Wahid Ali in which the plaintiff Salamat Ali was not a co-sharer. The decision in the previous suit can, therefore, be disregarded. The appeal fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. 8.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 119 OF 1924.

August 22, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

GADIGI MUDAPPA AND OTHERS—INSOLVENTS—APPELLANTS

versus

SEERNALI PARAMESWARA BHAT AND OTHERS—PETITIONER AND RECEIVER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 14—Creditor's petition—Leave to withdraw—Discretion of Court.

Under s. 14 of the Provincial Insolvency Act, no petition to adjudicate a person an insolvent can be withdrawn without the leave of the Court.

Where a petitioning creditor who has since settled his claim with the insolvent applies to the Court for permission to withdraw the petition, it is open to the Court to refuse leave and to pass an order of adjudication.

Appeal against an order of the District Judge, Bellary, dated the 14th March 1924.

Mr. *T. M. Krishnaswami Iyer*, for the Appellants.

Messrs. *T. M. Venugopal Mudaliar* and *T. R. Venkatesa Iyer*, for the Respondents.

JUDGMENT.—The appellants before us were adjudicated insolvents by an order of the District Judge, dated the 14th March 1924. The petition in insolvency was filed on the 13th November 1922 by a creditor to whom about Rs. 20,000 was due by the insolvents. Various adjournments were obtained on the ground that the debtors were settling with their creditors. One of these orders of adjournment was made on the 4th of February 1924. It is specifically mentioned in it that "No further adjournment will be granted beyond the 25th February to which date this (that is, the petition) is finally adjourned." It is clear that the procedure prescribed by s. 24 of the Provincial Insolvency Act was followed and the learned Judge gave a finding that the insolvents committed an act of insolvency. As regards this, there can be no doubt, because Ex. A which is a notice issued by the debtors previous to the filing of the petition, contains a statement that the debtors were unable to pay their debts. It would, however, appear that the petitioning creditor having settled his claim with the insolvents applied to the Court for permission to withdraw his petition. Under s. 14 of the Provincial Insolvency Act no petition shall be withdrawn without the leave of the Court. The Court refused leave and passed the order of adjudication. There is nothing irregular in this and we see no ground for setting aside the order. Some minor grounds have been feebly urged by the learned Vakil for the insolvents but we find they have not been taken in the memorandum of appeal and and we do not think it necessary to discuss them. The appeal is dismissed with costs of the respondents which will come out of the estate.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 157 OF 1922.
May 16, 1924.

Present:—Mr. Henry Cecil Walsh, Acting Chief Justice, and Mr. Justice Ryves.

MUHAMMAD RAZA KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD ASKARI KHAN—DEFENDANT—RESPONDENT.

Public highway—Obstruction—Suit by private person, when maintainable—Special damage—Rule of equity, justice and good conscience.

The case of public ways and highways is one of those cases which must be governed by the rule of equity, justice and good conscience. [p. 306, col. 1.]

Waghela Rajsanji v. *Sheikh Masludin*, 14 I. A. 89; 11 B. 551; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.), referred to.

No action can be maintained for what is a mere general obstruction of a highway affecting the whole public at large by one person without proof of special damage. [*ibid*]

Fazul Haq v. *Maha Chand*, 1 A. 557; 2 Ind. Jur. 790; 1 Ind. Dec. (N. S.) 386, *Satku* v. *Ibrahim*, 2 B. 457; 2 Ind. Jur. 828; 1 Ind. Dec. (N. S.) 726 and *Adamson* v. *Arumugam*, 9 M. 463; 10 Ind. Jur. 374; 3 Ind. Dec. (N. S.) 718, followed.

Land which was once in private ownership can only be converted into public use in respect of its surface by an act of dedication. [p. 305, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Piggott, dated the 5th June 1922, and reported in 70 Ind. Cas. 758.

Mr. *S. Z. Mehdi*, for the Appellants.

Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—In this case which raised a question of some importance, we regret that we find ourselves unable to agree with the view taken by the learned Judge. He says in his judgment that, he can find no case in the official reports in which the principle contended for by the appellant has been affirmed, or applied by the Courts in India. In this, we think he was misled. It appears that the relevant authorities were not quoted to him. The suit of the plaintiff has been dismissed on the ground that no one, except the Municipal Board, in any particular place in which a public way is obstructed, has any right to complain of the obstruction in a Civil Court. We think that this is incorrect, and lays down the true principle too narrowly. The case is important, for this reason, because Municipal Boards, at any rate in these Provinces, are young, untrained and apparently not too well-equipped for the discharge of the difficult duties which they have to perform. For example, in the district from which this case comes, nobody could say that the condition of the

roads, at any rate, in Allahabad, was such as would meet with the approval of an ordinary competent surveyor who was jealous of his reputation as a road authority, and the case is, therefore, important, inasmuch as whereas considerable inconvenience might be inflicted upon individuals in these Provinces by obstruction to ways and streets which are vested in the Municipal Authorities, inconvenience which cannot be compensated by cash, we are afraid that if individuals so inconvienced had to wait until the Municipal Board was stirred into sufficient activity, to bring a suit in order to redress the grievance of obstruction they would probably have to wait a very considerable time. The point may be stated in a nutshell. The plaintiff and the defendant occupy adjoining houses in this locality. Between their two houses runs a road or lane which is obviously of great value and convenience to both of them. It is not suggested that it is a private way, jointly enjoyed by both of them. As to its origin the plaintiff's case is, and there appears to be no dispute about it, that it was originally his father's, that the road or way now vested in the public authority for the use of the public, was dedicated to the public by his father; that the soil still remains in his proprietorship, and that the defendant, by blocking up either end of this lane by means of *pakka* walls which absolutely prevent the plaintiff from using it in any shape or form, has caused not only an obstruction which must necessarily concern any member of the public who desires to use the road but which inflicts serious inconvenience and obstruction amounting to special damage, upon the plaintiff. Except so far as concerns the special damage suffered by the plaintiff which is a question of fact and which has not been clearly determined by any judicial decision in the lower Courts, these facts appear to be agreed on both sides. Now the vesting in local authorities in these Provinces, and the control exercised by local authorities in these Provinces over streets, roads, lanes and ways which are public, and over which the public have a free, unrestricted right of passage, is statutory. As regards Allahabad from which this case comes, it turns upon s. 113 of the Municipalities Act of 1916, or the corresponding section of the previous Act. With regard to the law of highways generally in India there is no Code. But dedication, which is the usual and almost invariable method by which land which was once in private ownership becomes, as regards its surface, reserved for the use of the public as a highway, precedes vesting and control. In other words, highways, streets and public roads are older than Municipalities, and older than the section which vests them in Municipalities; and, therefore, the statement that a public way is vested in and belongs to a local authority under the Municipalities Act, 1916, is only a partial statement of the legal position, a point which, we think, the learned Judge overlooked. Every public road or way must have a history, and every piece of land in the Province must have had an ownership at some time or another, and land which was once in private ownership can only be converted, into public use in respect of its surface, by an act of dedication. A dedication means something more than a gift. It is derived from the word "to give," but it involves a setting apart by the donor for a specific purpose. Certainly in England, and probably in an ancient country like India, it is impossible, in the vast majority of cases, to say when this dedication took place. So that, as a matter of accurate statement or historical truth, the existence of a prior dedication, with regard to an ancient public way, takes very much the nature of what is called a lost grant. It is entirely different in its legal attributes, and in its origin, from a private way or easement which may be acquired by prescription following upon continuous user. The public cannot acquire a public way by prescription, and where a public way is found, and no traces are forthcoming of its origin, the law presumes a dedication or a lost grant by the owner to whom the land belonged, and who alone could dedicate it. These principles, which are really elementary, but not always clearly understood, are the law as understood and accepted by generations of lawyers in England. It is, of course, sometimes dangerous to attempt to ascertain the law in India by the discussion of English cases. But in a matter of this kind, where, in legislation like the Municipalities Act following closely upon English Local Government Legislation, the Legislature has left the matter at large, without following it up by codifying the general law on a topic such as highways, the Courts in

India are really enjoined to apply the English principles. That statement of the law is borne out by Act XII of 1887, more generally known as "The Bengal and Assam Civil Courts Act," which codifies and carries forward the old Bengal Regulations. Section 37(2) enjoins upon the Court, in cases not provided for by the foregoing section which deals with traditional Muhammadan and Hindu Law, or by any other law for the time being in force, which, of course, includes a Municipal Statute, the duty of acting according to justice, equity and good conscience. In the case of *Waghela Rajsanji* v. *Sheikh Masludin* (1), the Privy Council has declared that that direction is generally interpreted as meaning the application of English principles, unless there is something in the state of Indian society which makes those principles either inapplicable altogether, or necessarily modified. We think that the case of public ways and highways is one of those cases which must be governed by the rule of equity, justice and good conscience as interpreted by the Privy Council, and that, therefore, the English principles are applicable, as was argued by the appellant before the learned Judge of this Court. Without going into the case, we merely draw attention to the fact that in saying this, we are not laying down any novel proposition although it does appear to be a proposition which was overlooked in the argument of this case and by a distinguished lawyer of this Court. But it is a proposition which has been clearly enunciated and accepted by at least three of the High Courts including Allahabad, if not by all of them: *Fazal Haq* v. *Maha Chand* (2), *Satku* v. *Ibrahim* (3) and *Adamson* v. *Arumugam* (4).

The Madras case is particularly interesting because the application of the rule of equity, justice and good conscience was used there to enforce the rule of the English Law against the plaintiff, that is to say, in holding that no action can be maintained for what is a mere general obstruction of a highway affecting the whole public at large, by one person without proof of special damage, a fact which was recognised by the learned Judge in his judgment. But the right to sue, while carefully guarded as laid down in *Adamson* v. *Arumugam*(4) is not destroyed, as the Judge seemed to think, by the fact that the road has become vested in, and belongs to the Municipality. We might here observe, lest it be thought that we are ignoring the expression "belonging to" which is contained in s. 113 of the Municipalities Act, that the words "vesting" and "belonging to" as applied to public ways which are vested in the Municipalities, clearly relate only to the streets, ways and passages or whatever else they may be, which belong to the public. In the case of a public way it is the surface and not the soil which constitutes the street; it is the surface along which the public have the right to pass, and it is the surface for the purpose of lawful passage which defines the public right. And therefore, when the words "belonging to" are used in the section, it is obvious that the Legislature did not intend to vest in the Municipalities anything more than what was necessary to constitute the street or passage, and did not thereby deprive the owner of the land who made the original dedication of the soil which he necessarily reserved to himself when he was content to dedicate the surface to the use of the public. So that the Courts in India and the Courts in England are unanimous in confining the right of suit and the right to compensation, in the case of a particular individual, to a person who can establish special damage. Special damage is not always easy to define or foresee, but it is well stated in the judgment in *Satku* v. *Ibrahim* (3) at page 459*:—

"More particular damage by the nuisance than the public in general, as if any accident occur to him, or he be obliged to go a greater distance and be thereby put to extra expense in the conveyance of his goods or otherwise." And without in the least desiring to dictate to the lower Court, it is material to point out, inasmuch as this part of the case has not really been considered in detail and it is really a question of fact, that, in this particular instance, it would appear from the map that the plaintiff would, every day and every hour of the day when he desired to leave his house by the entrance on what is apparently the eastern side, and turning at right angles to the left to walk in a northern direction, be compelled to go the other way and travel at least 3 or

(1) 14 I. A. 89; 11 B. 551; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. s.) 364 (P. C.).

(2) 1 A. 557; 2 Ind. Jur. 790; 1 Ind. Dec. (N. s.) 386.

(3) 2 B. 457; 2 Ind. Jur. 828; 1 Ind. Dec. (N. s.) 726.

(4) 9 M. 463; 10 Ind Jur. 374; 3 Ind. Dec. (N. s.) 718.

* Page of 2 B.—[*Ed.*]

4 times as far and 3 or 4 times as fast, if he were pressed for time. In our view that would amount to special damage, or a more particular form of nuisance suffered by him than by the general public. And we think the lower Appellate Court ought to consider, even although the particular form of nuisance is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way a Court of Justice would remove by granting an injunction ; for example, a mandatory injunction to remove the obstructing walls.

Some reference was made by the Counsel who argued the case very fairly on behalf of the respondent, to s. 91 of the Civil Procedure Code. We do not propose to attempt to explain to what extent s. 91 overlaps, or is parallel with, the right of a local authority, like a Municipality, to sue in respect of an obstruction to a public right of way, or how far it affects persons like the plaintiff, who wished to sue with the sanction of the Legal Remembrancer. We would merely utter a word of warning that s. 91 is a provision for procedure. It does not purport to create a right which did not exist before. It certainly does not purport to deprive anybody of a right derived from the general law of the land. Sometimes it is said to be, what one may call, a prohibitive section, which prevents a person from asserting a right except in a particular way. A Court, which applies the section, must avoid treating the section as though it went further than it does and deprived a person, or individual, of a right, and we think, we may say this much at any rate, without going outside the questions which arise in this case, that it cannot possibly be held to apply to this particular case. For example, a gentleman who was more inconvenienced by the obstruction to a public way in his immediate neighbourhood than any one else might be the most unpopular person in the neighbourhood. Indeed it is the fate of persons who are unpopular, to find themselves frequently more inconvenienced by the acts of their neighbours than other people, and it would create injustice if a man who happened to be so unpopular that he could not get anybody to join with him in a suit, could be deprived entirely of the use of a necessary public way merely because he could not show under s. 91 of the C. P. C. that he was one of two persons who were desirous of asserting their right. We think that we are merely declaring again the law as it has been recognised to exist for a long time past. We must allow the appeal and remand the case to the lower Appellate Court to decide the following issues :—

(1) In what respect and to what extent, if any, has the plaintiff suffered a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the walls built by the defendant ?

(2) Would the plaintiff be adequately compensated by a sum of money as damages, and a refusal of the injunction so as to leave the walls permanently standing ?

(3) Has anything happened other than the dedication of this public way and the vesting section of the Municipalities Act to take the original ownership of the land out of either the plaintiff or his fathers ?

Either party will be at liberty to tender fresh evidence. Costs will abide the result.

Our attention is now drawn to a further authority [*Tota* v. *Sardul Singh* (5)] in which it is said that a *zemindar* does not sue as a guardian of the public in relation to a way in his village but in respect of an interference with his own rights of property. We will consider this when the case comes back with the findings on the further issues remitted.

After the return to the order of remand their Lordships delivered the following

JUDGMENT.—On the findings of the Court below which have been set out in a variable judgment there is no doubt that the appellants are entitled to succeed and to have a decree in their favour. We decree a mandatory injunction against the defendants directing them to pull down the walls and to restore the way to its former condition. This is to be done at once at their (defendants') own expense and the way must be made as good as it was before. The defendants and their agents must be restrained by an injunction from interfering with the plaintiffs' use of the way. The plaintiffs must also have a decree for Rs. 10 nominal damages and the costs of the suit in the Courts below and in this Court including in this Court fees on the higher scale.

K. S. D. *Order accordingly.*

(5) 10 A. 553 A. W. N. (1888) 263; 6 Ind. Dec. (N. S.) 372.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 296 OF 1923.

August 1, 1924.

Present:—Mr. Justice Lentaigne.

HLA BAN U AND ANOTHER—APPELLANTS

versus

A. V. P. L. RAMANATHAN CHETTYAR—RESPONDENT.

Mortgage—Equity of redemption, purchaser of—Mortgage-decree, satisfaction of—Purchaser of equity of redemption, rights of—Attachment, proof of—Entries on warrant, whether sufficient.

Where the debt due under a mortgage-decree is paid off by the person who had purchased the equity of redemption and the entire interest in the land, the rights under the mortgage-decree are kept alive and enure for the protection of the purchaser. [p. 310, col. 2.]

Parashram v. *Govind*, 21 B. 226; 11 Ind. Dec. (N. S.) 153 and *Vanmikalinga Mudali* v. *Chidambara Chetty*, 29 M. 37, followed.

Where at the time of the purchase, one of the items of the mortgaged property has already been attached by the mortgagee in execution of a money-decree of his and the property having been put to sale, the mortgagee obtains a sale certificate without the knowledge of the purchaser of the equity of redemption, he cannot set up this sale as against the purchaser. [p. 310, col. 2.]

Shyam Lal v. *Bashir-ud-din*, 29 A. 778; 3 A. L. J. 630; A. W. N. (1906) 230, referred to.

The warrant of attachment can be rightly put in evidence for the limited purpose of proof of the issue of such warrant and as a basis of the proper evidence that the attachment thereunder was rightly effected. [p. 309, col. 2.]

But the mere entries on the warrant that the notice was posted on the courthouse are not sufficient evidence of the execution of the warrant as against the person disputing the regularity of the attachment. [p. 310, col. 1.]

Appeal against a decree of the District Court, Akyab, in Civil Appeal No. 31 of 1923.

Mr. *Chari*, for the Appellant.

Mr. *Bose*, for the Respondent.

JUDGMENT.—In order to understand the facts in issue in the suit now under appeal it is necessary to mention some earlier proceedings. In Civil Regular No. 13 of 1918 of the District Court of Akyab the respondent Chettyar firm obtained a mortgage decree againt three persons, Mi Shauk Pon Me, Nga Ni Daung, and Nga Hla Aung, for a sum of Rs. 7,627-2-8 including costs and an order for the sale of eight pieces of land being the mortgaged property. By a proclamation issued in such suit the said eight pieces of land were proclaimed for sale on the 19th May, 1919, in execution of such mortgage decree. By a registered deed bearing date and held to have been executed on the 3rd May, 1919, the said three defendant-mortgagors purported to sell and transfer the said eight pieces of land to the second appellant, U Kyaw Zan U, for the price of Rs. 9,000. The said purchaser U Kyaw Zan U, as he was entitled to do under s. 55 (5), cl. (*b*) of the Transfer of Property Act, 1882, paid the amount of the said mortgage decree Rs. 7,627-2-8 into the District Court to the satisfaction of the said mortgage decree on the 14th May, 1919, and at the same time filed a petition in such suit setting out the fact of his purchase and praying for permission to make such deposit and for the cancellation of the proclamation for a sale on the 19th of that month. The sale was stopped, full satisfaction of that decree was entered up, and on the 10th June, 1919, the amount was paid out by the Court to the Advocate of the Chettyar firm.

In Civil Regular Suit No 8 of 1917 of the Sub-Divisional Court of Minbya, the same Chettyar firm had obtained a money decree for Rs. 1,143 12-0 against the same three persons, Mi Shauk Pon Me, Nga Ni Daung and Nga Hla Aung on the 21st July, 1917; and on the 10th April, 1919, in Execution Case No. 17 of 1919 of the same Sub-Divisional Court and in execution of that money-decree the Chettyar firm applied for the attachment of the piece of land the subject-matter of the present suit which is also one of the eight pieces of land covered by the said mortgage decree and included in the subsequent deed of conveyance on sale to the appellant, U Kyaw Zam U. The evidence or absence of evidence as to the steps taken to effect such attachment will be discussed later on in this judgment, as an important issue in this case depends thereon. The sale of such piece of property in execution of such money decree was carried out by the Bailiff of that Court on the 28th June, 1919, and the decree-holder, the said Chettyar firm, was declared the purchaser thereof for Rs. 482-8-0; on the 1st August, 1919, the sale certificate was issued to the Chettyar firm as such purchaser.

On the 21st January, 1921, the said Chettyar firm instituted the suit now under appeal, Civil Regular No. 14 of 1921 of the Township Court of Minbya against the first appellant Hla Ban U claiming Rs. 275 as damages for the use and occupation of the said land. Hla Ban U claimed to be the tenant under the 2nd appellant U Kyaw Zan U: and on the 10th February, 1921,

the 2nd appellant U Kyaw Zan U was made a second defendant in the suit; he filed a written statement claiming to be owner under the deed of sale, dated the 3rd May, 1919, which he filed with his written statement. At the hearing, the two documents, the deed of the 3rd May, and the Court sale certificate were treated as admitted in evidence, but except that before settlement of issues the parties each stated that he owned the land or admitted the rent. No evidence was recorded and as the statements by the parties were taken before settlement of issues, there was no cross-examination.

On the 30th of March, 1921, the Township Court dismissed this suit on the ground that the plaintiff was unable to prove that the attachment was made before the land was sold to Kyaw Zan U; but on appeal the District Court of Akyab reversed that decree on the ground that the sale certificate issued by the Court proved plaintiff's ownership, whilst in the opinion of the Judge the registered deed of sale produced by U Kyaw Zan U, though admitted in evidence, was insufficient to prove defendant's title. On second appeal the decree of the District Court was reversed by the late Chief Court, and it was held that the registered deed having been admitted in evidence without any objection being taken thereto, it was not open to the District Court, of its own motion, to object to the registered deed as not sufficiently proved; and the case was sent back to the Trial Court with the direction that the case should be tried *de novo* on the basis that no further evidence be taken as to the two deeds but that the trial be on the five issues framed by the Chief Court.

When the case was heard again, the parties did not examine any witness, but produced certificate copies of certain documents in addition to the documents previously filed by them. The Township Court again dismissed the suit with costs; and the District Court again reversed the decree of the Trial Court and granted the plaintiff a decree as prayed with costs. It will be more convenient to discuss the findings of the lower Courts, issue by issue, as the re-trial was directed to proceed on specific issues.

The 1st issue was—What was the date on which the attachment in C. R. No. 17 of 1919 of the Sub-Divisional Court of Minbya was actually effected? The only evidence produced by the Chettyar firm on this issue was the filing of a certified copy of the warrant of attachment with a report by the Bailiff of the Township Court attached to it. From that report it is obvious that the Bailiff did not himself go to the land, but that some process-server had reported to him his movements and that he had tendered a copy to Ma Mi Shauk Pon Me who refused to sign her name saying that she had nothing to do with the warrants, that a copy was posted on the notice-board of the village headman that a post was fixed on the land and a copy was posted on it and the land seized. The dates of such occurrences are not given by the process-server in his report, but the report of the Bailiff on the warrant contains entries that the notice was posted in the court-house on the 12th April, that the date of execution was the 18th April 1919, and the date of the retun the 21st April, 1919. On this the Township Court held that the attachment was actually effected on the 18th April, 1919 and the District Court accepted that finding, but neither Court has gone fully into the question and both the Courts appear to assume that the mere entries on the warrant are sufficient evidence of such execution whilst the appellant is disputing the regularity of the attachment. In my opinion the warrant was rightly put in evidence but only for the limited purpose of proof of the issue of such warrant and as a basis of the proper evidence that the attachment thereunder was properly effected; and it would be impossible to prove the actual effecting of the attachment without first putting the warrant into evidence.

There is a dispute as to how such an attachment should be effected; I think that the appellant is wrong in his contention that a notice to the District Court was necessary, and that he was also wrong in his contention that the mortgaged property was in the custody of the Court. I think that the Chettyar firm was entitled to attach the property in the manner provided in sub-r. (2) of r. 54 of O. XXI, so as to enable the firm to proceed against the equity of redemption, as was held in *Parashram* v. *Govind* (1), and that if the property had been sold by the Court under the mortgage decree, such an attachment would have given the Chettyar firm a claim against the balance of the proceeds of sale remaining after the mortgage-debt, expenses, etc., and all secured claims had been discharged, provided that a notice of the previous effecting of the

(1) 21 B. 226; 11 Ind. Dec. (N. S.) 153.

attachment reached the District Court before the distribution of the proceeds. Rule 13 of O. XXXIV gives the order of payment in one class of case.

The question then arises whether the warrant proves the date of the effective attachment. In my opinion, the entries or reports as to how the process-server effected the execution of the warrant cannot in this case be given a higher probative force than depositions in the execution proceeding; but such depositions would be inadmissible in this case under s. 33 of the Indian Evidence Act, 1872, for various reasons obvious on a perusal of that section, and there is nothing to show that the 2nd defendant agreed to such hearsay reports being treated as proof of the facts alleged. Moreover, the process-server does not state that he personally knew the land in suit, and there is no report by the headman stating that the land on which a warrant was alleged to have been posted was that now in suit. In my opinion much clearer evidence that all requisite steps had been taken is necessary when the question arises between the attaching creditor and a third party, who cannot be treated as having notice of the proceeding or as bound by the attachment until such proof has been given. This is not a case in which an intervenor, having discovered an attachment objects to it. I pointed out these objections at the hearing, and I was then requested by the Advocate for the respondent to remand the case for such evidence. I do not think that this is the class of case in which such a remand should be ordered especially as the previous order for a re-trial was granted for the express purpose of enabling the plaintiff to prove such points; and it is obvious that the Chettyar firm having realised the sum of Rs. 7,627-2-8 from the 2nd defendant, is now trying on technical grounds to deprive him of the benefit of portion of the property purchased with that money. I must, therefore, hold that it is not proved when the attachment was actually effected and that it is not proved that it was prior to the 3rd May, 1919.

The 2nd issue is— "If the attachment was effected prior to the 3rd May, 1919, can the 2nd defendant plead that such attachment was in operation against his purchase on the 3rd May, 1919?" Both the lower Courts decided this issue against the 2nd defendant. Having regard to my finding on the 1st issue, this issue does not arise. If it had been proved that the attachment had actually been effected prior to the 3rd May, 1919, s. 64 of the Code would have technically applied, but the question would arise as to whether the facts alleged by defendant under the 3rd and other issues would raise an estoppel or other protective shield.

The 3rd issue—"If the sale to the 2nd defendant is inoperative as regards the land in dispute in the present suit, can the 2nd defendant set up as a shield the mortgage decree in C. R. No. 13 of 1918 of the District Court of Akyab?" The Trial Court decided this issue in favour of 2nd defendant, but the District Court reversed that finding, because the case did not come within s. 101 of the Transfer of Property Act, 1882. The appellant relies on the decisions in *Vanmikalinga Mudali* v. *Chidambara Chetty* (2) and in *Shyam Lal* v. *Bashir-ud-din* (3); and it is contended that as the mortgage-debt due under the decree for Rs. 7,627-2-8 was paid in satisfaction of the decree by the 2nd defendant who had bought the equity of redemption and the entire interest in the land and the 2nd defendant-appellant was entitled to keep alive the rights under the mortgage decree and it was for his benefit that he should do so, and that, therefore, such rights would enure for the protection of the 2nd defendant-appellant. In this case the 2nd defendant-appellant himself paid the amount into Court in his own name and on his own account, so it must be treated that he paid the amount for his own protection and in order to obtain a title to the property; and this would be even a stronger case than that decided by the Privy Council in *Dinobhandu Shaw* v. *Jogmaya Dasi* (4). In that case there was an attachment of the equity of redemption of certain lands which were the subject of two mortgages. Pending the attachment the mortgagor desired to pay off both mortgages, and Rs 40,000 was lent to him by the new mortgagee on the promise that on re-payment of the previous mortgages, the property be mortgaged to him; the two mortgages were paid off and then the property was reconveyed to the mortgagor, who handed the reconveyance to the new mortgagee. After that the appellant in that suit purchased at the execution sale with notice of the transactions, and it was held that the intention of the

(2) 29 M. 37.
(3) 29 A. 778; 3 A. L. J. 630; A. W. N. (1906) 230.
(4) 29 I. A. 9; 29 C. 154; 12 M. L. J. 73; 4 Bom. L. R. 238; 6 C. W. N. 209 (P. C.).

parties was that the earlier mortgages should not be extinguished on being paid off, but were to be kept alive for the benefit of the respondent mortgagee, the object being to give him the only charge on the property. That decision would apply exactly to this case with the modification that the object here was to sell the entire property to the appellant-2nd defendant. In that case it was urged that whatever the intention of the parties may be, s. 276 of the C. P. C., 1882 (corresponding to s. 64 of the later Code) rendered the mortgage for Rs. 40,000 wholly void as against the appellant auction-purchaser. In reply to this their Lordships of the Privy Council said :—"So to construe this section would be quite wrong. So far as the mortgage for Rs. 40,000 prejudiced the execution creditor, it is void as against him ; but the section does not render void transactions which in no way prejudice him; and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the object of that section is to give an execution creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties." These remarks must apply to the case now before me, and their application cannot have any less force in the case now before me where the attaching creditor and execution purchaser was himself the mortgagee who was paid off pending the attachment. For these reasons I think that this issue should also be decided in favour of the appellant.

The case which I have cited would be authority for the proposition that the Chettyar by his execution sale could not have any greater right than against the original equity of redemption; and the question occurred to me whether the fact, that the mortgagee who was paid off was also the attaching creditor, does or does not improve the position of the appellant. A copy of the petition under which the money was paid into Court is an exhibit and has been translated, and it expressly pointed out that 2nd defendant Kyaw Zan U had bought the mortgaged properties for Rs. 9,000 from Mi Shauk Pon Me on the 3rd May, 1919 and that the Rs. 7,627-2-8 had been retained and was being paid into Court as the decretal amount; and the prayer of the petition was that the petitioner be allowed to make such deposit, that the sale proclamation be cancelled and that the suit be closed. That petition presumably gave the Chettyar firm notice of the 2nd defendant's position ; and presumably with such knowledge the Chettyar firm received the sum of Rs. 7,627-2-8 and drew it out of Court. On these facts I think that the Chettyar firm should have realised that the 2nd defendant was presumably paying this amount under the belief that he was obtaining good title to all the mortgaged property. That being so, the question arises whether it would be open to the Chettyar firm to now allege that the 2nd defendant had acquired no title to one piece of the properties so sold unless he could also show that at the time he accepted that Rs. 7,627-2-8 he had expressly informed the 2nd defendant about the attachment then existing according to the Chettyar and which he afterwards made the basis of his purchase and of the present suit. I pointed this out to the Advocates at the hearing and that there was no suggestion that the 2nd defendant had been informed about the alleged attachment; and it was urged for respondent that this point had not been taken by the appellant. That may be true, though it is a point of estoppel which would obviously arise on the facts as alleged for appellant. The point or some similar point was possibly urged before the District Judge who held that he could see no reason why plaintiff should acquaint 2nd defendant about the application to attach the property. As no issue has been framed on this question of estoppel and it is alleged that it was not raised, I will not express any final opinion on it, and it is, I think, unnecessary to decide this point in the present appeal. I may here note, however, that the actual form of the present suit is itself suggestive that the Chettyar firm realised the weakness of their case, and were launching a speculative suit for damages for a temporary use and occupation as a trespasser against a person in occupation who then alleged himself to be a tenant of the 2nd defendant, when the more appropriate claim would have included a claim for recovery of possession based on the same alleged title against both the defendants.

The 4th issue is—"Did the 2nd defendant or his vendor know of the application in Execution Case No. 17 of 1919 to attach the property in suit, when he purchased the

same ? If so, is the 2nd defendant postponed to the plaintiff in consequence of such knowledge?" Both the lower Courts decided that there was no reason to suppose that the defendants knew of the application to attach the property when he purchased it ; and decided this issue against the plaintiff, as their was no evidence. I agree with that finding.

The 5th issue is—"Did the 2nd defendant take any steps to have the sale certificate cancelled ? If he did not can he claim priority ?" Both the lower Courts have held that the 2nd defendant took no steps, and the learned District Judge added a finding that "he cannot claim priority," but he gives no reason for such finding. In para. 2 of his written statement, the 2nd defendant stated that he was not aware of the allegations in para. 2 of the plaint ; and he thereby denied all knowledge of the fact that plaintiff had been a purchaser at the Court sale or that the property had been sold at the Court sale. No attempt was made to show that 2nd defendant had any such knowledge ; and the plaintiff by his action in originally omitting to join 2nd defendant as a party to this suit, was obviously asserting that he had no knowledge of the claim of 2nd defendant, and subsequently he joined him in an amended plaint merely on an assertion that first defendant alleged that he had paid rent to 2nd defendant. It is difficult to believe that in the period of twenty months between May, 1919, and the institution of the suit in January, 1921, the plaintiff firm remained so completely ignorant of the fact that 2nd defendant was claiming to be purchaser of the land. As I have indicated above, the facts that 2nd defendant paid the Rs. 7,627-2-8 into the District Court on the 14th May, 1919 and at the same time formally alleged his purchase of the mortgaged lands in a petition, would presumably have been communicated to the plaintiff before the plaintiff drew that money out of Court. I cannot, however, find any indication that during this period, the fact of plaintiff becoming an auction-purchaser of the land now in suit was ever communicated to or brought to the knowledge of the 2nd defendant until the present suit was instituted in 1921. This fact is a sufficient answer to the contention so strongly urged by the Advocate for the plaintiff-respondent that r. 92 of O. XXI of the Code is a bar to the defence. The 2nd defendant could not be expected to apply to set aside a sale in a suit to which he was not a party and which had never been communicated to him and of which he expressly denies having any knowledge. Consequently, I must hold that the plaintiff has not established the necessary basis of fact even for a discussion as to the question whether r. 92 could have any application.

For the above reasons I must hold that the plaintiff has failed to establish his claim or that he had acquired any title to the land in suit by reason of the alleged Court sale and I, therefore, set aside the decree of the District Court and direct that the suit be dismissed with costs throughout.

K. S. D. *Decree set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 88 OF 1922.

August 2, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

S. M. S. SUBRAMANIA CHETTIAR—PLAINTIFF—APPELLANT

versus

SINNAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, powers of—Interference in favour of non-appealing respondent—Principles applicable—Discretion of Court—Grounds for not filing appeal—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), s. 91—Attaching creditor—Right of redemption.

The powers of the Appellate Court under O. XLI, r. 33, C. P. C., may be exercised notwithstanding that the appeal is as to part only of the decree. They may be exercised in *favour* of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or memorandum of objections, but not *against* a party not before the Appellate Court, without hearing him and without affording him an opportunity to show cause or argue against it. [p. 314, col. 1.]

Where a respondent when called upon to support the judgment of the lower Court supports it, or is able to do so, not on the ground on which the lower Court has based it, but on more fundamental grounds which may go to the very root of the case of the appellant, it becomes necessary for the Court of Appeal for the purpose of deciding the appeal to give its decision on those more fundamental grounds. If in coming to a conclusion on such fundamental grounds, the Court finds that the result of giving effect to its decision on the fundamental questions or questions involved would be to render illogical or illegal that portion of the decision of the lower Court which has not been appealed against, then subject to the Court not making an order against a party behind his back the Court is empowered to

make the decision as a whole logical and consistent. The question, however, is one for the judicial discretion of the Court. In any case in which there are grounds justifying a party in not filing an appeal or memorandum of objections, judicial discretion may properly be exercised in his favour. [p. 315, col. 2.]

Where a party does not file an appeal or memorandum of objections against the decree owing to judicial authorities being against him, which authorities are subsequently overruled, there is sufficient excuse for not filing the appeal or memorandum of objections. [p. 3.4, col. 2.]

The provisions of r. 33, of O. XLI, C. P. C. should not be read and construed as subject to the provisions of r. 22 of the said Order and the Court Fees Act, Limitation Act, etc., [p. 314, col. 1.]

Rangamlal v. *Jhandu*, 11 Ind. Cas. 640, 34 A. 32; 8 A. L. J. 1111, relied on.

Nagalla Katayya v. *Nagalla Mallayya*, 8 Ind. Cas. 337; (1910) M. W. N. 719; 9 M. L. T. 39, not followed.

The statutory right given by cl. (*f*) of s. 91 of the Transfer of Property Act can be exercised only by a judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property, but an auction-purchaser in execution of such a decree sheds his character as attaching creditor by such a purchase and is not entitled to redeem. [p. 316, cols. 1 & 2.]

Chamiyappa Tharakan v. *Rama Iyer*, 62 Ind. Cas. 121; 44 M. 232 at p. 240; 40 M. L. J.65; (1921) M. W. N. 53, relied on

In O. XXXIV, r. 1, C. P. C., the expression "having an interest either in the mortgage security or in the right of redemption" does not include a person who has a mere statutory right to redeem given to him under cl. (*f*) of s. 91 of the Transfer of Property Act, and the expression "in the right of redemption" means and refers only to an interest in the estate itself which is called the equity of redemption. [p. 317, cols. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Madura, in Appeal Suit No. 96 of 1920 (A. S. No. 224 of 1920, District Court, Madura), preferred against that of the Court of the Second Additional District Munsif, Madura, in Original Suit No. 10 of 1918.

Mr. *T. L. Venkatarama Iyer*, for the Appellant.

Mr. *P. R. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.—Questions of some difficulty have been raised and argued in this second appeal. The facts though somewhat complicated may be very briefly set out. The plaintiff who is the appellant in this second appeal obtained a money decree against one Subbiah Pillai and others and in execution of the decree procured the attachment of the suit property in October 1913. The defendant who had previous to such attachment got a mortgage of the suit property from the said Subbiah Pillai filed a suit on the mortgage in November 1913 and obtained a preliminary decree in December 1913. To this suit the plaintiff was not made a party. The plaintiff, however, in pursuance of the attachment obtained by him brought the property to sale and purchased it himself in April 1914. The first defendant on the other hand proceeded with his mortgage-decree and at the sale held by the Court, purchased the property himself in March 1916. The plaintiff thereupon filed the suit from which this second appeal arises claiming to be entitled to redeem the suit property from the mortgagee by payment to the defendant of what may be found due to him on the mortgage originally in his favour. The Court of first instance decreed the plaintiff's claim but he filed an appeal therefrom for the purpose of having reduced in appeal the amount he was found liable to pay for redeeming the mortgage. When the plaintiff's appeal came up before the Appellate Court, the learned Subordinate Judge finding that the plaintiff had no cause of action or right to redeem dismissed his suit in its entirety under the provisions of r. 33 of O. XLI, C. P. C. And hence this second appeal.

The learned Vakil for the plaintiff-appellant contended that the lower Appellate Court had not on a proper construction of r. 33 of O. XLI, C. P. C. any right or jurisdiction to dismiss the plaintiff's suit in its entirety and even if it had jurisdiction, the jurisdiction was liable to be exercised with judicial discretion and that the lower Appellate Court acted improperly in exercising such discretion and dismissing the plaintiff's suit, especially when the defendant had filed no appeal or even memorandum of objections against the decree passed against him. As has often been pointed out, the terms of r. 33 of O. XLI, C. P. C., are, undoubtedly, very wide. It may be of importance, however, to note that the terms of the rule are not really as wide as they have been sometimes supposed or taken to be. It is clear that by the use of the words "respondents or parties" the power was intended to be exercised by the Court even in *favour* of parties to the litigation though they may not be before the Court of Appeal either as appellants or respondents. But the rule speaks of the power conferred by it being exercised *in favour* of such parties and not against them for the obvious reason that whereas an order may be made in favour of a person even though he may not be present, it is against

all principles of justice that a power should be exercised against a person, behind his back and without his having had an opportunity to be heard in the matter. I cannot, therefore, regard as correctly decided such a case as *Nagalla Kotayya* v. *Nagalla Mallayya* (1), where the Second Appellate Court passed a decree, against a defendant in the original suit who was not before that Second Appellate Court, without hearing him and without even affording him any opportunity to show cause or argue against it. Mr. T. L. Venkatarama Iyer, the learned Vakil for the appellant, contended that r. 33 of O. XLI, C. P. C. should be read and construed as subject to the provisions of r. 22 of the said Order and the Court Fees Act, Limitation Act, etc. It seems to me that such a contention is obviously untenable especially having regard to the provisions of that rule that the power may be exercised notwithstanding that the appeal is as to part only of the decree and may be exercised in *favour* of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objections. In support of such a contention, however, the case of *Rangamlal* v. *Jhandu* (2) was cited. No doubt the learned Judges in that case state that in the exercise of the powers conferred by O. XLI, r. 33 Courts should not lose sight of the other provisions of the C. P. C. itself, nor the Court Fees Act nor of the Law of Limitation. I cannot agree that that case should be read as though the learned Judges laid down that the provisions of O. XLI, r. 33, C. P. C., were controlled by such provisions as r. 22 of the same Order. The learned Judges in that case did not decide that the Court had no jurisdiction to make such an order. The jurisdiction given by r. 33 is recognised and when the learned Judges refer to the other enactments, I take it that they do so merely for the purpose of indicating that on the mere pretence of an appeal by one party, the Court should not indulge in a roving re-trial and make any order it pleases, and that the discretion vested in it should be exercised judicially having due regard to the fact that generally speaking parties should for the purpose of getting relief from Court observe certain conditions with regard to the filing of appeals, objections and so forth. I regard the case of *Rangamlal* v. *Jhanda* (2) as only an authority for the position that in the circumstances of the case before the Court, there having been no excuse or justification for the defendant not having filed any objection or appeal against a portion of the decree to which he had submitted, the lower Appellate Court erred in exercising its discretion in his favour. That decision is at any rate clear authority for the position that in any case in which there are grounds justifying a party in not filing an appeal or memorandum of objections, judicial discretion may properly be exercised in his favour. It seems to me that the principle underlying O. XLI, r. 33 is essentially this. The Appellate Court has, no doubt, to confine itself to the appeal before it. In many cases it would be possible to dispose of the subject-matter of the appeal either with regard to the persons entitled or parties liable or with regard to the subject-matter without any examination whatever of the grounds on which other portions of the case might have been dealt with and disposed of in the Court of first instance. But it may and does often happen, that a respondent when called upon to support the judgment of the lower Court supports it or is able to do so not on the ground on which the lower Court has based it but on more fundamental ground which may go to the very root of the case of the appellant. Then it becomes necessary for the Court of Appeal for the purpose of deciding the appeal to give its decision on those more fundamental grounds. If in coming to a conclusion on such fundamental ground, the Court finds that the result of giving effect to its decision on the fundamental question or questions involved would be to render illogical or illegal that portion of the decision of the lower Court which has not been appealed against, then subject to the Court not making an order against a party behind his back, the Court is empowered to make the decision as a whole logical and consistent. In such cases a Court of Appeal is bound from sheer self-consistency to give effect to its own decision and carry it out to its logical conclusions. Otherwise it will involve a Court of Law stultifying itself and not being able to give effect to its decision logically. I wish, however, to guard myself against being understood as defining the entire scope of

(1) 8 Ind. Cas. 337; (1910) M. W. N. 719; 9 M. L. T. 39.

(2) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

the rule. But at any rate most of the cases that arise under the rule will be found to fall under this class. Further the Court is not bound to do a thing in every case in which it has the power to do so, and it is here that the question of judicial discretion comes in. There may, no doubt, be cases where no excuse or justification whatever could be found for a party not having preferred an appeal or memorandum of objections; but even in such cases Courts of Law might feel called upon to interfere under the provisions of O. XLI, r. 33, C. P. C. but it is not, however, necessary to decide that point. There can be no doubt that at any rate in cases where such excuse or justification is found, Courts of Law should be more ready to exercise the powers given under the rule. In the case before me the question of the plaintiff's right of suit was raised by or on behalf of the defendant-respondent in the course of the defendant-respondent resisting the plaintiff's appeal for reducing the mortgage amount. If the plaintiff had no right to redeem at all, it followed that no question could arise of the amount he had to pay for redeeming the mortgage. On this question of the plaintiff's right to redeem, the lower Court came to the conclusion that he had no such right. It was, of course, open to the lower Appellate Court to have dismissed the plaintiff's appeal on that finding. But if the lower Appellate Court should have contented itself with dismissing the appeal, it would have been a case of that Court not giving legal or logical effect to its finding that the plaintiff had no right of action, a case, therefore, of the Court stultifying itself. Then the question arises why was it that the defendant did not file any appeal or memorandum of objections. In the case before me I have no hesitation whatever in coming to the conclusion that no such appeal or memorandum of objections was filed by the defendant-respondent merely because there was about the time when it was open to him to have filed such an appeal or memorandum of objections, a decision of this Court in *Venkata Seetharamaya* v. *Venkataramaya* (3) in which it was definitely held by two learned Judges that an attaching decree-holder has not only a right to redeem a mortgage on the attached property but is also a necessary party to a mortgage-suit. It was not till several years later, in fact till about the date when the plaintiff's appeal came up for hearing before the lower Appellate Court, that the report appeared of the decision of this Court in *Chamiyappa Tharakan* v. *Rama Iyer* (4) in which the decision in *Venkata Seetharamaya* v. *Venkataramaya* (3) was refused to be followed. It seems to me, therefore, that there was sufficient excuse or justification in the circumstances for the defendant-respondent not having preferred an appeal or memorandum of objections.

If such excuse or justification should exist, there is no reason whatever why an Appellate Court should not exercise its discretion and give legal and logical effect to its finding on a particular question raised before it. That is what the lower Appellate Court has done. At any rate the lower Appellate Court having exercised the discretion vested in it and the circumstances being such that it cannot possibly be said that the discretion was exercised improperly, I do not feel called upon to interfere and reverse the decision of the lower Appellate Court. A very large number of cases was cited before me on both sides. I have not thought it necessary to refer to them in detail because most of the cases contain no useful discussion of any principles capable of application to other cases. In a later case in Allahabad that of *Jawahar Bano* v. *Shujaat Husain Beg* (5), the learned Judges recognise that at any rate in cases where there is sufficient reason for a respondent neglecting either to appeal or to file objections the Court may interfere under the provisions of O. XLI, r. 33, C. P. C. In a Calcutta case: *Debendra Narayan Singh* v. *Narendra Narayan Singh* (6), the learned Judges recognised the extensive jurisdiction of the Court under r. 33, O. XLI, C.P.C., It seems to me that there was no warrant for limiting the very wide terms of the rule in the manner in which the learned Judges are reported to have done in the case of *Ramchandra Chowdhury* v. *Madho Prasad Chatterji* (7). I may refer also to three Madras cases that have been cited before me. In the case of *Gopalasamy Iyengar* v. *Num-*

(3) 15 Ind. Cas. 334; 37 M. 418.

(4) 62 Ind. Cas. 121; 44 M. 232 at p. 240; 40 M. L. J. 65; (1921) M. W. N. 53.

(5) 58 Ind. Cas. 114; 43 A. 85; 18 A. L. J. 925; 2 U. P. L. R. (A.) 309.

(6) 54 Ind. Cas. 636; 24 C. W. N. 110; 30 C. L. J. 417.

(7) 36 Ind. Cas, 537; (1918) Pat. 26; 5 P. L. W. 213.

machi Reddiar (8), the learned Judges speak of orders under r. 33 of O. XLI, being made out of consistency and state that the mere fact that a party has not appealed is not sufficient to refuse relief to him. In the case of *Subbarayulu Naidu* v. *Papammal* (9), on a finding of limitation by the lower Appellate Court the decree against a defendant who had not appealed was also set aside. In the case of *Rama Aiyar* v. *Vanamamalai Aiyar* (10), Mr. Justice Sadasiva Iyer in the second appeal imposed a condition of a sum of money on the plaintiff before he could obtain possession even though the defendant had not preferred an appeal for obtaining such relief.

I have, therefore, come to the conclusion that the lower Appellate Court not only had jurisdiction to dismiss the plaintiff's suit under the provisions of r. 33, of O. XLI, but that in the circumstances of the case there was no improper exercise of judicial discretion by that Court.

But it has been argued before me by Mr. T. L. Venkatarama Iyer, the learned Vakil for the appellant, that the decision of the lower Appellate Court to the effect that the plaintiff had no right of suit because he had no right to redeem is wrong. The plaintiff was not only attaching creditor of the suit property but became purchaser of that property at the execution sale long before the purchase by the defendant under his mortgage-decree. It is true that under the provisions of s. 91 of the Transfer of Property Act an attaching creditor is a person who is accorded by that Statute a right to redeem. The right is given to him not because he has otherwise any interest in the mortgaged property or even because the attachment creates any such interest in him but merely because the Legislature has thought fit to give such a right. Section 91 of the Transfer of Property Act in enumerating persons who may redeem and sue for the redemption of mortgaged property includes in cl. (*f*): "A judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property." It follows from this that the statutory right given by cl. (*f*) of s. 91 of the Transfer of Property Act can be exercised only by a person who answers to the description of the person referred to in that clause, namely, a judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property, and it follows that when a person ceases to answer to that description or possess that character, he ceases to have the right accorded to him of redeeming the property. The question then is whether on the date of the institution of the suit by the plaintiff he possessed such character or answered to the description in cl. (*f*), namely, "a judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property." Mr. P. R. Srinivasa Iyengar, the learned Vakil for the respondent, argued that by reason of his own purchase the plaintiff had long before his present suit shed his character as judgment-creditor, and that, therefore, no right of redemption could be claimed by him in his capacity as attaching decree-holder. I find that this is the view of the law taken by the learned Judges in the case of *Chamiyappa Tharakan* v. *Rama Iyer* (4). At the bottom of page 240* the learned Chief Justice says as follows:—"Even if there had been no such decree, the attachment and the attaching decree-holder's right of redemption would have come to an end on the 9th of November 1908, when he brought the judgment-debtor's interest to sale and it was acquired by the auction-purchaser through whom the plaintiff claims." I respectfully agree with his view. Whatever rights as purchaser the decree-holder may get, there can be no doubt that on his purchase he sheds his character as attaching decree-holder. He is in no sense the purchaser of any right which is accorded by the Statute to the attaching decree-holder because he is the purchaser only of the right, title and interest of the judgment-debtor in the property. If he should make a claim for redemption as representing the judgment-debtor, he would be met by the answer that the mortgagor had been made a party to the mortgage-suit. Preferring to follow, as I do, the decision in *Chamiyappa Tharakan* v. *Rama Iyer* (4), it seems to me sufficient merely to state that on the date of the suit by the plaintiff, he did not have vested in him any right to redeem the property and that, therefore, the lower Appellate Court was right in finding accordingly.

(8) 74 Ind. Cas. 416; 17 L. W. 254 at p. 272; (1923) A. I. R. (M.) 392.
(9) 29 Ind. Cas. 579.
(10) 27 Ind. Cas. 336.

*Page of 44 M.—[*Ed.*]

It has also been ably argued on behalf of the appellant that on the date on which the defendant as mortgagee instituted his suit on the mortgage, the plaintiff still held his character as attaching decree-holder and that, therefore, he was liable to be made a party to the mortgage-suit under the provisions of O. XXXIV, r. 1, C. P. C. and that as he was not made such a party any decree passed or proceedings taken in the suit could not possibly bind him. I fail to see how this could possibly help the plaintiff if on the date of his suit he had no right to redeem. However, that may be, I am inclined to think, following the opinion of the learned Judges who decided the case of *Chamiyappa Tharakan* v. *Rama Iyer* (4) that in O. XXXIV, r. 1, C. P. C., the expression "having an interest either in the mortgage security or in the right of redemption" cannot include a person who has a mere statutory right to redeem given to him under cl (*f*) of s. 91 of the Transfer of Property Act and that the expression "in the right of redemption" means and refers only to an interest in the estate itself which is called the equity of redemption.

The observations to the contrary in the case of *Venkata Seetharamaya* v. *Venkataramaya* (3) have been refused to be followed in the later case of *Chamiyappa Tharakan* v. *Rama Iyer* (4).

I have, therefore, come to the conclusion that the lower Appellate Court was right in deciding that the plaintiff had on the date of his suit no right to redeem and that, therefore, he had no right to maintain the suit. The second appeal, therefore, fails and should be dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H,

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2617 OF 1920.
June 4, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Campbell.

MEHR CHAND—PLAINTIFF—APPELLANT
versus
THE FIRM JUGAL KISHORE-GULAB SINGH—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 73—Sale of goods—Breach of contract by vendee—Vendor, remedy of—Damages, measure of.

Where a vendor is obliged to re-sell the goods on account of the breach of contract by the vendee to accept and pay for the goods, he (the vendor) is entitled to claim damages to the amount of the difference between the contract-price and the market price on due date.

Second appeal from a decree of the District Judge, Delhi, dated the 7th August 1920, reversing that of the Junior Subordinate Judge, Second Class, Delhi, dated the 7th October 1919.

Mr. *Shamair Chand*, for the Appellant.
Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This is a second appeal against an appellate decree of the District Judge, Delhi.

The defendants admittedly, on the 26th August 1918, agreed to purchase from the plaintiff 5 cases of cloth at Rs. 39-2 per piece to be delivered on the 7th October 1918. The plaintiff came into Court alleging that the defendants had failed to take delivery or to pay the price and had thus broken the contract. He alleged further that he had been obliged to resell the goods in December 1918 incurring a loss of Rs. 3,568-12-3, which amount he claimed.

The defendants pleaded that the goods were neither specified nor appropriated, that they were not with the plaintiff on due date, that the latter had no right of re-sale, and that in point of fact they themselves on 7th October 1918 had sold the goods back to the plaintiff at Rs. 33-4 per piece.

The Trial Court decreed the plaintiff's claim, but on appeal the learned District Judge decided that there had been neither appropriation nor assent by the buyers to appropriation, that property in the goods had never passed and that thus there could have been no re-sale at the buyers' risk. He reversed the decree of the Trial Court and dismissed the suit holding further that no decree for damages based on the market-price on due date could be granted because the suit had been based merely upon the alleged re-sale and was merely for the amount of short proceeds on that re-sale. Both Courts agreed in finding that there had been no sale back by the defendants on the 7th October.

In this Court it has been argued for the plaintiff-appellant, firstly, that there was no issue in the Trial Court on the question of appropriation of the goods, but this contention is without force, for the question was included in issue No. 2 framed by the Trial Court the terms of which were, "was there

any valid or regular sale"? Obviously there could have been no valid and regular sale unless the goods had been appropriated to the contract and ownership in them had passed.

The second plea is that at least the plaintiff was entitled to a decree for Rs. 1,468-12 being the difference between the admitted contract price and the rate of Rs. 33-4 per piece at which the defendants alleged that they had re-sold to the plaintiff on due date. Mr. Sardha Ram for the defendants-respondents contests this claim on the ground that the suit was brought only on an alleged resale and also on the ground that the admission regarding the retransfer on due date was not conclusive against his clients and could have been proved to have been wrong had there been an issue on the question of the market-value on due date. We think, however, that on the pleadings the plaintiff was entitled to ask for a decree for the difference between the contract-price and the market-price on due date in the alternative to his main claim.

Not only did the defendants in their written statement assert that they had re-transferred their bargain to the plaintiff on the due date at Rs. 33-4 per piece, but in the correspondence on the record they admitted that they were liable for the difference between this rate and the contract rate. It is inconceivable that they would have sold again at less than the market-rate. Had the market rate been more than Rs. 33-4 they could have taken delivery and minimised their loss by selling in the market. In the circumstances we think that there could be no better proof of the market value on the 7th October 1918 than the defendants' plea and their admission in their replies to the notices sent to them by the plaintiff, particularly the document marked D-1, dated the 19th October 1918, in which the defendants say "we are always ready to pay you at Rs. 5-14-0 per cent. per annum every time."

We hold that the plaintiff was entitled to a decree for damages for breach of contract to purchase based on the difference between the contract-price and the market-price on the 7th October 1918, and that this latter price is proved to have been Rs. 33-4 per piece. We accept the appeal and give the plaintiff a decree for Rs. 1,468-12 and direct that the parties shall bear their own costs throughout.

K. S. D. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 318 OF 1922.

September 30, 1924.

Present:—Mr. Justice Devadoss.

VENKATASUBBIER—PLAINTIFF—APPELLANT

versus

SUNDARAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption subsequent to wife's death—Succession to relatives of wife—Adopted son, rights of.

An adopted son can inherit to the relations of the wife of his adoptive father only where she has taken part in the adoption. [p. 320, col. 2.]

Where a Hindu subsequent to the death of his wife, adopts a boy, the adopted son cannot inherit as a collateral to the relatives of the deceased wife of his adoptive father.

A wife who does not or cannot take part in the adoption of a boy by her husband, cannot become the mother of the boy in the same sense as the wife who receives the boy in adoption and who is termed the "receiving mother." [p. 319, col. 2.]

The adoption of a boy being only to a man the relationship of the adopter to the adopted boy is irrespective of there being an adoptive mother. [p. 321, col. 1.]

(Case-law discussed.)

Second appeal against a decree of the District Court, Salem, in Appeal Suit No. 207 of 1920, preferred against that of the Court of the District Munsif, Krishnagiri, in Original Suit No. 122 of 1919.

Mr. *A. Krishnaswami Iyer*, for the Appellants.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The plaintiff is the son of a step-sister of one Narasimha Iyer. The first defendant is the widow of Narasimha Iyer. Defendants Nos. 3 and 4 are the sons of another step-sister of Narasimha Iyer. Plaintiff's suit is for a declaration that the alienation made by the first defendant in favour of the second defendant is not binding upon the plaintiff and defendants Nos. 3 and 4, as they are the reversioners to the estate of Narasimha Iyer. Defendants Nos. 1 and 2 pleaded that the plaintiff and defendants Nos. 3 and 4 were not the nearest reversioners and that one Subbu Narayana Iyer the adopted son of the husband of Venkachi Ammal, the sister of Narasimha Iyer, was the nearest reversioner to him.

The District Munsif found that the alienation was not for purposes which could bind the reversioners and dismissed the suit on the ground that Subbu Narayana

Iyer was the nearest reversioner and not the plaintiff.

The plaintiff's appeal to the District Court was dismissed on the ground that he was not the nearest reversioner. The plaintiff has preferred this appeal.

It is argued for the appellant that Subbu Narayana Iyer could not inherit to the relations of Venkachi Ammal, the wife of Narasimha Iyer. It is admitted that Venkachi Ammal died before Narasimha Iyer adopted Subbu Narayana Iyer. The question is whether an adopted son can inherit to the relations of a wife of the adoptive father. The contention of the Vakil for the appellant is that an adopted son can inherit to the relations of the receiving mother only, in other words, an adopted son can inherit only to that wife of the adoptive father, who joins in the ceremony of adoption.

It is well-settled that if a man has two wives and makes one of the wives take part in adopting a boy, the wife so taking part in the adoption becomes the adoptive mother and the other wife is a step-mother. This point was settled in *Annapurni Nachiar* v. *Collector of Tinnevelly* (1) which was affirmed on appeal by the Privy Council in *Annapurni Nachiar* v. *Forbes* (2). The principle of these decisions is that it is open to the husband to select any one of the wives to take part in the adoption. The wife, so selected by him, is termed the receiving mother and, for all practical purposes becomes the mother and the adopted son inherits to her relations as a son born of her womb. *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (3), *Kali Komul Mozumdar* v. *Uma Sunker Moitro* (4) and *Padmakumari Debi Chowdhrani* v. *Court of Wards* (5).

A widow can make a valid adoption. *Nagappa Udapa* v. *Subba Sastry* (6) and *Chandvasekharudu* v. *Bramhanna* (7). In the latter case, the learned Judges were of opinion that an unmarried man could make a valid adoption. The principle of the Hindu Law is that an adoption is made to the man, for a man can make an adoption not only without the consent of the wife but also in spite of her protest. The wife has no voice in the matter and she can be associated with the husband only if he desires her to do so. When a widow makes an adoption, under a power given by the husband, she makes the adoption only to the husband and not to herself. Where a husband does not associate any of his wives in the act of adoption, can it be said, that the wives of the adopter become his mothers? A man can ask only one of his wives to take part in the adoption. In delivering the judgment of their Lordships of the Privy Council in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (8) Lord Moulton observed: "Only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child." Where a wife does not take part in the adoption by the husband she becomes a step-mother if another wife takes part in the adoption.

The contention on behalf of the respondent is that in this case the adopter had only one wife who was dead at the time of the adoption and that according to the Hindu Law it is the *patni* that takes part in all religious ceremonies and she being the only wife whom the adopter had, it must he considered that she was the mother of the adopted son. It is further argued that the adopted son becomes affiliated to the adopter and his wife, and, therefore, he must be treated as a son born to the wife.

The question is whether a wife, who does not or cannot take part in the adoption, can become the mother of the boy in the same sense as the wife who receives the boy in adoption and who is termed the receiving mother. There is no direct authority on the point but a text in Dattaka Mimamsa is relied upon for the

(1) 18 M. 277; 5 M. L. J. 121; 6 Ind. Dec. (N. S.) 542.

(2) 23 M. 1; 1 Bom. L. R. 611; 3 C. W. N. 730; 26 I. A. 246; 9 M. L. J. 209; 7 Sar. P. C. J. 591; 8 Ind. Dec. (N. S.) 395 (P. C.).

(3) 6 C. 256; 7 C. L. R. 145; 3 Ind. Dec. (N. S.) 168.

(4) 10 C. 232; 13 C. L. R. 379; 10 I. A. 138; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458; 5 Ind. Dec. (N. S.) 156 (P. C.).

(5) 8 C. 302; 8 I. A. 229; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148; 4 Ind. Dec. (N. S.) 193 (P. C.).

(6) 2 M. H. C. R. 367.

(7) 4 M. H. C. R. 270.

(8) 23 Ind. Cas. 166; 37 M. 199 at pp. 220, 222; (1914) M. W. N. 299; 2 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 41 I. A. 51 (P. C.).

contention that it is really the receiving mother that becomes the mother of the adopted boy in the full sense of the term so as to enable the adopted boy to inherit to his adoptive mother's relations. The text is in Ch. VI, *verse* 50: "The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest; for the rule regarding the paternal, is equally applicable to the maternal grandsires of adopted sons." This shows that the relations of the adoptive mother only are the maternal relations of the adopted son. If a wife of the man who makes an adoption does not join in the adoption, she cannot become the receiving mother or adoptive mother. Relying upon this text, Golabchandra Sarkar Sastri in his work on "The Hindu Law of Adoption" is of opinion that it is the adopted son that can inherit to the relations of his adopted mother only. He observes at page 215: "In order that the affiliation may be complete, it appears to be necessary that the wife also should join in adopting a son." At page 227 he remarks: "To be a son to her for legal and religious purposes it appears to be necessary that she should join in the ceremony of accepting the boy adopted by the husband, for in the absence of her acceptance, she cannot be called 'adoptive mother.'" At page 419 (E) he says: "But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son. Even when a man has only one wife, and the man alone adopts, and the wife does not join in the act of adoption or concur on it, the legal relation of mother and son cannot arise between them. There can be no actual and legal relation of mother and son between the wife taking no part in the adoption and the husband's adopted son any more than between a wife and the husband's begotten son by her co-wife." It is clear that the wife in order to have the real relation of mother and son should join the husband in making the adoption. If she does not, she stands only in the position of a step-mother. As the adoption is made only to the husband and as a bachelor or widower can adopt it is but reasonable that the wife in order to have the legal relation of mother and son should join in the act of adoption. If an unmarried man makes an adoption and afterwards marries two wives can it be said that both the wives are adoptive mothers?

It is contended that where there are two or more wives, the wife or wives who do not take part in the adoption, become step-mothers, but where there is only one wife, she becomes the adoptive mother whether she joins in the act of adoption or not. It is difficult to accept this argument, for it would lead to this conclusion that when a man having more than one wife makes an adoption without making any one of the wives take part in the adoption, all would become adoptive mothers. This is opposed to the observation of their Lordships of the Privy Council in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (8): "To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance."

Mr. Ananthakrishna Iyer, lays stress on the text of Nanda Pandithar in Dattakka Mimamsa, Part I, *verse* 22: "In consequence of the superiority of the husband by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband."

Mr. Mayne, in his book, notes this text, as authority, for the position that an adoptive mother has the same relation to the adopted boy as a natural mother would: (*Vide* Mayne, para. 166). He does not express any opinion as to the relationship of the only wife of the adopter who does not take part in the adoption by the husband. If it is open to a husband to select any of his wives to join in adopting a boy, it is also open to him to make an adoption without joining any of them in the act of adoption. The cases of *Nagindas Bhugwandas* v. *Bachoo Hurkissandas* 9) and *Anandi Ram Pai* v. *Hari Suba Pai* (10) which lay down that an adopted son is for all purposes, the son of the adoptive mother, do not help to solve the question. An argument was advanced that as the adopted boy loses his right in the natural family to his mother's relations, he must be held to acquire such rights in the adopter's family. This argument overlooks

(9) 32 Ind. Cas, 403; 40 B. 270; 30 M. L. J. 193; 14 A. L. J. 185; 3 L. W. 259; 19 M L. T. 193; 18 Bom. L. R. 172; (1916) 1 M. W. N. 258; 23 C. L. J. 395; 20 C. W. N. 702; 43 I. A. 56 (P. C.).

(10) 3 Ind. Cas. 745; 33 B. 404; 11 Bom. L. R. 641.

the fact that an unmarried man, a bachelor could make adoption, in which case the boy can have no adoptive mother at all. The question is not what he gains or loses. The adoption being only to a man the relationship of the adopter to the adopted boy is irrespective of there being an adoptive mother.

In this case, the wife was dead at the time of the adoption. The adoption being after death, it cannot be said by any fiction that she took part in the adoption. The argument that she was a *patni* and, therefore, she must be held to be the mother, is, I think, not a satisfactory argument. Supposing that Narasimha Iyer, had two wives, who were dead at the time of the adoption, could it be said that both the deceased wives became the adoptive mothers when the adoption was made. Mr. Ananthakrishna Iyer remarked that it was unnecessary to speculate upon matters not actually before the Court for decision. But in considering whether a principle is sound or not we must see what the logical consequence of the principle would be. The case would be different if there is express authority for the position, in which case, the reasonableness or otherwise of the authority need not be considered. But in this case, there is an absence of authority except the text of Nanda Pandithar in Dattaka Mimamsa, already referred to. I think, the opinion of a Sanskrit scholar like Golab-Chandar Sarkar Sastri, is entitled to considerable weight. Apart from his view, I think considering the principle of the various decisions on the point and especially the decision in *Annapurni Nachiar* v. *Collector of Tinnevelly* (1) and *Annapurni Nachiar* v. *Forbes* (2), I hold that an adopted boy cannot inherit to the relations of the wife of the adoptive father, who does not take part in adopting him or, in other words, he can only inherit to the adoptive mother's relations and not to the wife of the adoptive father who does not take part in the adoption.

I allow the appeal. Inasmuch as the District Court has disposed of the appeal in its findings on issue No. 1, I remand the appeal to the District Court for disposal after recording findings on the remaining issues. Costs will abide the result; Court-fee in this Court to be refunded.

V. N. V. *Appeal allowed.*

Z. K.

LAHORE HIGH COURT.

CIVIL REVISION No. 9 OF 1924.

May 23, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice.

MOTI RAM—PLAINTIFF—PETITIONER

versus

THE FIRM KISHORI LAL-RAM SARUP—DEFENDANTS—RESPONDENTS.

Practice—Witnesses not served—Process-server, negligence of—Suit, whether can be dismissed.

Where plaintiff's application for summoning witnesses was granted and he deposited the diet money as well as the process-fee, but the witnesses were not served on account of the negligence of the process-server and the plaintiff's suit was dismissed for want of proof:

Held, that the plaintiff could not be punished for the negligence of an officer of the Court.

Petition, under s. 25 of Act IX of 1887, Small Cause Courts Act, for revision of a decree of the Small Cause Court, Lahore, dated the 3rd December 1923.

Lala *Parkash Chandar* for Mr. *Sagar Chand*, for the Appellant.

Lala *Ram Labhaya*, for the Respondents.

JUDGMENT.—On the 26th November 1923, the plaintiff made an application for summoning two witnesses and deposited the diet money as well as the process-fee. This application was granted by the Court, but it seems that the summonses were not served with the result that the plaintiff's suit has been practically dismissed for want of proof. Now both the witnesses were residents of Lahore, and if the process-server had done his duty there ought not to have been any difficulty in serving the witnesses before the date fixed for the hearing.

I consider that the process-server was responsible for not serving the summonses and that the plaintiff shall not be punished for the negligence of an officer of the Court. Accordingly I accept the application and setting aside the judgment of the lower Court, direct it to decide the case after hearing such evidence as the parties may desire to produce. I make no order as to costs in this Court.

K. S. D. *Application accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 26 OF 1924.

July 16, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Jackson.

R. V. PALANISAMI PILLAI—PETITIONER—

versus

R. SRINIVASARANGACHARIAR—RESPONDENT.

Madras District Municipalities Act (V of 1920)—Rules for preparation of electoral rolls, rr. 7, 8 (e)—"Preparation", whether includes action of revising authority—"Proceedings," meaning of.

In the rules for the preparation of electoral rolls under the Madras District Municipalities Act, the word "preparation" is used both in a general and in a restricted sense in different places. In r. 8 of the rules, which provides that no failure to observe the directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings, the word "preparation" is used in the general sense and includes the action of the revising authority.

Therefore, a Judge inquiring into an election dispute cannot go behind the electoral roll which is final and inquire into alleged defects in the procedure followed by the authority revising an electoral roll. Under r. 7 of the said rules, the revising authority must consist of the Chairman of the Municipality and two unofficial gentlemen nominated by the Collector, but an order admitting a claim to be entered in the electoral roll cannot be questioned on the ground that it was signed by the Chairman and only one unofficial, instead of two as required by the rules.

The word "proceedings" in r. 8 (*e*) of the above rules is of the widest import and includes an inquiry into an election dispute.

Petition, under s. 115 of Act V of 1908 and s. 106 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Trichinopoly, dated the 5th January 1924, in O. P. No. 10 of 1923.

Mr. *V. L. Ethiraj*, for the Appellant.

Messrs. *I. R. Ramachandra Iyer* and *S. Ramaswamy Dikshit*, for the Respondent.

JUDGMENT.—This case arises out of an election dispute in the Municipality of Srirangam. The petitioner in this Court Mr. R. Palanisami Pillai obtained 37 votes and the respondent Mr. R. Srinivasa Ranga Chariar 14 votes at a poll for filling up the vacancy of Councillor held on 29th September 1923. The respondent filed an election petition contending *inter alia* that the petitioner's name had been wrongly entered in the electoral roll and, therefore, he was disqualified under s. 48 (1) (*a*) Madras Act V of 1920. "No person shall be qualified for election as a Councillor unless the name of such person appears on the electoral poll". The Subordinate Judge of Trichinopoly inquired into the petition and found that although the petitioner's name had not been clearly entered in the preliminary roll, the matter had been taken before the revising authority and his claim for registration had been admitted, Exs. D, D-1. But the revising authority under r. 7 of the rules for the preparation of electoral rolls shall be the Chairman and two unofficial gentlemen nominated by the Collector and such authority shall sit in open Court. The order admitting the claim (Ex. D-1) is signed by the Chairman and one unofficial gentleman. Therefore, the learned Subordinate Judge has held that the revision was *ultra vires* and has *accordingly* unseated the petitioner Mr. Palanisami Pillai as being an unqualified candidate. The petitioner does not now traverse this finding on its merits, but contends that the Judge inquiring into the dispute cannot go behind the electoral roll which is final. He relied upon r. 8 (*e*) of the Rules for the Preparation of electoral rolls. "No failure to observe the dates prescribed in these rules or to observe other directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings". As observed in his Order of Reference by Wallace, J., who originally heard this civil revision petition, this rule would settle the question were there no ambiguity as to the meaning of the word "preparation" which is sometimes in these rules themselves used to include revision, and sometimes to describe the preliminary stage before revision. Thus when the Act itself (V of 1920) s. 44 (1) enjoins that "The Chairman shall annually prepare and publish an electoral roll," both "preparation and revision" are obviously included in the term "prepare." So too in rules "preparation, claims and objections, revising authority and final publication," all fall under the main heading "Rules for the Preparation of Electoral Rolls in Municipalities" and "preparation" in this main heading must be used in a comprehensive sense. The sub-head "preparation" rr. 1 to 3, is in the restricted sense and refers entirely to the preparation of the preliminary roll. Compare r. 3 (*b*). Next come claims and objections and revising authority still under the main general heading of "preparation." Then under the sub-head, "final publication" comes the rule in question 8 (*e*) 'failure

to observe directions regarding the preparation of the electoral roll shall not entitle any one to question the conclusiveness of the register". Taken by itself this must mean the general preparation and publication, for there could obviously be no sense in giving special finality to the preliminary preparation of the roll, the revision of which is expressly provided for. But in 8 (*f*) "the preparation, revision and publication of the electoral roll may take place on such dates, etc.," preparation is undoubtedly used as meaning preliminary preparation. While in 8 (*g*) "None of the officers entrusted with the preparation of the rolls shall be held legally liable for their completeness of accuracy" the word "preparation" must again refer to the whole process, for it would be absured to relieve from liability the officers who make the preliminary preparation but to deny the same relief to those engaged in the revision and publication. It must be taken, therefore, that "preparation" is used both in a general and in restricted sense in different portions of the same rules and we find that in r. 8 (*e*) "preparation" is in the general sense and includes the action of the revising authority.

It was further contended on behalf of the respondent that election proceedings in r. 8 (*e*) is not intended to include an inquiry into an election dispute. No such distinction is to be found in the Act or rules, and the word "proceedings" is of the widest import and may well include an inquiry into an election dispute. The rules for decision of disputes are drawn up by virtue of the authority conveyed by s. 303 (2) (*b*) "he may make rules with reference to all matters relating to elections", and an inquiry held under rules must be regarded as an election proceeding.

Accordingly the validity and conclusiveness of the register cannot be questioned in these proceedings, and the petitioner Mr. R. V. Palanisami Pillai must be held to have been duly elected. The civil revision petition is allowed with costs throughout.

V. N. V. *Petition allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 216 OF 1923.

March 28, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Le-Rossignol.

PARTAP DAS—PLAINTIFF—APPELLANT

versus

NAND SINGH M AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 10—Compromise conferring full proprietary right—Restriction on power of alienation, whether valid.

When full proprietary rights pass to a person under a deed of compromise, any restriction contained in the compromise on the power of alienation is a derogation from the full proprietary right conferred upon him and is consequently void.

Letters Patent appeal against the judgment and decree of Mr. Justice Harrison, in Civil Appeal No. 534 of 1923, and reported as 76 Ind. Cas. 16, reversing that of the District Judge, Ludhiana, dated the 19th June 1923.

Dr. *Nand Lal*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondents.

JUDGMENT.—A dispute between the parties regarding the title of the respondents to a large area of land was terminated by a compromise between them before the Revenue Authorities. The compromise provided that the defendants-respondents should surrender to the plaintiff possession of a certain portion of the area and that the residue in the possession of the defendants-respondents should be entered as theirs in proprietary right subject to the condition that the respondents should have no power to alienate the land the proprietary title in which was thus conceded to them. Subsequently the defendants alienated a portion of the land by a mortgage and this appeal arises out of a suit brought by the plaintiff for a declaration that the mortgage is null and void.

The learned Judge in Chambers dismissed the plaintiff's suit on the ground that when a full proprietary right had passed to the defendants the restriction in respect of the allenation was null and void inasmuch as it is opposed to the principles underlying s. 10 of the Transfer of Property Act and results in the creation of a title which is unknown in law.

Having heard Counsel for both sides we are of the opinion that the decision of the Court below is correct, that the restriction contained in the compromise on the power of alienation is a derogation from the full

proprietary right conferred upon the defendants and is consequently void.

We accordingly dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION No. 75 OF 1924.
August 29, 1924.
Present:—Mr. Justice Young.
MA NAW NAW AND ANOTHER—APPLICANTS
versus
V. E. S. S. M. SOMASUNDRAM CHETTY—RESPONDENT.

Limitation Act (IX of 1908), s. 5, applicability of—Application to set aside ex parte *decree.*

Section 5 of the Limitation Act applies only to appeals or applications for a review of judgment or for leave to appeal and not to an application for setting aside an *ex parte* decree or an order of dismissal for default.

Civil revision against the decree of the Township Court, Nyaunglebin, in Civil Regular No. 177 of 1923.

Mr. *Kyaw Din*, for the Applicants.

Mr. *Barnabas*, for the Respondent.

JUDGMENT.—This was a suit for redemption of certain lands alleged to be mortgaged. The defendants were served but failed to appear, and on the 30th May 1923 the plaintiff obtained a decree *ex parte*. On the 26th September 1923 the defendant applied under O. IX, r. 13, to have the *ex parte* decree set aside, and summons was issued to the plaintiff to show cause why this should not be done. After several adjournments the matter was set down for argument on the 17th November 1923, when the plaintiff appeared, and the defendant's Advocate but not the defendant. The defendant's Advocate then obtained leave to withdraw from the application which, in the absence of the defendant, was dismissed.

On the 11th January 1924, the defendant again filed a fresh petition which was either to re open the *ex parte* decree or to set aside the dismissal order of the 17th November 1923.

Viewed as a second application to re-open the *ex parte* decree, the petition is barred under Art. 164 of the Limitation Act, which provides that the application must be made within thirty days of the date of the decree or when the summons was not served within thirty days from the date when the applicant obtained knowledge of the decree. Here the decree was dated the 30th August 1923, and the respondent was served with substituted service and, therefore, is presumed to have had knowledge of it. It was, therefore, hopelessly barred. If he be assumed not to have had knowledge of the decree till the 17th November 1923, his application is equally barred.

Viewed as an application to set aside the order of dismissal passed on the 17th November 1923, it was equally barred by Art. 164 which provides a similar period of limitation. In neither case could relief be had under s. 5 of the Act, which applies only to appeals or applications for a review of judgment or for leave to appeal.

Defendant's learned Counsel asks me to treat this application as one for review, but I cannot do so. In the first place the application was not one for review but to set aside the *ex parte* decree and re-open the suit; and in the second it was not stamped as an application for review; and in the third place the negligence of the former agent of the defendant which is the ground put forward is no justification for applying for this particular remedy.

The order, re-opening the suit, must be set aside and the decree remain standing and the applicants have their costs four gold *mohurs* of the application.

K. S. D. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 135 OF 1924.
October 30, 1924.
Present:—Mr. Dalal, J. C.
Musammat RABBUL ARFIN AND OTHERS—DEFENDANTS—APPLICANTS
versus
BABU RAZA—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—O. XXIII, r. 1—Withdrawal of suit, permission for, after conclusion of trial—Irregularity—Revision.

It is the duty of the High Court to see that justice is properly done and that a subordinate Court does not pass any orders transparently for the purpose of avoiding the trouble of writing a judgment. [p. 325, col. 1.]

After the evidence of both the parties to a suit had been recorded and a date was fixed for arguments the

plaintiff made an application to the Court for permission to withdraw the suit with leave to bring a fresh suit on the same cause of action and the Court granted such leave. On revision:

Held, (1) that the Trial Court had exercised its jurisdiction with gross irregularity and that palpable injustice was done to the defendant by the order passed by the Trial Court;

(2) that in such circumstances the High Court was entitled to interfere in revision and to set aside the order of the lower Court.

Application, under s. 115, C. P. C., for revision of an order of the Additional Subordinate Judge, Gonda, dated the 4th August 1924, in Regular Suit No. 28 of 1924.

Mr. *M. Wasim*, for the Applicants.

Mr. *M. Ayub*, for the Opposite Party.

ORDER.—The suit for the cancellation of a gift was instituted on the 7th of April 1923. It went through various stages of proceedings. All the witnesses for the plaintiff were examined and also all the witnesses for the defence. The 4th of August 1924, 16 months after the suit was instituted, was fixed for arguments. On that day the guardian of the plaintiff put in an application for withdrawal of the suit with permission to bring a fresh suit in respect of the same subject-matter. The lower Court in its wisdom considered that the grounds given in the petition of the plaintiff were sufficient for allowing such a conditional withdrawal. To me this seems to be a travesty of justice and an abuse of the process of law. It was asserted on behalf of the respondent that this Court had no jurisdiction to interfere by way of revision in a case like the present. Such cannot possibly be the law. It is the duty of this Court and specially of the Judge at present presiding in this Court as head of the judiciary in the Province to see that justice is properly done and that a subordinate Court does not pass certain orders transparently for the purpose of avoiding the trouble of writing a judgment. The lower Court has exercised its jurisdiction with gross irregularity. When a litigant has been dragged through the Court for 16 months, to permit all that trouble to be wiped out, to have the sword hanging over his head again and to give the plaintiff an opportunity of dragging the defendant again through the same mire of litigation would bring justice and proceedings in a Court of Law into utter contempt. This Court is certainly entitled to interfere where the facts are so gross and palpable injustice has been done.

If the plaintiff desired to amend the plaint it was open to him to apply for amendment which can be done at any stage of the proceedings but a case brought to this limit after 16 months must be taken to a close. I set aside the order of the lower Court completely and remand the suit to it for a trial from the date 4th August 1924 after cancellation of the judgment and decree of that date. It will be open to the Court to grant amendment of the plaint, to fix further issues and to examine more witnesses. If the plaintiff likes he can withdraw the suit without permission to bring a fresh suit on the same cause of action. Whatever happens, the plaintiff should be compelled to conduct the litigation in such a way as to put an end thereto.

I set aside the order and decree of the lower Court and remand the suit to it under O. XLIV, r. 23, for trial according to the instructions given above. Costs here and heretofore shall abide the result.

Z. K. *Order set aside.*

RANGOON HIGH COURT.

CIVIL REVISION No. 180 OF 1924.

December 5, 1924.

Present:—Mr. Justice Godfrey.

BARNETT BROS., LTD.—APPLICANTS—PETITIONERS

versus

E. FOWLE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (ii), O. XXII, r. 4—Defendant, death of—Legal representative, appointment of—Representation to estate not taken out—Plaintiff, duty of.

The widow or brother of a deceased defendant is not necessarily his legal representative who must be his executor or administrator, or a person who has intermeddled with his estate and so made himself executor *de son tort*. [p. 326, col. 1.]

Where no representation has been taken out of a deceased defendent's estate the only course of the plaintiff is to take proceedings to have an administrator appointed. [*ibid.*]

Sukh Nandan v. *Rennick*, 4 A. 192; 2 Ind. Dec. (N. S.) 801, *Framji Dorabji* v. *Adarji Dorabji*, 18 B. 337; 9 Ind. Dec. (N. S.) 733 and *P. L. M. Firm* v. *Stacey*, 33 Ind. Cas. 169; 9 B. L. T. 122, referred to.

Civil revision against the order of the Chief Judge, Small Cause Court, Rangoon, in C. R. No. 407 of 1923.

Mr. *Patel*, for the Applicant.

JUDGMENT.—This is an application to revise the judgment of the Chief Judge

Small Cause Court, dismissing the plaintiffs' suit against the respondents for the recovery of the balance of the price of goods sold and delivered to one E. Fowle. It appears that during the pendency of the suit the defendant E. Fowle died and upon application made, the Court directed that respondents who are the widow and the brother of the deceased defendant be brought on to the record as his legal representatives. It is admitted that the deceased died intestate and that no representation has been taken to his estate. It cannot be disputed that the deceased defendant was, and the respondents are, persons to whom the provisions of the Indian Succession Act would apply and the learned Judge in effect held that the respondents were not legal representatives of the deceased and dismissed the suit against them for that reason. The application upon which the respondents' names were brought on the record in place of the deceased defendant was made under O. XXII, r. 4, C. P. C., which provides that where the defendant dies and the right to sue survives (which it does in this case) the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and he shall proceed with the suit. And the short question for disposal is whether the respondents are or are not the defendant's legal representativs. "Legal representatives" is defined by s. 2 (*ii*), C. P. C., as meaning "a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased." It is clear from the Succession Act, s. 179, that the person who in law would represent the estate of the deceased defendant would be either his executor or his administrators. The respondents are neither and since it is also not alleged that they have intermeddled with his estate and so made themselves responsible as executors *de son tort*, the suit will not lie against them. It would further seem that since no representation has as yet been taken out of the deceased defendant's estate the only course of the plaintiff-applicant would be to take proceedings themselves to have an administrator appointed as no right to the property of an intestate's estate can be established in Court unless Letters of Administration have been first granted (s. 190, Succession Act). The case of *Sukh Nandan* v. *Rennick* (1) and *Framji Dorabji* v. *Adarji Dorabji* (2) are in point and in keeping with the opinion expressed in ruling referred to by the lower Court: *P. L. M. Firm* v. *Stacey* (3). For these reasons this application fails and it must accordingly be dismissed.

K. S. D. *Application dismissed.*

(1) 4 A. 192; 2 Ind. Dec. (N. S.) 801.
(2) 18 B 337; 9 Ind. Dec. (N. S.) 733.
(3) 33 Ind. Cas. 169; 9 B. L. T. 122.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 97 OF 1923.
November 20, 1924.
Present :—Mr. Ashworth, A. J. C.
JAFAR KHAN—PLAINTIFF—APPELLANT
versus
Musammat QADIRAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58—Registration Act (XVI of 1908), ss. 17, 49- Mortgage, usufructuary--Unregistered deed—Recital as to transfer of possession, admissibility of—Suit to recover possession, maintainability of—Suit to recover mortgage money.

An unregistered deed of usufructuary mortgage contained a clause to the effect that the mortgagee in the event of his losing possession of the mortgaged property could require the mortgagor to re-pay the loan out of his assets other than the mortgaged property. The mortgage-deed contained a recital that possession of the property had been given to the mortgagee. Sometime afterwards the mortgagee brought a suit for possession of the land and in the alternative for recovery of the mortgage money:

Held, (1) that the mortgage-deed being unregistered the claim for possession must fail;

(2) that the usufructuary mortgage did not in itself imply a personal liability on the part of the mortgagor to re-pay the debt;

(3) that the recital in the mortgage-deed that possession had been transferred to the mortgagee was inadmissible in evidence to prove the transfer of possession under s. 49 of the Registration Act;

(4) that the personal liability of the mortgagor under the clause in the mortgage-deed arose only upon loss of possession by the mortgagee and that the mortgagee having failed to show that he ever got into possession, it could not be held that he had lost possession and that, therefore, he was not entitled to recover the mortgage money from the mortgagor under the clause.

Pulaka Veetil Muthalakulangara Kunhu v. *Thiruthipalli Madhava Menon*, 1 Ind. Cas. 1; 19 M. L. J. 584; 32 M. 410 and *Ethel Georgina Kerr* v. *Clara B. Buxton*, 4 C. L. J. 510, distinguished.

Appeal against the judgment and decree of the Subordinate Judge, Sultanpur, dated the 31st May 1923.

Mr. *S. M. Ahmad*, for the Appellant.

Mr. *E. C. Singh*, for the Repondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-appellant for possession of some land on the basis of a usufructuary mortgage. The mortgage-deed required registration, and the suit for possession was, therefore, dismissed by the Court of first hearing. There was also, however, a claim for recovery of the mortgage money. This too was dismissed by both the lower Courts, and the sole question in this appeal is, whether they were right in holding that this money could not be recovered.

It is admitted, that the question whether a decree could be given for the mortgage money depended on the question whether the mortgagor under the inoperative mortgage deed had made himself liable personally for re-payment of the sum. The clause in the deed relied upon by the appellant is a clause providing that the mortgagee, in the event of his losing possession of the mortgaged property, could require the mortgagor to re-pay the loan out of his assets other than the land. It is clear from the deed that the mortgagor purported by means of the deed to give possession to mortgagee. He must be held to have failed to give this possession, because, there is no evidence of the giving of possession apart from the recital in the deed, and the deed not being registered cannot, even under s. 49 of the Registration Act (XVI of 1908), be used as evidence of the transfer of possession of the property. To so use the deed would be to allow the deed to affect immoveable property comprised therein. The personal liability only arose upon loss of possession by the mortgagee and it cannot be said that this contingency has arisen, as the mortgagee has failed to show loss of possession, because, he has failed to show that he ever got possession. There is nothing else in the deed showing that the mortgagor made himself personally liable to re-pay the money. A usufructuary mortgage, such as this one, does not in itself imply any personal liability to re-pay the debt. I have been referred by the appellant's Counsel to *Pulaka Veetil Muthalakulangara Kunhu* v. *Thiruthipalli Madhava Menon* (1) and *Ethel Georgina Kerr* v. *Clara B. Buxton* (2). In both these cases the mortgage deeds were construed to contain a personal covenant to re-pay the debt. They are, therefore, to be distinguished from the present case of a usufructuary mortgage. In this case, the consideration for the payment of Rs. 100 by the creditor was merely the signing of the deed by the debtor. It was for the creditor to see that the deed became of value to him by registration. In the absence of registration the creditor was giving one hundred rupees for something of no value. His having done so, he is not at liberty to sue for the one hundred rupees as he was bound to be aware of the law, and he could have himself made the deed of value by getting it registered. The rulings referred to by the lower Courts appear to me to be inapplicable. For the above reasons I dismiss this appeal with costs.

(1) 1 Ind. Cas. 1; 19 M. L. J. 584; 32 M. 410.
(2) 4 C. L. J. 510.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1815 OF 1921.
May 26, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

WASAWA MAL—PLAINTIFF—APPELLANT

versus

Qazi GHULAM JILANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 34—Money-decree—Interest till realisation.

When a suit for the balance of purchase-money of a house has been decreed, it is equitable to allow interest on the decretal amount from the date of the decree to the date of realisation.

First appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 9th March 1921.

Dr. *Nand Lal*, for the Appellant.

Bakhshi *Mulk Raj* for Mr. *Anant Ram*, for the Respondent No. 2.

JUDGMENT.—Wasawa Ram, plaintiff-appellant, sold a house to Ghulam Jilani, respondent No. 1, on the 22nd January 1920 for Rs. 28,000. This included Rs. 16,000 said to be due to Dewa Singh respondent No. 3, prior mortgagee. Ghulam Jilani re-sold the house to Jawanda Mal, respondent No. 2, who in his turn sold half of it to Abdul Karim, respondent No. 4. It has been urged that the balance of the con-

sideration, Rs. 6,000, was not paid to the appellant, the agreement being that this would be payable when actual possession had heen given to the vendee. The Court below has found that actual possession is with the vendees and the appellant is, therefore, entitled to recover Rs. 6,000 which has been made a charge upon the property sold. It refused to decree Rs. 900 on account of interest accruing up to the date of the suit and made no order as to future interest from the date of decree to the date of realization.

The plaintiff has appealed as regards the future interest and asks for it at the rate of 2 per cent. per mensem. Jawanda Mal is the only one of the respondents who has appeared or has been represented before us. On his behalf it is urged that the plaintiff should have recovered the money by execution of the decree. It appears, however, that he applied for execution two days after the decree had been passed but that application was dismissed as premature. Dr. Nand Lal informs us that a subsequent application for execution was made and proceedings in execution are still going on. This is not contested before us. In our opinion it would be equitable to allow reasonable interest on the principal sum, Rs. 6,000, from the date of decree to the date of realisation. We, therefore, accept the appeal so far as to allow interest on the sum of Rs. 6,000 at the rate of 6 per cent. per annum from the date of decree to the date of realisation. We fix the rate at this low figure so that it may not be an inducement to the decree-holder to delay execution of his decree. At the same time it will be in the interest of the vendee to see that the sum due to him is paid without undue delay. This interest will also form a charge on the property in dispute and we further direct that the appellant be paid his costs of this appeal by the respondents with the exception of Dewa Singh. Costs will also be a charge on the property.

K. S. D. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 232 OF 1923.

September 25, 1924.

Present:—Mr. Neave, A. J. C.

KANDHAIYA BAKHSH PANDE—PLAINTIFF—APPELLANT

versus

RAM CHARITAR—DEFENDANT—RESPONDENT.

Construction of document—Mortgage—Deed of further charge—Redemption, suit for, by transferee of mortgagor—Amount payable on redemption.

The predecessor-in-title of the plaintiff mortgaged the property in suit to the defendant for a certain sum. Sometime afterwards the mortgagor executed a second deed in favour of the mortgagee which was described as a *tamasuk zar mazid* and provided that at the time of redemption the money due under it shall first be paid and then the original mortgage money, and that until this money was paid neither the mortgagor nor his heirs would be entitled to redemption. No details of the property were given in the deed but a reference was made to the previous mortgage deed and to the description of the property contained in it. In a suit for redemption by the plaintiff:

Held, that no further charge on the mortgaged property was created by the subsequent deed, and that the original mortgagor was only under a personal liability to pay the amount due under that deed, which did not involve the plaintiff, who was a transferee from the original mortgagor, in any liability, and that the plaintiff was, therefore, entitled to redeem the property on payment of the amount due under the original mortgage-deed. [p. 329, col 2.]

Case-law discussed.

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 27th April 1923, in an appeal preferred against the decree of the Munsif, Musafirkhana at Sultanpur, dated the 22nd December 1922.

Mr. *R. D. Sinha*, for the Appellant.

Mr. *Moti Lal Saksena*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal from an order of the Subordinate Judge of Sultanpur decreeing his claim for redemption of certain mortgaged property on payment of Rs. 486-8-0. The plaintiff-appellant is the transferee of the original mortgagor *Musammat* Mandraj Kuar.

On the 12th October 1898, the latter mortgaged the property in suit to one Gopal Tewari for Rs. 49-12-0. Gopal Tewari is now dead. He has left sons and nephews, but only the eldest son Ram Charitar has been made a defendant in this suit.

On the 27th February 1904 *Musammat* Mandraj Kuar executed a second deed in favour of Ram Charitar for Rs. 80. In this it was covenanted that until the money now lent was re-paid with interest, the property mortgaged under the previous deed could

not be redeemed. On the 28th July 1908 the equity of redemption was sold to the present appellant, who came to Court claiming to redeem on payment only of the original Rs. 49-12-0. The defendant objected that the second deed of the 27th February 1904 was a deed of further charge and that the plaintiff was not entitled to redeem until the money due under that document, principal and interest, was paid in addition to the original mortgage money. The First Court disallowed this plea, holding also that the second deed had not been satisfactorily proved to be genuine. On appeal the learned Subordinate Judge has reversed the finding of fact and has held that the deed is a deed of further charge, and that the plaintiff is precluded from redeeming the mortgage until the money due under both deeds is paid.

In the memorandum of appeal two points have been taken. In the first, the finding of fact arrived at as to the genuineness of the second deed is challenged. This is clearly a finding of fact which is not open to question in second appeal and the point has not been seriously pressed. The second point, however, is of more importance. This is whether the deed of the 27th February 1904 amounted to a deed of further charge or not, and whether the plaintiff is bound to pay the money due under it before he can redeem the mortgage.

It will be well first to give an abstract of the essential provisions of the deed. This describes itself as a *tamasuk zar mazid*, and provides that at the time of redemption the money due under it shall first be paid, and then the original mortgage money. Until this money is paid, neither the mortgagor nor his heirs shall be entitled to redemption. Reference is made to the previous mortgage deed and to the description of the property contained in it.

The learned Subordinate Judge has held that the recitals in this deed read as a whole go to show that the parties to it intended it to be a deed of further charge, and that such a document should not be too strictly construed in view of the laxity as to the drafting of legal documents which is prevalant in this country.

He has referred to a number of rulings, in particular to *Chauharja Bakhsh* v. *Ram Harakh* (1), *Suraj Bali Lal* v. *Ram Dular Singh* (2), *Naunidh Lal* v. *Mahadeo Singh* (3) and also to *Chandrika Pershad* v. *Jagannath* (4), in all of which it was held that documents similar in their general terms to the one now in question should be regarded as deeds of further charge.

On the other side reliance is placed on *Ramadhin Misra* v. *Sitla Bakhsh Singh* (5) and *Gaya Prasad* v. *Rachpal* (6), both of which refer to *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (7).

A careful examination of the rulings relied on by the learned Subordinate Judge and the respondent, will show that in each case there were important points which differentiate the deeds before the Court in those cases from the deed now in suit. In the case decided by a Bench of this Court in *Chandika Pershad* v. *Jagannath* (4), the deed on the face of it purported to create a charge and definitely hypothecated property. In both *Chauharja Bakhsh* v. *Ram Harakh* (1) and *Naunidh Lal* v. *Mahadeo Singh* (3), the deeds were styled *rahannama zar mazid*, and one at last contained an accurate description of the property. In *Suraj Bali Lal* v. *Ram Dular Singh* (2), again, the deed is called *zar mazid mai qabza* and gives details of the property. The present deed on the other hand is described as already mentioned, as *tamasuk zar mazid*. No details of the property are given, though it is true that from the reference to the original mortgage it would be possible to identify it. There does not seem to be any point of distinction between the present case and that reported in *Ramadhin Misra* v. *Sitla Bakhsh Singh* (5) and I am of opinion that the principle laid down in that ruling must be followed here, and that it must be held that no further charge was created by the deed in suit, but that the original mortgagor was only under a personal covenant which did not involve her transferee in any liability.

For these reasons I allow the appeal and restore the order of the First Court. The appellant will have costs throughout. One of the grounds of appeal related to the deficiency in Court-fee due from the respondent. Orders have already been passed

(1) 32 Ind. Cas. 740; 2 O. L. J. 601.

(2) 50 Ind. Cas. 897; 6 O. L. J. 147.

(3) 65 Ind. Cas. 401; 25 O. C. 134; 8 O. L. J. 640; (1922) A. I. R. (O.) 58.

(4) 8 O. C. 227.

(5) 25 Ind. Cas. 905; 17 O. C. 303

(6) 70 Ind. Cas. 66; 9 O. L. J. 484; 4 U. P. L. R. (O.) 110; (1923) A. I. R. (O.) 24.

(7) 9 B. 233; 5 Ind. Dec. (N. S.) 155.

directing him to deposit the deficient amount.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 27 OF 1923.
July 11, 1924.

Present:—Mr. Justice Mukerjee and Mr. Justice Dalal.

Babu SANWAL DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

Saiyad ALI MAHDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Sub-mortgage to member of Hindu joint family—Purchase by sub-mortgagee in execution of decree—Statement re existence of first mortgage—Suit for redemption—Acknowledgment—Other members, whether bound—Limitation Act (IX of 1908), s. 19.

In the case of a mortgage executed in 1859, the mortgagees executed a sub-mortgage of their mortgagee rights in 1900 in favour of two members of a Hindu joint family, *S.* and *K.* The sub-mortgage was a simple one. *S.* and *K.* got a decree for sale against their mortgagors and purchased the property in execution. In the list of properties to be sold signed by *S.* he described the property as subject to the mortgage of 1859. In a suit for redemption of the mortgage of 1859 against *S.* and other members of the family:

Held, (1) that *prima facie* the suit was barred; [p. 330, col. 2.]

(2) that inasumch as in describing the property purchased by him *S.* mentioned that it was subject to the mortgage of 1859, this constituted a valid acknowledgment and the suit was within time against him; [p. 331, col. 1.]

(3) that as the purchase was made for the benefit of the entire family and in preparing the list *S* was acting on behalf of the family, the acknowledgment was binding on all the members of the family. [*ibid.*]

Second appeal from a decree of the District Judge, Benares, dated the 18th September 1922.

Dr. *K. N. Katju*, for the Appellants.

Messrs. *P. L. Banerji* and *Hyder Mahdi*, for the Respondents.

JUDGMENT.—This appeal raises two questions:—first, whether having regard to the fact that the appellants were made parties to the suit for redemption after the expiry of sixty years from the date of the mortgage, the suit against them was time-barred and secondly whether the statement of the property sought to be sold, dated the 21st June, 1919, signed by Sanwal Das operated as an acknowledgment under s. 19 of the Limitation Act, and saved the suit from being time-barred.

The facts briefly are these:—There was an ancient mortgage dated the 16th July 1859 for Rs. 1,200. The suit to redeem the mortgage was brought on 29th January 1918. The mortgagees or some of them made a sub-mortgage of their mortgagee rights with respect to a 7 annas 8½ pies share on 19th September 1900 in favour of two persons Sanwal Das and Kampta Prasad. The sub-mortgage was a simple one. Sanwal Das and Kampta Prasad got a decree for sale against their mortgagors and brought the property to sale and themselves purchased on 20th March 1920. Kampta Prasad has since died. Sanwal Das, his brother Baldeo Das, Kampta Prasad's sons and other members of the family were impleaded in the suit for redemption by order dated the 23rd December 1920. These are the parties who are the appellants before this Court. Three of these contested the suit and pleaded limitation among other matters. In answer to this plea of limitation the plea of acknowledgment was taken and it was further urged that the actual sale having taken place pending the suit, the question of limitation does not arise.

As we have stated, there are two points for decision in the case. On the first point it appears to us that the auction purchase by the appellants can be referred only to the simple mortgage they obtained on 19th September 1900. It is not the case that this auction purchase took place under a simple money decree and the right to the property accrued to the appellants for the first time at the date of the sale. They already had an interest in the property by the mortgage, simple though it was, dated the 19th September 1900. We are, therefore, of opinion that the Courts below were not right in holding that the suit was not barred against the appellants if there happened to be no acknowledgment.

Coming to the second point we think that the Courts below were right in treating the statement of properties, *Fard-i-Taliqa*, signed by Sanwal Das, as a sufficient acknowledgment of the liability of the appellants to be redeemed. The mortgage in suit, namely, the mortgage of 1859, uses a rather peculiar word which has become almost obsolete at this date, namely, *baiul khayar* in describing the nature of the mortgage. The document was a mortgage by conditional sale. The word that is generally used to denote a mortgage by conditional sale in the vernacular is *baiul ufa* or *bai miadi*. In the list of properties to be sold

signed by Sanwal Das he described the property 7 annas 8½ pies share in the village Deokali as *baiul khayar*. Clearly he mentioned the very expression which had been used in the mortgage of 1859. We have, therefore, not the least doubt in our minds that Sanwal Das in describing the property mentioned that the property was subject to the very mortgage of 1859. There is, therefore, no vagueness about the acknowledgment.

The question now is whether Sanwal Das was authorised to make an acknowledgment on behalf of the family. We have already stated that all the appellants, who were large in number, were impleaded as subsequent transferees on account of the auction purchase dated the 20th March 1920. The purchase was made by only two persons Sanwal Das and Kampta Prasad. It follows, as the lower Appellate Court finds, the family being a joint one, the purchase was made for the benefit of the entire family. Sanwal Das alone signed the list for himself and for his co-decree-holder and co parcener, Kampta Prasad. Evidently he was acting on behalf of the family. Such is the finding of the Court below. We hold, therefore, that there is a valid acknowledgment of the mortgage on behalf of the family by Sanwal Das.

The result is that the appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

N. H. & K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 242 OF 1923.

November 4, 1924.

Present:—Mr. Ashworth, A. J. C.

CHHOTEY LAL—PLAINTIFF—APPELLANT

versus

Pandit IQBAL NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Sale of zemindari—*Maintenance granted in perpetuity to vendor—Charge on property*—Khewat, *entry in, value of.*

A *zemindar* sold his *zemindari* to the defendant and, after the sale was completed, the defendant executed a document in favour of his vendor whereby, in consideration of the sale having been made to him, he agreed to pay to the vendor and his descendants a certain sum as maintenance in perpetuity. The vendor sold the right of maintenance to the plaintiff who brought a suit to recover arrears of maintenance as *nankar* from the defendant. At the time when the agreement for maintenance was executed the allowance was entered in the *khewat* as *nankar* and was treated as an inferior and under-proprietary right. In column 5 it was also described as being "*mustasna az bai*."

Held, (1) that the agreement did not create a charge on the property sold and that no order could be made for the payment of the maintenance out of the profits of the *zemindari*; [p. 332, col. 2.]

(2) that the value to be ascribed to the entry in the *khewat* was that of *contemporanea ex positio* and nothing higher and that the construction of the agreement itself being clear the Courts could not be compelled to follow a contemporaneous but incorrect construction adopted in the *khewat*. [p. 332, cols. 1 & 2.]

Appeal against a judgment and decree of the Third Additional District Judge, Lucknow, dated the 19th April 1923.

Mr. *S. M. Ahmad*, for the Appellant.

Mr. *P. C. Gupta*, for the Respondents.

JUDGMENT.—This second appeal arises from a suit brought by one Chhotey Lal, appellant, against the respondents Pandit Iqbal Narain etc. for the recovery of a sum of Rs. 20 alleged to be due as *nankar* allowance at the rate of Rs. 48 per annum. The plaintiff-appellant purchased this "allowance" at an auction sale from certain persons Bhaggu etc., who were the original *zemindars* of *Mauza* Luhramau. Bhaggu etc., in 1864 sold their *zemindari* to one Sheo Nath, Ex. A—2, which is dated 20th August 1864, and in which mention is made of the sale of the *zemindari* having previously been effected. After the sale was completed, Sheo Nath executed a document Ex. A—2 in favour of Bhaggu. The essential part of the document runs as follows:—"Whereas Bhaggu etc., the *zemindar* of *Mauza* Luhramau, have sold their respective *zemindari* to me, the declarant, for Rs. 1,500, I, out of my own free-will and consent, having fixed Rs. 48 for the maintenance of the aforenamed persons in perpetuity, during the continuance of their line of descent, do hereby covenant and reduce to writing that I shall, without any objection and pretext, continue to pay the annuity to the aforesaid persons detailed below. The aforesaid persons should remain prepared to perform village work. The annuity shall continue so long as issue begotten by or born of the aforenamed persons remains in existence, and that when the children born of them cease to exist, I shall be at liberty not to pay the same." This document was registered and at the time of registration a fur-

ther endorsement signed by Sheo Nath was entered. This is in favour of the three obligors guaranteeing them Rs. 48 per annum from generation to generation in consideration of their having sold their village for Rs. 1,500.

The Court of first instance decreed the claim. It held that the allowance was a "*nankar*" in the usual sense, *i.e.* an under-proprietary tenure." This meant that the allowance was a charge on the *zemindari*. A decree was given for the payment of the same by certain date, and an order was passed that in default the property would be sold. An appeal to the Additional District Judge of Lucknow was made by the defendants. It was held that Ex. A-2 was not a charge upon the *zemindari*, nor did it make the profits of the *zemindari*, liable for the maintenance, and that the sum claimed was only payable out of the private purse of the purchaser of the *zemindari*. It was also pointed out that no claim had been made by the plaintiff in the plaint for anything but a personal decree. The Munsif's order as to sale of the property in default of payment was set aside. It was held, however, that the allowance was transferable and payable in perpetuity. The result was that the decree of the First Court was varied but the decree for Rs. 20 was maintained. In this appeal three points are taken. It is urged that the Munsif was entitled to give any relief that he thought fit even though not claimed. Secondly, it is urged that the agreement Ex. A-2 should have been held to create a charge on the *zemindari* and lastly, it is urged that even if the maintenance was not a charge, the persons for the time being in possession of the village should have been held liable to pay the allowance out of the income of the village. I will deal with the second point first. There is nothing in Ex. A-2, which suggests that it was the intention of Sheo Nath to create a charge on the village, except the statement that the allowance was to be an allowance in perpetuity. The appellant places great reliance upon the fact that in the *khewat* of 1867, that is, three years after Ex. A-2 was executed, the allowance was entered as "*nankar*" and treated as an inferior or under-proprietary right. In column 5 it was also described as being "*mustasna az bai*," which the Munsif has interpreted to mean excepted from the corpus of the property sold to the purchaser. The value to be ascribed to this *khewat* is that of *contemporanea ex positio*, and nothing higher. I am unable to hold that the language of Ex. A-2 can be interpreted to create a charge, and the Courts in these circumstances cannot be compelled to follow a contemporaneous but incorrect construction. If Ex. A-2 had been open to the possible construction that a charge was intended, the entry in the *khewat* would have been of great value in turning the scale. As it is, it cannot be regarded as binding on the Court. No plea has been taken in either of the lower Courts, or in this Court that the agreement embodied in Ex. A-2 was bad for want of consideration. I do not, therefore, feel it necessary to consider this point, but, the fact that the sale of the *zemindari* had been completed before this agreement or deed was executed, makes it less likely that the purchaser would, having got the *zemindari*, go out of his way to create a charge on it. There is a Single Judge's judgment of this Court, *Mirza Muhammad Jafer Ali Khan* v. *Muzaffar Husain* (1) in which Mr. Kendall made the remark: "It is indeed accepted law that cash *nankar* granted in lieu of the surrender of *zemindari* rights, is an under-proprietary tenure." This, however was a case where the payment had been made a charge on property. It is only authority for holding that a charge on *zemindari* in lieu of surrender is an under-proprietary tenure.

We may now deal with the third contention of the appellant. It is clear that, failing the allowance being a charge on the village, no order can be made for the payment of the maintenance out of the profits of the *zemindari*. As to the first point, apart from the fact that there was no request made in the plaint for recovery of the money by sale of property, it would clearly not be fitting, in a case of a personal claim, to make an order for the sale of property in default of payment of the same decree. For the above reasons this appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 4 O. & A. L. R. 446.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 62 OF 1923.

August 18, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

PYDA SATYARAJU—APPELLANT

versus

THE GUNTUR COTTON, JUTE AND PAPER MILLS Co., LTD.—RESPONDENTS.

Companies Act (VII of 1913), ss. 162, 163—Petition for winding up—Disputed debt, enforcing of—Abuse of process of Court—Practice—Preliminary order—Appeal from final order, effect of.

With respect to all Courts, more especially Courts of Record, such as the Original Side of the High Court, the order of the Court is the order that comes to be embodied in the formal order drawn up and issued by the Court, and when the first order of the Court is in the nature of a preliminary order, an appeal against the final order would be held to include any principles decided for the purpose of the preliminary order. [p. 334, col. 1.]

A petition for winding up of a Company which is put in by a creditor in order to obtain an unfair advantage over other creditors at a time when the Company is not known to be insolvent or with a view to bring pressure to bear upon the Company and enforce payment of a disputed debt amounts to an abuse of the process of the Court and should be dismissed. [p. 334, cols. 1 & 2.]

In re London and Paris Banking Corporation, (1874) 19 Eq. 444 at p. 445; 23 W. R. 643 and *Tulsidas Lalubhai* v. *The Bharatkhand Cotton Co., Ltd.*, 27 Ind. Cas. 44; 39 B. 47; 16 Bom. L. R. 692, relied on.

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 26th April 1923, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in O. P. No. 136 of 1922.

Messrs. *T. R. Ramachandra Iyer* and *S. Srinivasa Iyer*, for the Appellant.

Messrs. *A. Krishnaswami Iyer* and *K. Kamaswara Rao*, for the Respondents.

JUDGMENT.—Respondents represent a Company called "The Guntur Cotton, Jute and Paper Mills Co., Ltd." The appellant Pyda Satyaraju is the wife of one of the Directors who is also the Secretary of the Company. She is stated to have a mortgage dated 2nd January 1918 for Rs. 1,23,354 upon the assets of the firm, Rs. 74,000 out of this sum having been paid towards interest and principal, about Rs. 90,000 remain to be paid. Three suits have been brought in the Guntur Courts which raise questions as to the validity of this mortgage and none of these suits have been finally settled. One is O. S. No. 42 of 1919 on the file of the Additional Subordinate Court for accounts in which the appellant's husband was charged with misfeasance in his capacity as Company Director. We are informed that the appeal in this suit is still pending. The other two are O. S. No. 15 of 1923 brought for a declaration that the debt is not binding on the Company and O. S. No. 21 of 1924, the mortgagee's suit for the enforcement of the terms of her mortgage. In a meeting of December the 30th 1917, the share-holders passed a resolution terminating the office of Secretary held by the appellant's husband to take effect from the 31st March 1918. The mortgage in favour of the appellant was executed on the 2nd January 1918 by the appellant's husband as Secretary of the Company, in favour of his own wife and by his brother-in-law. During the pendency of O. S. No. 42 of 1919, the Sub-Court appointed a Receiver. The appellant sent a notice to the Company on the 10th January 1920 demanding the payment of the balance due on her mortgage with interest within one month. The Sub-Court refused to permit the Receiver to pay up the debt. At a meeting of the share-holders a resolution was passed on the 18th November 1922 refusing the winding up of the Company and declaring that the appellant was not a creditor of the Company. In these circumstances the appellant and two others applied on the Original Side of this Court for an order for winding up the said Company. Kumaraswami Sastri, J., who heard the petition upon the Advocate General who appeared for the Company, admitting that there was a sum of Rs. 60,000 belonging to the Company in Court, ordered that this sum should be paid to the appellant upon her furnishing security for its re-payment if she might be ordered to do so in any proceedings in appeal or suit, and he adjourned the matter for some time in order to allow the appellant to produce a statement of accounts showing the exact amount due to her. Upon the adjourned date the learned Judge ordered the Company to pay into Court Rs. 65,000 the amount to stand to the credit of the appellant and to be paid over to her, in the event of her being successful in the suit filed by the Company to declare her mortgage to be invalid, and the amount was ordered to be invested meanwhile in war-bonds. Now the appellant appeals on the ground that the learned Judge had no power to alter his first order because the money was not paid into her hands but

was allowed to be deposited in Court. The respondents have filed a memorandum of objections in which they maintain that the appellant's petition should have been summarily dismissed.

I will deal with the memorandum of objections first.

Mr. T. R. Ramachandra Iyer has raised the preliminary point that it should have been in form an appeal against the original order of Mr. Justice Kumaraswami Sastri bearing date 29th January 1924, and no appeal having been filed against that order, it became final and it was not open to the respondent to attack that order or the grounds thereof by an appeal against the later order of the 26th of April, and also that in any case any appeal from the order of the 29th January was out of time. With regard to this objection it seems to us sufficient to observe that with respect to all Courts, more especially Courts of Record such as the Original Side of the High Court, the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court and that secondly, when the first order of Court is in the nature of a preliminary order, an appeal against the final order would undoubtedly be held to include any principles decided for the purpose of the preliminary order.

As regards the merits, the law is perfectly clear, that petitions for winding up, which are put in, in order to obtain an unfair advantage over other creditors, at a time when the Company is not known to be insolvent, amount to an abuse of the process of the Court and should be dismissed: See Buckley on the Companies and Limited Partnerships Act, para. 4, page 313. In Palmer's Company Precedents, para. 2, Ch. 3, page 52, it is stated: "It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs. A winding up petition is not to be used as machinery to try a Common Law action." *In re London and Paris Banking Corporation* (1), Jessel, M. R. observed: "I should be bound by authority (even if I entertained a different opinion, which I do not) to hold that if the debt is *bona fide* contested, and there is no evidence other than non-compliance with the statutory notice to show that the Company is insolvent, and the Company denies its insolvency (as this Company does), I ought to dismiss this petition." Having further found that the petition in that case had not been presented *bona fide*, that is, not with the view of obtaining a winding up order, but with the object of extorting from the Company, a larger sum than they thought was fairly due, under pressure of a threat to present the winding up petition, he dismissed the petition with costs. In *Tulsidas Lalubhai* v. *The Bharatkhand Cotton Co., Ld.* (2), two learned Judges of the Bombay High Court observed that if a party presenting a petition to wind up a Company had the object of bringing pressure to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts, he commits one of the worst abuses to which the winding up sections of our Statute Law could be perverted. The learned Judge who heard this petition on the Original Side stated that he could not hold that the claim was a fraudulent one or one made with an indirect motive to establish by a short cut an otherwise unsustainable claim. Without going so far as to say that the claim was a fraudulent one, we feel no doubt in saying that no order for payment should have been made. The debt is disputed; suits are pending contesting the validity of the mortgage; the share-holders have passed a resolution denying the status of the appellant as a creditor. She is the wife of one of the Directors whose conduct has been condemned. The Company is not admitted to be insolvent and there is no reason why the appellant, if the amount is due, should not get her remedy in the usual course by obtaining a decree in the suit instituted by her. It is urged on her behalf that the order was made by consent and, therefore, that the respondents are not in a position to object to it. In the order it is stated that the Advocate-General offered to bring the money into Court. We do not think that this implies that he was ready to submit the case of his client to any order that the Court might pass. If he did make any admission that would enable the appellant to abuse the process of the Court, then we think that the learned Judge should not have acted upon

(1) (1874) 19 Eq. 444 at p. 448; 23 W. R. 643.

(2) 27 Ind. Cas. 44; 39 B. 47; 16 Bom. L. R. 692.

it. The only order that can be made upon this appeal and the memorandum of objections is to cancel the learned Judge's order for payment of Rs. 65,000 into Court and to dismiss the petition for winding up, with costs to be paid to the respondent Company, both here and in the original Court. The memorandum of objections is allowed with costs. The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 8 OF 1924.

November 18, 1924.

Present :—Mr. Asworth, A. J. C.

MANI RAM AND ANOTHER—DEFENDANTS APPELLANTS

versus

Syed WASI ALI—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 108 (2), 127—Suit for ejectment for arrears of rent—Jurisdiction of Civil and Revenue Courts.

Jurisdiction under the Oudh Rent Act is determined by the allegations contained in the plaint, and to make a suit for arrears of rent and for ejectment cognizable under s. 127 read with s. 108 (2) of the Act, it is sufficient for the plaintiff to allege that the defendant is a mere trespasser. [p. 336, col. 1.]

Bhagwan Bakhsh Singh v. *Shafiq-uz-Zaman*, 26 Ind. Cas. 709; 1 O. L. J. 707, dissented from.

Rent appeal against the judgment and decree of the District Judge, Fyzabad, dated the 18th January 1924, confirming the decree of the Assistant Collector, First Class, Fyzabad, dated the 2nd November 1923.

Mr. *L. S. Misra*, for the Appellants.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—This second rent appeal arises out of a suit brought by the plaintiff-respondent against the defendants-appellants in the Court of a Sub-Divisional Officer of Fyzabad for arrears of rent and for ejectment of the tenant. The plaint shows that the plaintiff had elected under s. 127, Oudh Rent Act, to treat the defendant, although he was a mere trespasser, as a tenant, and was claiming a specific amount of rent, in anticipation of the Court, under the same section, determining that rent to be fair and equitable. The claim for the ejectment of the tenant is based on sub-s. 2 of s. 127. The defence consisted of the contention that of the lands in suit, six *bighas*, one *biswa*, were held by the defendants as occupancy tenants, and that in respect of 10 *bighas*, 10 *biswas*, the plaintiff had no cause of action, as they had become the absolute and proprietary holding of the defendants by twelve years' adverse possession. The Court of first hearing failed to frame or decide any issue as to the alleged occupancy holding, beyond finding, on an issue confined to the facts that the defendants had failed to show that the Revenue Court had declared them entitled to the 6 *bighas*, 1 *biswa*, as occupancy tenants, although it was proved that the defendants had applied for correction of papers in respect of these 6 *bighas*, 1 *biswa*, on the 10th June 1911. Now, it is obvious, from the earlier part of the judgment of the Court, that to prove their occupancy rights in this area, the defendants had relied not on the proceedings taken in 1911 for the correction of papers but on a judgment delivered in 1886 in a suit brought by one Kalka Prasad against Fida Husain for establishment (so it is stated) of occupancy rights. The Court has stated that the defendants relied on this judgment, at the beginning of its judgment, but has nowhere in the rest of its judgment referred to this piece of evidence. I find that the file of this case was produced in evidence, and remained on the file until after the judgment in appeal by the District Judge, when it was taken back by the defendants themselves. As regards the 10 *bighas*, 10 *biswas*, which the defendants claim to be held by them as proprietors by reason of twelve years' adverse possession as such, the Court refused to frame an issue on the ground that no authority had been shown to it for holding that a trespasser could acquire ownership of land adversely possessed by him for twelve years.

Accordingly the plaintiff-respondent's suit was decreed.

An appeal was filed in the Court of the District Judge of Fyzabad. The first ground taken was that the issues framed did not cover the pleadings on the record. The District Judge, although not framing any issues, went into the evidence as regards the claim for occupancy rights and the claim for proprietary rights. He looked at the decree of the 8th June 1886, and found that it did not help the defendants, as the decree did not give the numbers of the plots in suit in that case, or, declare

the defendants' grandfather to be an occupancy tenant, and consequently, in the absence of any other evidence, the defendants' contention failed. As regards the claim for proprietary possession of the 10 *bighas*, 10 *biswas*, the District Judge, after rejecting the appellants' plea that the claim to proprietary possession took the case out of the jurisdiction of a Rent Court, went on to decide that the defendants had not held the land in adverse possession for twelve years.

In this second appeal, the questions that have to be decided are: (1) Have the Rent Courts got jurisdiction in this case? (2) Had the plaintiff no cause of action in respect of the 10 *bighas*, 10 *biswas*, by reason of the defendants having acquired proprietary title by adverse possession for twelve years? and (3) Is there any evidence to justify a finding that the defendants are occupancy tenants of the 6 *bighas*, 1 *biswa*?

It may be conceded that the issues framed by the original Court were not sufficient to decide the case but this is immaterial, in view of the fact that there is no complaint that any evidence was excluded by reason of the issues being incomplete, and by reason of the fact that the District Judge, in effect, decided the necessary issues. It may also be conceded that the Court of first instance was wrong in its view that title cannot be acquired by adverse possession.

As to the first question, the plaintiff relies upon a ruling of the Board of Revenue reported as *Bhagwan Bakhsh Singh* v. *Shafiq-uz-Zaman* (1). This ruling refers to another ruling of the Board of Revenue, *Nisar Ali* v. *Meghi* (2). In these rulings, the latter of which refers to Oudh and the former to Agra, it was held, that a suit for arrears of rent under s. 127 read with s. 108 (2), should not be entertained where the defendants were *bona fide* claimants to proprietary interest, or, where a question of adverse proprietary right would probably arise (at what stage in a case is not stated). I am unable to follow these rulings. Jurisdiction under the Oudh Rent Act is determined by the allegations in the plaintiff, and it is sufficient for the plaintiff to allege that the defendant is mere trespasser to make the suit cognizable under s. 127 read with s. 108 (2). So far there is nothing in the Oudh Act similar to s. 199 of the Agra Tenancy Act, giving the Court an option to require the plaintiff to institute a suit in the Civil Court. I, therefore, hold that this suit was cognizable by the Rent Courts.

As to question (2), no evidence has been shown to me to justify a finding of adverse possession for more than twelve years. Indeed, the contention has not been pressed in this Court. I, therefore, decide against the appellants on this question.

As to question (3), it is maintained by the Counsel for the appellants that the District Judge was wrong in holding that the decree of the 8th June 1886, failed to support the appellants' contention. He states that if the plaint and the file of those proceedings are looked at, it will be seen that the decree refers to some of the plots at least in question. Whether this is so or not, it is impossible for me to determine, as neither the decree, nor any part of the record in which the decree is embodied, are before this Court. All such papers were taken back by the appellants from the record after the District Judge's decision. No application has been made for admitting this evidence again on the file, and the respondent's Counsel has had no opportunity to meet the contention that they would prove the defendants' occupancy rights in any of the plots. Further, I would point out, that it is not alleged in the grounds of appeal that these papers prove the occupancy rights. What is stated in ground No. 3 is, that the lower Court was wrong in thinking that the defendants relied only upon the decree dated 8th June 1886, for establishing their claim to occupancy rights. The case, therefore, that had to be met in this Court by the respondent was that there was other evidence on the record of this case proving the occupancy rights. No such other evidence has been referred to by the appellants' Counsel. I must, therefore, take it that the District Judge was right in holding that the decree of 1886 failed to prove occupancy rights in favour of the appellants, and that there is no other evidence to prove such rights.

In the grounds of appeal the appellant has also objected that the Court of first hearing should not have assessed rent in accordance with the prayer of the respondents. This ground leaves it doubtful whether the fact of any assessment or the amount assessed was questioned. If the latter was intended the ground fails as no

(1) 26 Ind. Cas. 709; 1 O. L. J. 707.
(2) Sel. Dec. No. 4 of 1913.

objection to the assessment was taken in the lower Appellate Court. Nothing, indeed, has been said on this matter by the learned Counsel for the appellants, and so the point must be deemed not to have been pressed.

For the above reasons this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2585 OF 1921.
July 11, 1924.

Present :—Mr. Justice Martineau and Mr. Justice Zafar Ali.

DAYA—PLAINTIFF—APPELLANT

versus

BUDH RAM, DECEASED, REPRESENTED BY CHHAJJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Village shamilat—*Partition*—'Hasab rasad khewat,' *meaning of.*

The term '*khewat*' in the phrase '*hasab rasad khewat*' admits of two interpretations and may mean proprietary land or the land revenue assessed on that land.

Sahib Khan v. *Ladiani*, 18 Ind. Cas. 137; 69 P. R. 1913; 57 P. L. R. 1913; 86 P. W. R. 1913, followed.

The actual meaning of the term in any particular case depends upon the circumstances of that case.

Second appeal from the decree of the District Judge, at Karnal, dated the 25th July 1921, confirming that of the Sub-Judge, at Karnal, dated the 27th May 1921.

Mr. *Shamair Chand*, for the Appellant.

JUDGMENT.—The proprietors of the village Jai Singh Pura, Tahsil Kaithal, District Karnal, have long been divided into two factions and litigating to have a rule settled for the partition of their *shamilat.* The present was the third suit of its kind and each suit was brought by the same set of proprietors. In their first suit they claimed partition on ancestral shares, but the Munsif held that possession was the measure of right and not ancestral shares. That decision still stands. In the second suit, which was instituted in June 1913, they contended that the Revenue Authorities had effected the partition on the basis of the *khewat* of Mr. Larkin's Settlement of 1856 and claimed that the partition should be made in accordance with the *khewat* of Mr. Stow's recent Settlement of 1909. They did not succeed in the Trial Court, or in the Court of the Divisional Judge, as both held that the partition had been made on the principle claimed by the plaintiffs themselves, but on second appeal a Division Bench of the Punjab Chief Court gave the plaintiffs the decree asked for, declaring that the partition should be made in accordance with the *khewat* of the recent Settlement. On receiving this decree the Revenue Authorities interpreted the term "*khewat*" as equivalent to "land revenue assessment" and proceeded to partition the *shamilat* in proportion to the revenue assessed on each proprietary holding. The plaintiffs then brought the present third suit to obtain a declaration that the *shamilat* should be partitioned according to the areas of the *khewat* or proprietary holdings. The First Court, by reference to *Sahib Khan* v. *Ladiani* (1), came to the conclusion that *khewat* meant "land revenue assessment," and that in accordance with the present "*khewat*" did not mean in proportion to the area of each holding, and dismissed the suit. The learned District Judge dismissed the appeal *in limine*, agreeing with the First Court. The plaintiffs now appear in this Court in second appeal, which has been heard *ex parte.*

We are of opinion that the term "*khewat*" as used in the present case has been misinterpreted by the Revenue Authorities as well as by the Court below. There can be no doubt that the term *khewat* in the phrase "*hasab rasad khewat*" admits of two interpretations as explained in *Sahib Khan* v. *Ladiani* (1), and may mean "proprietary land" or the land revenue assessed on that land. But from the history of the present litigation it is clear that it was used in this case in its literal sense to mean proprietary land. The word *khewat* is a derivative of *khet* (field). Partition in proportion to land revenue was never set up as the rule of partition by either party, and it is unfortunate that the Revenue Authorities proceeded to apply that rule on a misinterpretation of the term *khewat* used in the judgment of the Punjab Chief Court referred to above.

We accept the appeal *ex parte* and grant the plaintiff the decree asked for and order the respondents to pay the plaintiff's costs throughout.

K. S. D. *Appeal accepted.*

(1) 18 Ind. Cas 137; 69 P. R. 1913; 57 P. L. R. 1913; 86 P. W. R. 1913.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 OF 1923.

October 15, 1924.

Present:—Mr. Dalal, J. C.

Lala SHIV NARAYAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

G. I. P. RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 72—Risk Note Form "B", goods consigned under—Suit for damages for loss of goods—Goods lost from wagon standing at platform—Presumption—Burden of proof—Appeal, second—Finding based on no evidence, whether can be questioned.

Where goods consigned to a Railway Company for carriage under Risk Note Form "B" are lost and the evidence shows that the loss must have occurred at a time when the waggon containing the goods was standing at the platform of a station, it must be held that the loss was due either to the wilful neglect of duty by the Company's servants or to theft by one of them. There is always considerable difficulty, almost amounting to impossibility, for a consignor to prove wilful neglect or theft by the Company's servants and the evidence given by the Company's servants in such a case must be viewed in favour of the consignor. [p. 339, col. 1.]

Where there is an entire absence of evidence in support of a finding, the finding is liable to be set aside in second appeal as defective on a ground of law. [p. 338, col. 2.]

Second appeal against the decree of the First Subordinate Judge, Bahraich, dated the 5th March 1923, preferred against that of the Munsif, Bahraich, dated the 31st March 1922.

Mr. *Bisheshar Nath*, for the Appellants.

Mr. *G. M. Mukerji*, for the Respondent.

JUDGMENT.—This is the ever recurring case of a claim for damages arising out of a loss of consignment booked under Risk Note Form B. A consignment of 4 bales of cloth was booked at Victoria Terminus on the G. I. P. Railway (that is of the defendant) to Chilwaria Station on the B. N. W. Railway. The case for the plaintiff was that he received only 3 bales out of 4 and that the other bale was lost through the wilful neglect of the defendant Railway Company or theft by or the wilful neglect of its servants. Under Risk Note Form B the plaintiff is protected from such loss. The question, therefore, is whether the consignment was lost by the wilful neglect of or theft by the defendants' servants. The First Court granted a decree to the plaintiff but this decree was set aside by the lower Appellate Court. In this second appeal it was argued by the plaintiffs' learned Counsel (1) that the defendant Company had not proved that this undelivered bale had been lost by it, and (2) that on the evidence on the record the wilful neglect of or theft by its servants was proved. It was objected on behalf of the respondent that there was a finding of fact of the lower Appellate Court that there was no wilful neglect or theft by the defendants' servants. There is such a finding but I think this Court is entitled to inquire into the evidence on which the finding is based. If there is an entire absence of evidence the finding will be liable to be set aside as defective on a ground of law. The first point raised by the appellants' learned Counsel loses its force because of para. 5 of the plaint where the plaintiff accepts a statement made to him by the Traffic Manager of the B. N. W. Railway that the bale had been lost while in custody of the defendant G. I. P. Railway. When such a position of loss is accepted by the plaintiff, I cannot hold that the defendant Company in spite of the plaintiff's acceptance of the allegation of another Railway Company was called upon to prove loss of the bale while in its custody.

I think the appeal should succeed on the second ground. The evidence as regards the loss consisted mainly of reports and evidence of Railway servants. The plaintiff himself, in the nature of things, did not accompany the consignment and could only depend on statements of Railway servants as to what happened to this particular bale. It appears that this particular bale was put in a waggon at the Victoria Terminus and a seal was fixed on that waggon. Altogether there were 70 bales including this particular bale in the waggon and when the waggon arrived at Nand Gaon Railway Station that seal was found broken. A servant known as the foreman, whose duty it was to count the packages, counted them and reported that there were 70, so it is certain that no theft was committed on the running train between Victoria Terminus and Nand Gaon. The learned Judge of the lower Court has referred to a presumption of the Station Master of Nand Gaon that the foreman miscounted the packages and that really one was missing at Nand Gaon. This idea struck the Station Master only when it was reported that this particular bale did not arrive at Bara Banki during transit. The Station Master would be primarily responsible for theft committed from the waggon while it was standing at his platform and would naturally try to

make out that the package was missed or lost while the train was running. The Station Master's statement is not based on any information received by him or on any examination made by himself. The waggon was then sealed and the seal was found intact at Bara Banki. The conclusion is irresistible that this package was stolen at Nand Gaon Station during the time the waggon was at the platform and before a new seal was impressed. There must have been wilful negligence of duty by the Company's Officials to allow such a thing to happen. There is always considerable difficulty almost amounting to impossibility for a consignor to prove wilful neglect or theft by the Company's servants and the evidence afforded by the Company's servants has always to be received in favour of the consignor. The evidence on the record proves that the package, which has been missing since, arrived at Nand Gaon and that it must have been taken out there while the Company's servants were fussing about and preparing to put on a new seal. I hold that this loss is due either to the wilful neglect of duty by the Company's servants or to theft by one of them. In my opinion the learned Judge has viewed the evidence quite wrongly and this Court is entitled to interfere in second appeal.

I set aside the decree of the lower Appellate Court and restore the decree of the First Court with costs of all the Courts.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 391 OF 1922.

September 9, 1924.

Present:—Mr. Justice Madhavan Nair.

JARA POOJARI—DEFENDANT—APPELLANT

versus

SOMAKKA (DIED) AND ANOTHER—PLAINTIFF AND HIS LEGAL REPRESENTATIVE —RESPONDENTS.

Landlord and tenant—Agricultural lease—Notice to quit—Reasonable period—Custom.

Neither the provisions of the Transfer of Property Act nor the principles of English Law in regard to a notice to quit are strictly applicable to agricultural leases in India. [p. 339, col. 2.]

All that is required in the case of such leases is a reasonable notice which is a question of fact to be decided in each case according to the particular circumstances and the local custom as to reaping crops and letting land The exact synchronising of the date fixed in the notice with the termination of the period of the lease is not necessary in every case. [p. 340, col. 1.]

Gangadharan Pattar v. *Patinhare Kovilakath Thazhathe Thavazhi Manavikraman*, 42 Ind. Cas. 268; 33 M. L. J. 512; 6 L. W. 491, *Jugut Chunder Roy* v. *Rup Chand Chango*, 9 C. 48; 11 C. L. R. 143; 5 Shome L. R. 88; 4 Ind. Dec. (N. S.) 684 and *Maung Po O* v. *Muniandy Sarvai*, 42 Ind. Cas. 375, relied on.

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 28 of 1921, preferred against that of the Court of the District Munsif, Mangalore, in Original Suit No. 179 of 1919.

Mr. *K. Srinivasa Rao*, for the Appellants.

Mr. *V. Narayana Iyer*, for the Respondents.

JUDGMENT.—The defendant-appellant admittedly held the plaint property as a tenant for a year ending with 31st March 1916 under a *chalgeni chit* dated 30th May 1915 executed by him in favour of one Ugga Chetty the predecessor-in-interest of the first respondent. He held over and the first respondent sent him a registered notice dated 27th November 1917 (Ex. B) requiring him to quit by the following Vishusankaramana (12th April 1918). The lower Court found that the appellant wrongfully refused to receive it and it fixed him with the knowledge of its contents. Argument was advanced on behalf of the appellant that the notice was invalid as it required surrender only on 12th April 1918 instead of 31st March 1918. The learned District Judge overruled it on the main ground that Vishusankramana is the customary day for termination of agricultural leases in South Kanara.

The only point taken before me in second appeal is that relating to the invalidity of the notice. The lease is an agricultural lease and hence the provisions of the Transfer of Property Act do not strictly apply; but the analogy of the said provisions and the principles of English Law are relied upon by the appellant. There is no doubt that under the English Law the notice must be to quit at the end of the year. As observed in *Doe d. Spicer* v. *Lea* (1): "If it (notice) might be given to quit 12 days afterwards, it might as well be at any time." The question for decision is to what extent is this principle applicable to agricultural leases of the kind under consideration.

(1) (1809) 11 East 312; 103 E. R. 1024.

It seems to me that the question is amply covered by authority which is binding on me. In *Gangadharan Pattar* v. *Patinhare Kovilakath Thazhathe Tharazhi Manavikraman* (2), this Court held that in the case of *verumpatam* leases in Malabar all that was required was reasonable notice which was a question of fact to be decided in each case according to the particular circumstances and the local custom as to reaping crops and letting land. The Court expressly decided that the exact synchronising of the date fixed in the notice with the termination of the period of the lease was not necessary in every case. See also *Jugut Chunder Roy* v. *Rup Chand Chango* (3) and *Maung Po O* v. *Muniandy Servai* (4). The decision in *Krishna Shetty* v. *Gilbert Pinto* (5) on which reliance was placed by the learned Vakil for the appellant does not lay down anything to the contrary; all that it decided was that the provisions of the Transfer of Property Act and the rules of English Law are binding as rules of equity, justice and good conscience, when dealing with agricultural leases in the absence of any special reason for not applying them. The dictum at page 660 that the Legislature wisely refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb shows that the existence of usages and custom would be a special reason for not applying the provisions of the Act and the rules of English Law to agricultural leases.

In the present case the notice is sought to be upheld on the ground that it is reasonable and is in accord with the custom of the country. As observed in the numerous decisions already adverted to this is a question of fact. The lower Appellate Court has recorded an unequivocal finding to the effect that Vishusankaramana day is the "customary day for terminating the agricultural leases in this country." This finding is conclusive and binding on me and no exception has been taken to it. Under these circumstances I hold that the notice in question is sufficient and good and is in accord with the usages of the country. The only point taken for the appellant thus fails. The second appeal is, therefore dismissed.

Mr. V. Narayana Iyer who argued the case at my request as *amicus curiæ* has helped the Court considerably by his careful and detailed argument.

V. N. V. *Appeal dismissed.*

Z. K.

(2) 42 Ind. Cas. 268; 33 M. L. J. 512; 6 L. W. 491.

(3) 9 C. 48; 11 C. L. R. 143; Shome L. R. 88; 9 Ind. Dec. (N. S.) 684.

(4) 42 Ind. Cas. 375.

(5) 50 Ind. Cas. 898; 42 M. 654; 36 M. L. J. 367; 9 L. W. 431.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 466 OF 1923.

January 31, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

HARI RAM SHAH—PLAINTIFF—APPELLANT

versus

INAYAT—DEFENDANT—RESPONDENT.

Interest—Suit on bond—Liability for interest proved—Stipulation as to compound interest—Burden of proof.

When the execution of a bond sued on is admitted and it is found that the defendant agreed to pay interest as entered in the bond, the burden rests on him to prove that he did not agree to the stipulation contained in the bond for the payment of compound interest.

Second appeal from the decree of the District Judge, Shahpur at Sargodha, dated the 15th November 1922, affirming that of the Subordinate Judge, Second Class, Sargodha, dated the 12th April 1922.

Mr. *M. L. Puri*, for the Appellant.

Mr. *Feroze Khan Nun*, for the Respondent.

JUDGMENT.—The plaintiff has sued to recover the money due on a bond, and has been given a decree for Rs. 1,187, including simple interest at the rate of 2¼ per cent. per mensem. The only question in this second appeal is whether he is entitled to compound interest, which the lower Courts have disallowed, finding that he has not proved that the defendant agreed to the stipulation contained in the bond that compound interest would be paid.

The defendant admitted having executed the bond, and with regard to interest he pleaded, not merely that he had not agreed to pay compound interest, but that he had not agreed to pay any interest at all. Consequently the issue framed was what rate of interest was agreed upon and was payable, so that the plaintiff's witnesses were not asked specifically about the agreement to pay compound interest but only whether

the defendant had agreed to pay interest. When the execution of the bond is admitted and it has been found that the defendant agreed to pay interest as entered in the bond, we think that the burden rested on him to prove that he did not agree to the stipulation contained in the bond for the payment of compound interest. He has given no evidence on this point, and we hold, therefore, that the plaintiff is entitled to compound interest on the amount of the consideration which the defendant has been found to have received, namely, Rs. 451. The compound interest upon that amount comes to Rs. 1,513, so that with the addition of the principal the plaintiff is entitled to Rs. 1,964 in all.

We accept the appeal and alter the decree to one for Rs. 1,964. As the interest is very heavy we direct that the parties shall bear their own costs in all the Courts.

K. S. D. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 57 OF 1924.

July 21, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

FIRM KACHAURI MAL-KALYAN MAL —DEFENDANT—APPLICANT

versus

FIRM WALI MUHAMMAD-ABDUL LATIF—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 104, Sch. II —Arbitration Act (IX of 1899), reference under—Order staying suit—Appeal, whether competent.

Unless the provisions of the Arbitration Act, 1899, are contrary to any of the provisions of the Second Schedule to the C. P. C., that Schedule must apply to a reference made under the Act, and consequently any order passed in such proceedings is open to appeal under s. 104 of the Code.

Nainsukh Das-Nagar Mal v. *Gajanand-Shyam Lal*, 61 Ind. Cas. 269; 19 A. L. J. 132; 43 A. 348, followed.

Revision from an order of the District Judge, Cawnpore, dated the 28th November 1923.

Mr. *N. P. Asthana*, for the Applicant.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—This is an application in revision asking this Court to set aside an order passed by the learned District Judge, Cawnpore, on appeal.

It appears that the parties to this application are members of a sugar committee. Under the rules framed by the committee to which the parties have committed themselves all disputes arising among them should be referred to arbitration. A dispute arose and it was referred to arbitration. Ignoring this reference the plaintiff brought a suit in the Court of the Subordinate Judge of Cawnpore. The defendant applied under s. 19 of the Arbitration Act (Act IX of 1899) for a stay of the suit pending the making of the award. The Court of first instance ordered a stay. The plaintiff appealed and the learned District Judge has set aside the order. It is contended before this Court by the defendant that the District Judge had no jurisdiction to entertain an appeal and that his order should be set aside.

The Arbitration Act of 1899 does not provide for an appeal. It is a very short Act and by s. 20 provision for framing rules has been made. It is common ground that this High Court has as yet made no rules on the points referred to in that section. Among other matters a rule was to be provided for "the stay of any suit or proceeding in contravention or submission to arbitration."

In this Court the opposite party contends that an appeal lay under s. 104 of the C. P. C. The question is whether the provision as to arbitration as laid down in the C. P. C. and Sch. II of the Code has any application to proceedings under the Arbitration Act of 1899. There is a case decided by a Division Bench of this Court, namely, *Nainsukh Das-Nagar Mal* v. *Gajanand-Shyam Lal* (1) in which it was held that in the absence of any rules framed under s. 20 in the Act of 1899, the provisions of the C. P. C. should be applied. The ground given is that something had to be done and the application of the C. P. C. was not inconsistent with the provisions of the Arbitration Act. We have every reason for following this precedent. We are prepared to follow this precedent on even larger grounds. Section 89 of the C. P. C. says (omitting the first few words) "all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

An exception is made in the following terms " save in so far as is otherwise pro-

(1) 61 Ind. Cas. 269; 19 A. L. J. 132; 43 A. 348.

vided by the Indian Arbitration Act, 1899, or by any other law for the time being in force."

This would mean that unless the provisions of the Indian Arbitration Act, 1899 are contrary to any of the provisions of the Second Schedule that Schedule must apply to a reference made under the Arbitration Act of 1899. If that be the case it would follow that the provisions of s. 104 of the C. P. C. will apply, because the Sch. II is governed by that section. There can be no force in a contention that, while the Second Schedule may be applied the main provisions of the Code by which orders passed under the Second Schedule are made appealable should not apply. We hold that the appeal to the District Judge was competent.

We dismiss the application in revision with costs which will include Counsel's fees in this Court on the higher scale.

K. S. D. *Application dismissed.*

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 91 TO 94 OF 1923.

August 8, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

GANAPATHI PILLAI—RESPONDENT No. 2—APPELLANT

versus

MALAIPERUMAL CHETTIAR AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Court sale, setting side of—Low price—Onus of proof.

On an application to set aside a Court sale under O. XXI, r. 90, C. P. C., it is necessary to prove that there was material irregularity or fraud in publishing or conducting the sale and that the irregularity or fraud so proved caused substantial injury to the parties who seek to set aside the sale, the onus of proof being on the person seeking to set aside the sale. The mere fact that the price fetched under the sale is low is by itself no ground to set aside the sale unless there has been irregularity or fraud by reason of which the price fetched was low.

Appeals against the orders of the Court of the Subordinate Judge, Negapatam, dated the 19th February 1923, in Execution Applications Nos. 566, 649, 659 and 634 of 1922 respectively in Execution Petition No. 254 of 1921 in Original Suit No. 231 of 1914.

Mr. *M. Patanjali Sastri*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—These are appeals against the order of the lower Court setting aside a Court sale in execution. The lower Court in its order points out several things in connection with the sale which it calls suspicious, and concludes that the property has been sold for an unconscionably low price, and on those two grounds it has set aside the sale. Now, obviously this order does not in any way comply with the requirements of O. XXI, r. 90, Sch. 1, C. P. C., under which the first thing to be proved is that there was a material irregularity or fraud in publishing or conducting the sale, and next that the irregularity or fraud so proved caused substantial injury to the parties who seek to set aside the sale. We are unable to find any irregularity or fraud and certainly the lower Court does not record that it found any.

The learned Subordinate Judge mentions two points: first, that at the time of the sale, as there were no bidders, the decree-holder got the upset price reduced from Rs. 11,000 to Rs. 2,500 on an affidavit by his Karyasthan, which the learned Judge calls suspicious. Why the affidavit by the Karyasthan should be suspicious, we do not know. The second point is that when the bidding was resumed, the Karyasthan bid for Rs. 70 more than the upset price of Rs. 2,500 and the learned Judge thought that he added Rs. 70 to the upset price because his conscience was pricking him. This seems to us rather a pointless remark. The learned Judge mentions another circumstance, that his predecessor was concluding sales in open Court while that was not his own practice, and, as this was the first sale conducted in that Court after he took charge, he thinks some bidders may have been waiting until the sale was concluded in open Court before making their bids. There is absolutely no evidence to justify any such assumption ; nor, even if there was any, would that circumstance amount to an irregularity or fraud in the conduct of the sale.

The learned Judge's conclusion that the price was unconscionably low is based, so far as appears from his order, on nothing more than a valuation by an Amin some five years earlier in March 1917, which valuation was attested by the auction-purchaser. He considers that this attestation meant that the

auction-purchaser gave his "sanction" to the estimate. It seems to us an inference wholly unjustified. The attestation was presumably in token of the Amin having come and made his estimate. The whole foundation of the suspicion which the Subordinate Judge entertains regarding the affidavit by the auction-purchaser, therefore, falls to the ground. The order seems to us wholly indefensible on the grounds urged by the lower Court.

We have been asked to uphold it on grounds other than those stated in the learned Subordinate Judge's order. It is urged that the decree-holder got the upset price reduced by deceiving the Court, *viz.*, by suppressing the material fact that the upset price was previously as high as Rs. 11,000, but this argument fails since the Court itself, had it been deceived, would certainly have stated so and made that a ground for action. Nowhere does it hint that it had been deceived. The decree-holder's petition to reduce the uspset price mentioned the fact of there being an upset price and we cannot believe that the Court did not call for and consider that figure before passing its order. It was obviously not deceived and, therefore, could not say that it was deceived.

It is next urged that the sale was held in secret and that all sales formerly used to be in open Court. We have already set out what the learned Subordinate Judge has said on this matter and it does not go anything like so far as to say that all the previous sales were being conducted in open Court, although the practice was to conclude the sale in open Court. Hence there was no room for the bidders to be ignorant of where the sale was being held. The statement of some of the petitioners in the lower Court, who are other decree-holders, that they were in open Court waiting for the sale and did not know that it was going on cannot be believed. There is not a scrap of evidence to support this statement and it seems to us wholly disingenuous. It is surely significant that these persons were present at the time of the sale and yet made no bid even when the upset price was reduced to Rs. 2,500.

It is further alleged that the prior Judge had previously refused to reduce the upset price to Rs. 8,000. There is again no evidence for this nor any evidence that it was not brought to the knowledge of the Judge, the decree-holders were in open Court as they say, there is no reason why they should not have brought this to the knowledge of the Judge. There is no proof of the supression of any material fact which deceived the Judge into passing his order.

It is next alleged that the purchase was *benami* for the decree-holder, he not having got the permission of the Court. Again there is nothing whatever to support this statement. It is a point taken in the judgment-debtor's petition and, if there was anything in it, surely the lower Court would have mentioned it.

It is finally urged that the price fetched is far too low. This by itself is no ground for setting aside the sale, unless there has been an irregularity or fraud by reason of which the price fetched was low. Such an irregularity must first be proved, and the authorities quoted by the respondent [*Saadatmand Khan* v. *Phul Kuar* (1), *Sheorutton Singh* v. *Net Lall Sahu* (2) and *Nibaran Chandra Chowdhry* v. *Chiranjib Prasad Bose* (3)] are no authorities for the contrary. We have already said that we find no irregularity or fraud. It was surely easy for the petitioners to have adduced evidence that the price was low if what they say is true. The judgment-debtors in fact asserted in their petition that several prominent persons and *mirasdars* were prepared to bid at the sale for more than Rs. 11,000 and that "they are even now prepared to do so;" but not a single one of these persons has come forward to substantiate the statement. The onus of proof clearly lay on the petitioners who were seeking to set aside the sale.

It is urged here that the learned Subordinate Judge did not take any evidence. It is not urged that he shut out the evidence which the petitioners had ready. We are, therefore, not prepared to allow evidence to be taken now at this late stage.

We must reverse the order of the Subordinate Judge and confirm the sale. The appellant will get his costs from the respondents in each petition here and below.

V. N. V. *Appeal allowed.*

Z. K.

(1) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624 (P. C.).

(2) 30 C. 1; 6 C. W. N. 688.

(3) 32 C. 542; 9 C. W. N. 487.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 194 OF 1923.
October 15, 1924.
Present:—Mr. Dalal, J. C.
Syed WARIS ALI—PLAINTIFF—APPELLANT
versus
Syed ABBAS ALI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Encroachment—Suit for injunction—Possession, prayer for, addition of.

Plaintiff, who was the *zemindar*, sued the defendant, a cultivator, for a perpetual injunction restraining him from using a certain piece of land over which he had encroached. After the issues were framed, but before the trial of the suit, the plaintiff applied for amendment of the plaint by adding a prayer for possession of the portion encroached upon, but the application was rejected on the ground that the addition of the prayer for possession would change the nature of the suit:

Held, that the real question in controversy between the parties was whether the plaintiff had lost his possession in such a way that he could not oust the defendant and that this was a fit case in which the application for amendment should be allowed as the amendment would not affect the grounds of the claim. [p. 344, col. 2.]

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 12th March 1923, preferred against that of the Additional Munsif, Sultanpur, dated the 16th October 1922.

Mr. *Hydar Husain*, for the Appellant.

Mr. *S. M. Ahmad*, for the Respondent.

JUDGMENT.—It was unfortunate that the Trial Court should have rejected the plaintiff's application for the addition of a relief in the alternative for possession of the land. This is the usual case where a cultivator has grabbed the *zemindar's* land. The plaintiff *zemindar* sued for a perpetual injunction probably on the misunderstanding that the slight user of the land by the defendant did not amount to possession and an injunction would be sufficient to deprive the defendant of such a right of user. After the issues were framed and before the evidence was led he applied to the Trial Court on 6th October 1922 for amendment of the plaint. The only amendment he desired was to add a prayer for possession and, of course, to pay the additional Court-fee, if any necessary. He made no prayer to change the actual pleadings which formed the ground work for his claim. The learned Judge of the Trial Court gave three reasons for rejecting the application (1) that the omission at the commencement to seek relief for possession in the alternative was deliberate, (2) that this addition of a new prayer in the alternative will change the nature of the suit and (3) that there had been delay in making the application. I can discover no evidence on which can be founded the charge of deliberate omission.

It appears to me that the plaintiff was wrongly advised because he gained nothing by suing for perpetual injunction instead of for possession. Possibly he or his adviser thought that this slight user for tying cattle, feeding them and erecting a house for himself by the cultivator amounted only to a nuisance which can be prevented by an injunction. It is not clear to me how the nature of the suit would be changed by an alternative prayer for possession when the basis for the claim, one original and the other in the alternative, remained the same and no prayer was added for the alteration of any one of the plaint paragraphs. 'Delay' is a relative term and must be considered in connection with the facts of every particular case. In the present case, 6th October was the date fixed for hearing immediately after issues and it must have been on the date when issues were framed that the plaintiff must have become fully aware of the claim put forward by the defendant. He then understood that a prayer for possession was necessary. The date of hearing after the framing of the issues was the first opportunity he had of filing an application for amendment. It was open to the Trial Court to mulct the plaintiff in cost of the witnesses who had been summoned for the 6th of October. The hearing could have been postponed to give the defendant an opportunity of meeting the fresh prayer of the plaintiff. The provisions of O. VI, r. 17 relating to amendment give a large discretion to the Court. The Court may, at any stage of the proceeding, allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. It is apparent that here the real question in controversy between the parties is whether the plaintiff had lost his possession in such a way that he could not oust the trespasser. The manner of the amendment would be just here because only an alternative relief was sought and the grounds for the claim were not changed. The plaintiff still maintains his character as *zemindar*, his title to the land as such *zemin-*

dar and his claim to take possession on the ground that he had been in such possession within the period of limitation. As observed by me above, the terms could have been fixed by the Trial Court by an order as to costs so as to make those terms just.

In a case where it could be held with confidence that a suit for possession could more conveniently be made subject-matter of a fresh action this Court in second appeal would not consider it just to grant an amendment. In the present case, however, if the plaintiff is relegated to a fresh suit the question of bar under s. 11 may easily arise and any opinion given by this Court in the present proceedings would not in any way bind the Court which would take cognizance of a fresh suit.

This was a case where the application for amendment of 6th October 1922 ought to have been accepted and I have given reasons why I desire to interfere at this late stage of the proceedings. Justice will be done if costs are allowed to the defendant to make up for the initial mistake of the plaintiff.

In the result I set aside the decrees of both the Courts and direct the Trial Court to accept the application of amendment of 6th October 1922. If the amendment is made and proper Court-fee paid the trial shall be held anew and the findings so far recorded shall not be considered binding. Both parties shall be given fresh opportunity of producing evidence both oral and documentary. I avoided considering the question whether the plaintiff is entitled to obtain perpetual injunction because it will be more convenient to try the entire suit afresh.

Of course it will be open to the Trial Court to fix time within which the plaintiff must pay additional Court-fee, if any, and take action.

The defendant shall receive costs of the lower Appellate Court and this Court in any case. The costs of the Trial Court shall be governed by any future order to be passed by that Court.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 311 OF 1921.

August 27, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Sree Rajah Rao VENKATA KUMARA MAHIPATHISURYA RAO BAHADUR GARU, RAJAH OF PITHAPURAM—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GODAVARI—DEFENDANT—RESPONDENT.

Public way—Lands within ambit of zemindari—Zemindar, *declaratory suit by—Immemorial use by villagers as cattlepaths—Nature of right—Adverse possession—Villagers not joined as parties—Declaration, whether can be granted—Madras Land Encroachment Act (III of 1905), ss. 7, 14—Assessment, levy of, on occupants—Right of action—Preliminary notice—Limitation—Regulation XXV of 1802, s. 4*—Lakhiraj *lands, what are.*

Plaintiff, the *zemindar* of a village, sued the Government for a declaration of ownership and for recovery of possession and injunction in respect of certain *puntas* or lands used as paths for men and cattle and within the ambit of the village. The members of the village community using these paths were not made parties to the suit. It was found that the lands were used as *puntas* even at the time of the Permanent Settlement and continued to be used as such without disturbance by the plaintiff. The *sanad* granted to the plaintiff at the time of the Permanent Settlement was not filed and no act was proved indicating any possession of the lands by the plaintiff adverse to the villagers:

Held, that the plaintiff not having shown that he was or had become the absolute owner of the suit lands, the basis of the suit failed and the suit must be dismissed. [p. 348, col. 2.]

Per *Spencer, Offg. C. J.*—(1) that the mere fact that assessment was levied by Government under the Madras Land Encroachment Act of 1905, against the occupants of the lands would not give a right of action to the plaintiff; [p. 346, col. 1.]

(2) that the period of limitation for a suit by a person aggrieved by proceedings under that Act was six months under s. 14 and that the suit having been brought more than a year thereafter was barred; [p. 346, col. 2.]

(3) that a preliminary notice under s. 7 of the Act to show cause why a person should not be made to pay prohibitory assessment under s. 5 of the Act did not give rise to a cause of action. [*ibid.*]

Secretary of State v. *Assan*, 32 Ind. Cas. 755; 39 M. 727; 30 M. L. J. 255; 19 M. L. T. 157; 3 L. W. 228; (1916) 1 M. W. N. 167 (F. B.), followed.

Per *Srinivasa Aiyangar, J.*—(1) that the plaint *punta* lands were not *lakhiraj* lands within the meaning of s. 4 of Regulation XXV of 1802; [p. 347, col. 2.]

(2) that these *puntas* having been dedicated to the public as highways, the Government at the time of the grant of the *sanad* to the *zemindar* held them in trust for the community, and it could not be assumed that in violation of such trust the Government granted them away to the plaintiff's predecessor; either the Government did not include these *puntas*

in the grant because they were used only for general communal purposes, or else they made over the trust to the *zemindar* for the purpose of maintaining the trust in favour of the community, in which case the trustee could not by adverse possession have reduced the trust property to private ownership, and that in either case, the plaintiff must fail; [p. 348, col. 1.]

(3) that even if the plaintiff had acquired title to the lands by adverse possession, the body of villagers against whom the plaintiff's possession was claimed to be adverse not having been made parties to the suit, the plaintiff was not entitled to any declaration to that effect. [p. 348, col. 2.]

Per *Spencer, Offg. C. J.*—The right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another. [p. 346, col. 2.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Rajahmundry, dated the 12th July 1921, in O. S. No. 12 of 1920 (O. S. No. 1 of 1919, Temporary Sub-Court, Rajahmundry).

Mr. *A. Krishnaswamy Iyer*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.

Spencer, Offg. C. J.—The plaintiff is the Rajah of Pithapuram. The defendant is the Collector of Godavari representing the Government. The subject of this suit are certain *puntas* used as paths by men and cattle in the village of Mummidivarappadu which forms part of the Palivela estate acquired by purchase and testamentary disposition by the plaintiff's predecessors. No members of the village community that use these paths in exercise of their communal rights have been made parties to the suit. The inclusion of the Government as a party can only be justified on one of three theories, (1) that the pathways were excluded from the Permanent Settlement and belong to the Government, (2) that the Government is the custodian of the communal rights of the public in respect of these paths, *vide Venkatarama Sivan* v. *Secretary of State for India* (1) and (3) that the Government has unauthorisedly levied penal assessment under Act III of 1905.

The plaintiff (appellant) does not admit the first theory as it would be fatal to his suit to obtain a declaration of title.

As regards the third theory, the assessment was levied from the occupants in 1914 according to the allegation in the plaint. This circumstance will not give a right of action to the plaintiff who did not pay anything. Moreover the limitation period for persons aggrieved by proceedings taken under that Act is six months under s. 14 and that period was long past when this suit was filed in 1918. It came out in the evidence that the plaintiff's Dewan had been served with a preliminary notice under s. 7 to show cause why he should not be made to pay prohibitory assessment under s. 5 or be summarily evicted under s. 6, but it has been held in *Secretary of State* v. *Assan* (2) by a Full Bench that notices under s. 7 do not give rise to a cause of action.

It remains to be considered whether a declaration of title can be given to the plaintiff and an injunction issued restraining the Government from interfering in any manner with his possession and enjoyment. The plaintiff admitted in his plaint that the suit *puntas* were once dedicated to the use of the public as a highway. The letting out by him of the soil for cultivation must necessarily interfere with the use of the surface for a public highway. He has failed to prove that the right which the public got by dedication of these *puntas* for use as a means of communication has ceased owing to disuse, or otherwise. The Subordinate Judge has found on issue No. 2 that the plaintiff has not acquired any prescriptive *right over them* and we have been shown no reason to come to a different conclusion.

In the course of the arguments on the appeal, the appellant's Vakil admitted that he did not dispute the right of way of the villagers over the paths. He styled it an easement right, but the right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another.

At any rate whatever right the public admittedly had in these paths has not been shown to have been lost, and, therefore, the plaintiff's appeal, like his ill-conceived suit, must fail and be dismissed with costs.

Srinivasa Aiyangar, J.—The plaintiff (appellant) is the Rajah of Pithapuram. The defendant (respondent) is the Secretary of State for India in Council represented by the District Collector of Godavari. The plaintiff claiming to be the *zemindar* of a

(1) 50 Ind. Cas. 360; 36 M. L. J. 203; 9 L. W. 381; 25 M. L. T. 232; (1919) M. W. N. 191.

(2) 32 Ind. Cas. 755; 39 M. 727; 30 M. L. J. 255; 19 M. L. T. 157; 3 L. W. 228; (1916) 1 M. W. N. 167 (F. B.).

village called Mummidivarappadu included in the estate of Palivela, filed this suit for a declaration of ownership and for the recovery of possession and for injunction in respect of certain *puntas* as they are called or lands used as cattle-paths in the village. The Subordinate Judge who tried the suit dismissed it with costs. And hence this appeal.

The plaintiff states that the village in question was acquired by his father under the will of his paternal aunt. I may remark to begin with that the case has been conducted in a very strange manner on both sides in the Court below. The plaintiff has not produced a scrap of paper, either the *sanad* in respect of the suit village or any other title-deed in respect thereof nor has any such document been produced on the side of the Government for the defence. But both sides have gone to trial on the assumption that the suit village belongs to the plaintiff and was a *zemin* village in respect whereof a *sanad* in the ordinary form was, or must have been, issued in the early part of the last century. The plaintiff's case is briefly this: These *puntas* or cattle-paths were dedicated for public use by the plaintiff's predecessors. Subsequently about the year 1883 the plaintiff's predecessore unlawfully entered upon these *puntas* and diverting them from their use as highways let them to agricultural tenants and doing so for over the statutory period succeeded in reducing them to their own private ownership. It is alleged that in the year 1914 after the plaintiff had acquired an absolute right in respect of the suit land the Government took proceedings under the Land Encroachment Act III of 1905, against the tenants in occupation let in by the plaintiff, and that as the lands did not belong to the Government their action under the Act was *ultra vires*. The plaintiff in these circumstances prays for a declaration that he is the owner of the *puntas*, and for such possession of the lands as may be necessary, and for an injunction against the defendant from interfering in any manner with the possession and enjoyment of the *puntas* by the plaintiff. It is clear from the Bhooband accounts relating to *faslis* even prior to the Permanent Settlement that the suit lands were used as *puntas* or cattle-paths even then. The plaintiff has in his plaint set up an affirmative case of dedication of these lands as highways by his predecessors-in-interest. That case has not been made out in the least. It is remarkable that the time when or about which such dedication was made is not mentioned in the plaint or made out in the case. The evidence in the case does not help us to determine whether the *zemin* was, by the *sanad* granted by the Government, merely confirmed to the predecessor-in-interest of the plaintiff or was really in the nature of a fresh grant. In the present state of the record, we are only left to speculation as to what really happened. However that may be, it is clear that the plaintiff has not made out the case set up by him of a dedication by his predecessors of the suit lands as *puntas* or highways because an act of dedication might imply a capacity to dedicate and involve ownership. All that is, therefore, clear is that in or about the year 1802, when the Permanent Settlement was made the suit lands were *puntas*. The plaintiff's alternative case as we must take it to be, is, that at the Permanent Settlement, when the *zemimdari* was granted to his predecessor-in-interest, these *puntas* were also included in the grant by the Government. It is true that these *punta* lands are within the ambit of the *zemindari* and would have passed to the *zemindar* undoubtedly under the grant if not reserved by the Government and if there was not anything in the nature of the lands themselves by which they became excluded from the grant. It has been strenuously argued on behalf of the Secretary of State by the learned Government Pleader that these lands should be held to be *lakhiraj* lands within the meaning of s. 4 of Regulation XXV of 1802. The lower Court has found against this contention. I think the lower Court was right. The true meaning of *lakhiraj* lands would appear to be lands capable of being a source of revenue but granted away free of revenue or on favourable rent. The learned Government Pleader pressed on us that according to the true construction of the words in s. 4 of the said Regulation, public roads should be included in the expression "lands exempt from public revenue." The expression "exempt from public revenue" would in the circumstance itself seem to imply the possiblity of the lands yielding revenue but for the exemption. I am, therefore, of opinion that the contention that these lands should be held to be *lakhiraj* cannot be supported. As the plaintiff has not proved that

the grant to his predecessor was only in the nature of confirmation, we must take it that it was really in the nature of an original grant. The position was then this: So far as these *puntas* were concerned, having been dedicated to the public as highways, the Government at the time of the grant held them in trust for the community and it must be an unwarranted assumption to suppose that in violation of such trust the Government granted them away to the plaintiff's predecessor. I am not prepared to make any such assumption in favour of the plaintiff. This is against all principle. One of two things, therefore, must have happened, either the Government did not include these *puntas* in the grant because they were roads and lands intended not for agricultural purposes but only for general communal purposes, or else they made over the trust to the *zemindar* for the purpose of maintaining the trust in favour of the community. If there had been no grant at all to the plaintiff's predecessor, it follows that the plaintiff's suit is not maintainable. If, on the other hand, the plaintiff's predecessor became a trustee in respect of the suit land for the purposes of their being maintained as highways for the benefit of the public, it is inconceivable how a trustee could by adverse possession have reduced the trust property to private ownership. The learned Subordinate Judge has found that the plaintiff has not established the title by adverse possession against the Government and we agree with him. The fact appears to have been that prompted by avidity the predecessors of the present plaintiff taking advantage of their power and influence as *zemindars* and the helplessness of the *ryots* entered upon these public paths and let them to tenants in order to make money. Even assuming that the plaintiff was in law in a position to acquire by adverse possession a title to these lands, I am far from satisfied that the evidence on the record shows any such continuous adverse possession of all the lands in question for such period as would enable the plaintiff to acquire such title. Though prayers regarding possession and injunction are included in the plaint, I cannot but regard the suit in the main as a declaratory suit. The plaintiff seeks a declaration that by adverse possession he has become the private owner of these lands. Apart from the Government represented by the defendant, the parties against whom the plaintiff's possession should have been adverse for the purpose of enabling him to acquire such title by prescription are the body of the villagers. They are not parties to the suit, and I fail to see how any such declaration could be made in a suit to which they are not parties. It has been argued by the learned Government Pleader that, under s. 49 of the Local Boards Act, these *puntas* became vested in the Local Boards and that under the provisions of s. 2 (2) of Act III of 1905, properties vested in the Local Boards are deemed to be properties of the Government for the purposes of the said latter Act. There are difficulties in the way of accepting this contention. It is true that all public roads have been vested by the said s. 49 in the District Board. But that section speaks of the vesting only of the public roads and not of all roads and the expression "public roads" is defined in s. 3 (*xxiii*) of Act V of 1884 as a road already vested in some local body. There is no evidence whatever on which it may be held that these *puntas* were ever vested in any local body. The applicability of the sections of the Land Encroachment Act depending as it does on the vesting of the lands as public roads in the District Boards under the provisions of s. 49 of the Act, the right of the Government to take proceedings under the Land Encroachment Act is by no means clear. However that may be, the plaintiff not having shown that he is or has become the absolute owner of the suit lands, I must take it that the very basis of his suit fails and the dismissal of the suit by the lower Court was right. It has been suggested in the course of the argument by the learned Vakil for the appellant that a declaration might be made in favour of the plaintiff at any rate with regard to the sub-soil of these lands leaving it open whether or not the right of highway still continues in the body of the villagers. No question has ever arisen with regard to the sub-soil of these lands in connection with any of the transactions or proceedings that led to this suit. To the plaintiff, who merely required to be able to let the surface soil to his own tenants for the purpose of making money, the right he was interested in securing and having declared, was the right only to the surface soil. I cannot, therefore, regard, except with suspicion, a request by the appellant's Vakil that at any rate the right to the sub-soil should be declared in this

action. Even if I should be inclined to do so, for the reason already set out, I cannot say that he has sufficiently established his right to the sub-soil so as to entitle him to any such declaration.

The plaintiff's suit was, therefore, rightly dismissed.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19 OF 1924.
August 18, 1924.
Present:—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.
SRI RAM AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MATHURA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. II, Art. 17 (iii)—Declaration that certain property not saleable in execution, suit for—Court-fee payable.

A suit for a declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage-decree obtained against another person, involves no consequential relief and falls within the purview of Art. 17 (*iii*) of Sch. II to the Court Fees Act. The plaint in such a suit requires a Court-fee stamp of Rs. 10 only.

First appeal from a decree of the Additional Judge, Lucknow, dated the 17th December 1923, in Original Suit No. 79 of 1923.

Messrs. *Bishehsar Nath* and *Daya Krishan Sethi*, for the Appellants.

ORDER.—The property in suit was the subject-matter of a decree for sale on the basis of a mortgage executed by Janardan Das. The mortgagee decree-holder has now taken steps to put the property to sale in terms of the decree. The present suit seeks a declaration to the effect that the said property belongs to the plaintiffs and that it is not liable to be sold in execution of the mortgage-decree. The plaintiff, have paid Rs. 10 as Court-fee for the declaration mentioned above. The office is of opinion that the suit involves a consequential relief and consequently the Court-fee should be calculated on *ad valorem* basis. For this opinion the office relies on a decision of a Bench of this Court in *Sripal Singh* v. *Jagdish Narayan* (1). We are, however, of opinion that that case is distinguishable on the ground that the suit there was brought by a person who was a party to the decree on the mortgage. The plaintiffs to the present suit are three idols and as such they were no party to the previous litigation. We think, therefore, that the Court-fee paid is sufficient.

Z. K. *Order acbordingly.*

(1) 65 Ind. Cas. 980; 24 O. C. 361.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 404 OF 1922.
September 19, 1924.
Present:—Mr. Justice Madhavan Nair.
SRINIVASA IYENGAR—PLAINTIFF—APPELLANT
versus
VELLAYAN AMBALAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 137, 138—Civil Procedure Code (Act V of 1908), s. 64—Attachment—Mortgage pending attachment, whether void or voidable—Auction-purchaser, suit by, to recover possession—Limitation—Prior mortgage, paid off, whether kept alive—Intention of parties.

A private alienation of property pending attachment is wholly void against all claims enforceable under the attachment. [p 351, col. 1.]

Where pending an attachment the judgment-debtor executes a usufructuary mortgage of the attached property, the mortgage is void and the auction-purchaser in execution of the decree becomes entitled to possession of the property on the date of the sale. A suit brought by him to recover possession of the property more than 12 years after the sale is barred by limitation either under Art. 137 or Art. 138 of Sch. I to the Limitation Act. [p. 351, col. 2.]

Dinobundu Shaw Chowdhry v. *Jogmoya Dasi*, 29 C. 154 at p. 166; 12 M. L. J. 73; 4 Bom. L. R. 238; 29 I. A. 9; 6 C. W. N. 209 (P. C.), relied on.

Nandigam Gangayya v. *Madupalli Venkataramayya*, 72 Ind. Cas. 839; 44 M. L. J. 80; 16 L. W. 958; 31 M. L. T. 423; (1923) M. W. N. 51; (1923) A. I. R. (M.) 230, *Gosta Behari* v. *Sankar Nath*, 36 Ind. Cas. 510; 26 C. L. J. 127 and *Mariappa Pillai* v. *Raman Chettiar*, 52 Ind. Cas. 519; 42 M. 322; 10 L. W. 59, distinguished.

The question whether a prior mortgage was or was not kept alive by a later mortgage executed in discharge of the earlier one, is one of the intention of the parties. [*ibid.*]

Gokaldas Gopaldas v. *Puranmal Premsukh Seochand*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), referred to.

Second appeal against a decree of the Court of the Subordinate Judge of Ramnad at Madura, in A. S. No. 14 of 1921, (A. S. No. 568 of 1919 on the file of the District Court, Ramnad) preferred against that of the Court of the District Munsif, Manamadura, in O. S. No. 97 of 1918.

Messrs. *K. Bhashyam Iyengar* and *S. Krishnaswamy Iyengar*, for the Appellant.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents.

JUDGMENT.—The plaintiff's suit is for redemption. The plaint-mentioned land belonged to one Venkataranganatha Naicker. It was sold in execution of a Small Cause decree against him and the plaintiff obtained it under a sale from one Tavasi Ambalam whose father purchased it from the auction-purchaser. The auction-sale held on the 13th of July 1891 was confirmed on the 14th of September 1891. While the property was under attachment, the owner of the property mortgaged it to the predecessor-in-title of the defendant on the 15th June 1891 under Ex. I. The mortgagee under Ex. I had paid off a prior mortgage existing on the property. The Subordinate Judge held that the mortgage under Ex. I was void under s. 64, C. P. C., that the defendant, the assignee of the mortgage interest, prescribed for an absolute title to the property, that the prior mortgage which was paid off by the defendant did not subsist at the time of Ex. I and that the plaintiff's suit was barred by limitation. He, therefore, dismissed the plaintiff's suit.

It is argued by Mr. Bhashyam Iyengar on behalf of the plaintiff-appellant, that the Subordinate Judge's decision that the defendant had prescribed for an absolute title to the property is wrong, that the alienation of the suit property made while the attachment was pending is only voidable at the option of the plaintiff, that the present suit cannot, therefore, be considered to have been barred by limitation and that, at any rate, since the prior *othi* was paid off by the mortgagee under Ex. I, the plaintiff could sue for the redemption of that *othi*.

Mr. Muthukrishna Iyer appearing for the respondent has not tried to support the decision of the Subordinate Judge that the mortgagee under Ex. I could, if the mortgage is invalid, prescribe for an absolute title and, therefore the cases cited by the appellant, namely, *Sontyana Gopala Dasee* v. *Inaputalapula Rami* (1) and *Aiyisa Bevi Ammal* v. *Kalandassa Rowther* (2) and *Nadepena Appamma* v. *Saripilli Chinnavadu* (3) against the decision of the Subordinate Judge on that point need not be considered.

The real question for decision is whether the plaintiff's suit is barred by limitation. The argument for the respondent is that the mortgage made pending the attachment in this case is void as against all claims enforceable under the attachment, and, since no suit was instituted by the plaintiff or his predecessor-in-interest within the twelve years' period allowed either under Art. 137 or Art. 138 of the Limitation Act, the present suit is barred by limitation. Section 64, C. P. C., says in effect that private alienation of property after attachment "Shall be void as against all claims enforceable under the attachment." The cases brought to my notice by the learned Vakil for the appellant to show that such alienations are only voidable do not really support his argument and can all be explained with reference to their special circumstances. In *Nandigam Gangayya* v. *Madupalli Venkataramayya* (4), the attaching decree-holder had agreed for a consideration with the purchaser of an item of the attached property that he would not bring that item to sale in execution of the decree. With reference to this special circumstance, the learned Judges pointed out that s. 64, C. P. C., is really one intended to benefit decree-holders, but that benefit being for the decree-holder he could waive the benefit. In that case it was held that: "As the decree-holders had entered into an actual contract with the purchaser, they cannot be permitted to go back upon their contract and insist upon the application of s. 64 in their favour. To allow them to do so would be clearly to perpetrate a fraud." In view of this

(1) 64 Ind. Cas. 328; 44 M. 946; 13 L. W. 685; (1921) M. W. N. 385; 41 M. L. J. 194.

(2) 80 Ind. Cas. 561; 46 M. L. J. 501; (1924) A. I. R. (M.) 793.

(3) 79 Ind. Cas. 510; 45 M. L. J. 667; (1923) M. W. N. 825; 33 M. L. T. 146; 19 L. W. 37; (1924) A. I. R. (M.) 292; 47 M. 203.

(4) 72 Ind. Cas. 839; 44 M. L. J. 80; 16 L. W. 988; 31 M. L. T. 423; (1923) M. W. N. 51; (1923) A. I. R. (M.) 230.

explanation, this decision, does not support the appellant. The decision in *Gosta Behari* v. *Sankar Nath*, (5) is also distinguishable. It decided that a transferee from the judgment-debtor of immoveable property attached in execution of a decree becomes the owner of the property and is competent to make an application under r. 89 of O. XXI, C. P. C. for cancellation of the sale in execution of the decree. It does not say that a private alienation of property pending attachment is not void as against all claims enforceable under the attachment. The learned Judges who decided the case took special care to point out that "In the case before us, there is no question of protection to the decree-holder, or of the enforcement of the claim under the attachment;" and they proceed to say: "The effect of the application under r. 89, if granted, is forthwith to satisfy the entire decree. It may be that, in some instances, the effect is to place the decree-holder in a better position than he occupies under an execution sale ..... Consequently by no strech of language can it be said that when an application is made in conformity with r. 89, any question arises as to a claim enforceable under the attachment within the meaning of s. 64." The decision in *Mariappa Pillai* v. *Raman Chettiar* (6), cited to show that the word 'void' in s. 36 of the Provincial Insolvency Act means only 'voidable' cannot, in my opinion be relied upon in support of the appellant's argument, for that decision as well as the other decisions referred to in it proceed on the analogy of the English Bankruptcy Act and also upon the consideration that the Act makes the intervention of the Court necessary to set aside an alienation which would not be so if the transfer were void *ab initio*. The observations of their Lordships of the Privy Council in *Dinobundu Shaw Chowdhry* v. *Jogmoya Dasi* (7) also support the view that a private alienation of property pending attachment is wholly void against all claims enforceable under the attachment. Their Lordships observe that: "So far as the mortgage for Rs. 40,000 prejudiced the execution creditor, it is void as against him; but the section does not render void transactions which in no way prejudiced him." In these circumstances, I hold that the alienation in this case, Ex. I, made pending attachment is void under s. 64, C. P. C. The purchaser at the sale in execution of the decree having become entitled to possession of the property at the time of the sale and no suit having been brought by him within twelve years after the sale the plaintiff's present suit is barred by limitation under Art. 137. If Art. 138 is the article applicable, even then twelve years had expired after the date of sale and the plaintiff's suit is barred by limitation.

The mortgage being void, the next question for consideration is whether the prior *othi* paid off by Perumal Naidu, the defendant's predecessor-in-interest and the mortgagee under Ex. I, is alive for his benefit. It is to be observed that that it should be considered to have been kept alive for the benefit of Perumal Naidu is argued not by the defendant but by the plaintiff. The circumstances of the case clearly show that there was no intention on the part of the mortgagee to keep the prior *othi* alive. The Court sale was not subject to any prior encumbrance. It is not clear when the prior mortgage of 1887 was actually paid off; but that it did not subsist at the time of Ex. I is clear as it was already discharged by a portion of the consideration for Ex. I. The document Ex. I says "I have given the above land on *othi* to you including the right to both *warams* and taken the consideration amounts as detailed hereunder; the *othi* amount of Rs. 280 *has been paid by you to Venkatachalam Pillai* in respect of the *othi* made by me on the 3rd of February 1887 last on the said land and the amount received by me in cash. * * * ." We know only this *viz.*, that Rs. 280 was paid by the mortgagee to Venkatachalam Pillai. The circumstances under which it was paid and the time when it was actually paid are not disclosed by the evidence. The question being primarily one of intention (See *Gokaldas Gopaldas* v. *Puranmal Premsukh Seochand* (8), I do not think the Subordinate Judge was wrong in coming to the conclusion from the circumstances of the case that the prior *othi* was not kept alive at the time when Ex. I was executed. In this view, it follows that the plaintiff could not take advantage of the prior *othi* for purposes of this suit.

(5) 36 Ind. Cas. 510; 26 C. L. J. 127.
(6) 52 Ind. Cas. 519; 42 M. 322; 10 L. W. 59
(7) 29 C. 154 at p. 166; 12 M. L. J. 73; 4 Bom L. R. 238; 29 I. A. 9; 6 C. W. N. 209 (P. C.).

(8) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

No other question was argued before me by the learned Vakil on behalf of the appellant. As the plaintiff's suit is barred by limitation, I dismiss this second appeal with costs.

V. N. V. *Appeal dismissed.*

Z. K.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 83 OF 1923.

June 10, 1924.

Present :—Mr. Justice Young and Mr. Justice Baguley.

MA PU MAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KO SIT TIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution of decree—Decree directing payment within certain time—Failure to make payment within time, effect of.

Where a decree directs that on payment by the plaintiff of a certain sum of money within a certain period, the defendant shall convey certain property to the plaintiff, the failure of the latter to make the payment within the time limited in the decree disentitles him from executing the decree.

Abdul Shaker Sahib v. *Abdul Rahiman Sahib*, 72 Ind. Cas. 868; 44 M. L. J. 107; (1923) M. W. N. 1; 17 L. W. 216; (1923) A. I. R. (M.) 284; 46 M. 148, referred to.

Ramaswami Kone v. *Sundara Kone*, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26, relied on.

Appeal against a decree of the District Court, Myaungmya, in C. E. No. 5 of 1923.

JUDGMENT.—By a decree of the District Court of Myaungmya, dated the 26th November, 1921, the plaintiffs-appellants were directed to pay into Court within a month from the date of the decree a sum of Rs. 1,203-3-0 and on such payment being made Ko Sit Tin, 3rd defendant was ordered to reconvey to them a certain plot of paddy land.

By the same decree the plaintiffs-appellants were also directed to pay into Court within the same period the sum of Rs.107-8-0 and on such payment Mg. Po Mya and Ma Ngwe Thin were ordered to reconvey to them another plot of land.

The appellants did not pay the said sums into Court till the 17th January, 1922, and on the 17th January, 1923, applied for execution of the decree by delivery of possession to them of the said two plots of land.

The respondents objected to the execution on the ground that there was no valid decree as the deposit of the money had not been made within the time ordered by the Court. The District Court of Myaungmya allowed the objection. Hence this appeal.

Sit Tin, one of the judgment-debtors, but not the other judgment-debtors had appealed on the 26th January, 1923, against the decree which was dismissed on the 15th December, 1922.

No application was made either to the original or the Appellate Court for an extension of the time.

The appellants relied on the case of *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (1), where it was held that the plaintiff not having made payment within the time fixed by the decree he was not disentitled to execute the decree.

In that case the purchasers had applied to the original Court for an extension of time and the case more applicable would, in my opinion, be that of *Ramaswami Kone* v. *Sundara Kone* (2), where it was held that the plaintiff not having made payment within the time fixed by the decree, he was not entitled to execute the decree, it seems to me the only possible order to make where the plaintiff, not having applied for an extension of time, pays the money into Court after the date fixed for payment.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 72 Ind. Cas. 868; 44 M. L. J. 107; (1923) M. W. N. 1; 17 L. W. 216; (1923) A. I. R. (M.) 284; 46 M. 148.

(2) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 107 OF 1924.
September 2, 1924.
Present:—Mr. Wazir Hassan, A. J. C.
BAIJ NATH AND OTHERS—ACCUSED—APPLICANTS
versus
EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 90, 100, 141, 325—Unlawful assembly—"Enforce any right," meaning of—Use of force to maintain right, effect of—Right of private defence, extent of—Amount of force necessary, determination of.

Where the common object of an assembly is to compel a person by means of force to omit to do a certain act, the assembly will become an unlawful assembly only if the act, the omission of which is compelled, is one which the person so compelled was legally entitled to do. [p. 354, col. 2.]

The true import of the expression "to enforce any right" in cl. (*iv*) of s. 141 of the Penal Code relates to an initial act when it is done in furtherance of any right, and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right. [p. 355, col. 1.]

A party of men who are not enforcing any right by means of criminal force but are, by means of force, maintaining a certain right, for instance the right to use water, which is being actually exercised by them, cannot be regarded as an unlawful assembly within the meaning of s. 141 of the Penal Code. [*ibid.*]

Where a person is attacked while doing a lawful act he is entitled to stand his ground and defend himself and is not required to run away and to seek the assistance or the protection of the authorities. [p. 355, col. 2.]

Where a man is put in a situation in which he is entitled to protect his own life against an intended attack it is impossible to weigh the force of the blows which he uses for that purpose in golden scales and to adjudicate with great nicety as to the exact amount of force which would be justified under the circumstances [*ibid.*]

(Case-law referred to.)

Criminal revision against an order of the Sessions Judge, Gonda, dated the 18th July 1924, against that of the Magistrate, First Class, Gonda, dated the 30th May 1924.

Mr. *G. H. Thomas*, for the Applicants.
The Government Pleader, for the Crown.

JUDGMENT.—The applicants, Baijnath and ten others, have been convicted under ss. 147 and 325 of the Indian Penal Code and separately sentenced under each section by a First Class Magistrate of Gonda and their appeal has been dismissed by the learned Sessions Judge of the same place. This is an application in revision. The facts as found by the learned Judge and as I have gathered from the evidence produced by the prosecution are as follows:—

From a tank in village Atraura water is taken by means of lifts, poured down into a *bodar* and carried through channels to adjoining fields for the purpose of irrigating them. Village Atraura is divided into two *mahals*; *Mahal* Kalka Prasad and *Mahal* Bhawani Sahai. Baijnath is a co-sharer in the former, and Jeobodh, the complainant, is an ordinary tenant in the village. It does not appear definitely that the tank in question lies within the one or the other of the two *mahals*. But considering the dominion which Baijnath exercises over the right of irrigation from the water in the tank, which I will presently state, the reasonable presumption is that the tank is situate in *Mahal* Kalka Prasad. For the purposes of this judgment it may well be treated as property common to both the *mahals*.

Baijnath is a *mukhia* of the village and, as found by the learned Judge, "used to have the first right to irrigate from this tank," and in the year in question he had not exercised that right till the date of the occurrence. He had also the right to settle the order of precedence amongst others as to the use of the water. This too he had not done. He had sown *kirao* in a field immediately adjoining the tank. The complainant has a field to the east of the tank beyond the field of Baijnath. In that field the complainant wanted to sow poppy. The *bodars* were old and are situate on the "*parti* land at the ridge of Baijnath's field."

On the 10th of November last Jeobodh repaired the old *bodars*. There is no evidence that Baijnath knew it, but whether he knew it or not is of no cousequence. On the morning of the 11th Baijnath with his party of eight labourers was working the lifts and irrigating his *kirao* field. Four of the labourers were actually engaged and the other four were resting as a relief group.

Jeobodh arrived on the scene with a party of equal strength. Balak playing the role of a spokesman threateningly asked Baijnath to stop the irrigation because poppy cultivation being Government's concern must have preference over *kirao* in the matter of irrigation. "Baijnath said that he would not let water be taken to poppy until his *kirao* had been cultivated"—*vide* Sheoratan Prasad. Balak persisted in his demand and what followed has a vital bearing on the case, a point which I regret to

observe, both the lower Courts have omitted to consider. Balak says: "When we stopped the irrigation of Baijnath, he said that we should be beaten." Balak was beaten. The learned Judge says: "The medical evidence shows that he was soundly trounced receiving nineteen bruises of greater or less size, some however caused by a fall and others by *lathis*. A general melee seems to have ensued...." Before I proceed further I will quote one more prosecution witness, Karim—"The *mar pit* was started after I reached the spot. The sticks were standing thrust in the ground. There was a talk about the irrigation and when Baijnath said he wo'nt let him irrigate, the *mar pit* began." These two pieces of evidence clearly suggest the inference that Jeobodh's party initiated the attack. My judgment, however, need not rest on it, except in so far that I find it fully established that Jeobodh's party stopped the working of the lifts and this obviously could not have been done without the use of some force.

Some more men came from the neighbouring *arhar* fields and took the side of Baijnath but there is no evidence that they were posted there by Baijnath. But assuming that they were, Baijnath and his party are not guilty for that reason if they are not guilty otherwise. The learned Magistrate rightly observes that the complainant "was under the impression that there would be some trouble." Further we have it in the evidence of P. W. Sheoratan that Jeobodh had asked him in the morning to come to his help. It follows that both sides were fully alive to the trouble that might ensue. But in view of the situation at the time no trouble could ensue but for the conduct of Jeobodh and his party. In the general melee an unfortunate woman whose husband was the partisan of Jeobodh also rushed and was beaten. Jeobodh ran away but some other members of his party received injuries of varying severity.

The conviction of the applicants under s. 325 of the Indian Penal Code clearly rests on s. 149 of the Code and the conviction under the latter section and s. 147 must depend upon the element that Baijnath and his party formed "an unlawful assembly." I am quite clear in my judgment that they did not.

'Unlawful assembly' is defined in s. 141 of the Indian Penal Code:—

"An Assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is—

"*First*.....

"*Second*.....

"*Third*.....

"*Fourth*—By means of criminal force, or show of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

"*Fifth*—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do."

The first three clauses have no application whatsoever and have, therefore, been omitted here. I will deal with the last clause first. There is no doubt that the common object of Baijnath's party was to compel Jeobodh by means of force to omit, for the time being, to irrigate his poppy field. That much is, however, not enough. The act omitted must be one which Jeobodh was legally entitled to. It is neither claimed nor shown by the prosecution that he had such a title to the irrigation. On the other hand, it is fairly clear on the facts stated above that the legal title was on the side of Baijnath.

It now remains to consider the application of the fourth clause. The *bodars* were on the *parti* land and on the ridge of Baijnath's field. Baijnath is the *zemindar*. He has, therefore, the legel title both to the *bodars* and the water in the tank and what is of no more consequence he was not "to take or obtain possession" of them for the simple reason that at the time when Jeobodh and his party appeared on the scene he was already in the rightful and peaceful possession of them. Nor was Baijnath's object to deprive Jeobodh "of the enjoyment of a right of water... of which he was in possession or enjoyment," the reason being that Jeobodh had neither the right of the use of water nor in the possession or enjoyment of it. Finally Baijnath's party, though not unlawful when it assembled might subsequently have become unlawful assembly if its common object was "to enforce any right or supposed right by means of criminal force or show of criminal force." It is more likely than not that the judgments

of the lower Courts are founded on the last mentioned point.

The true import of the expression "to enforce any right" relates to an initial act when it is done in furtherance of any right and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right. The distinction may be fine but it is substantial. In the case before me and on the proved facts Baijnath was not enforcing any right by means of criminal force but he was certainly by means of force maintaining the right to use the water, in other words, he was defending his act of exercising his right which was in progress. "After that it is immaterial who struck the first blow"—Per Simpson, A. J. C., in *Inderjit* v. *Emperor*(1). The present case clearly resembles with *Lila* v. *Emperor* (2). The distinction enunciated above has been recognised as a valid one by all the High Courts in India and was recently emphasised in the decision of Mr. Justice Ryves in *Hira* v. *Emperor* (3) and of Mr. Simpson in the case already referred to. On this aspect of the case the learned Magistrate makes the following observation:—"Even if we take for granted that the accused and his men were working out the lift since before and it was Maharaj Bahadur and his men who disturbed them, then there was hardly any occasion for the accused and their party to take the law into their own hand, for it could be hardly likely that Maharaj Bahadur and his men would take away all the water of the pond before the help of the authorities could be invoked and unless this was proved there would be no occasion for exercising the right of private defence in this case." The implication of this observation is more serious than the apparent meaning. It amounts to this that the accused should have abandoned the enjoyment of their legal rights, allowed the opponents to take possession of the *bodars* and to have run away to seek the protection of the authorities. This, to my mind, is clearly an erroneous view of the law to take. This was fully explained in the case of *Hafiz Ali* v. *King-Emperor* (4). In that case Mr. Scott observed as follows:—"For the prosecution it is also contended that no right of self-defence arose because the applicants had time to have recourse to the protection of...the Police. I do not, however, understand that the law intends that when a person is attacked while doing a lawful act, he is not entitled to stand his ground and defend himself, but must run away." The same view was taken by Mr. Simpson in the case already mentioned. The learned Magistrate proceeds:—"The more than necessary injuries could not be tolerated in the exercise of the right of private defence and here we find that a woman was indiscriminately beaten and two of the party of the complainant received serious injuries in the form of fracture of right humerous and fracture of bone of the hand." It is difficult to understand what the learned Magistrate means. He has mixed up the case of the woman with the discussion of the right of private defence, and does he mean to suggest that the accused should have used their fists and not their *lathis* at all or in using the latter they should have employed less force? As I have already shown the complainant's party had actually stopped the irrigation and this could not have been done without using force, the exact nature and extent of which the record does not reveal. As observed by Ryves, J., in the case mentioned before: "If a man is entitled to protect his own life by using a *lathi*, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, 'in golden scales' and to adjudicate with great nicety as to the exact amount of force which would be justified." No charge under s. 325 can be sustained independently of s. 149 because it is not shown who caused which injury as the learned Magistrate himself recognises in his judgment. Nor has s. 34 of the Indian Penal Code, for the reasons already stated, any application to the facts of this case. The result is that the application is accepted, the conviction and sentences are set aside and the applicants are acquitted. They shall be released forthwith.

Z. K. *Application accepted.*

(1) 83 Ind. Cas. 523; 11 O. L. J. 40; 26 Cr. L. J. 43.
(2) 77 Ind. Cas. 1002; 9 O. L. J. 291; 4 U. P. L. R. (O.) 74; (1922) A. I. R. (O.) 228; 25 Cr. L. J. 538.
(3) 71 Ind. Cas. 605; 45 A. 250; (1923) A. I. R. (A.) 194; 24 Cr. L. J. 189.
(4) 10 O. C. 196; 6 Cr. L. J. 271.

PATNA HIGH COURT.

CRIMINAL REVISION No. 399 OF 1924.
November 13, 1924.
Present:—Mr. Justice Adami and Justice Sir John Bucknill, KT.

ANANT SINGH—COMPLAINANT—PETITIONER

versus

HARI CHARAN CHAUKIDAR—OPPOSITE PARTY.

Acquittal—Revision by private person—Proper remedy.

It is not desirable to grant applications made by private persons for setting aside orders of acquittal.

The remedy of a person who feels himself aggrieved by an order of acquittal is to ask the Government's legal advisers to take up the matter.

Appeal from an order of the District Magistrate, Chapra, Saran, dated the 29th May 1924, affirming that of the Magistrate, Second Class, Chapra, dated the 12th April 1924.

Messrs. *Rai Gurusaran Prasad* and *Anant Prasad*, for the Petitioner.

Mr. *Jaffar Imam*, for the Opposite Party.

JUDGMENT.

Bucknill, J.—This was an application in Criminal Revisional Jurisdiction made by a person called Anant Singh. The cricumstances under which this application comes before this Court are very simple.

A certain Hari Charan *chaukidar* was charged by the complainant with assault and he was tried by a Magistrate of the Second Class of Chapra on the 12th April 1924 for an offence said to have been committed against the provisions of s. 325, Indian Penal Code. For certain reasons which the Magistrate expresses at considerable length the accused man was acquitted. It is important, I think, to observe that there is certainly in the Magistrate's decision one sentence which appears to indicate that he was satisfied that the accused person had in fact assaulted the complainant. This passage which occurs at the end of his judgment reads "There cannot be any manner of doubt that the complainant had been very badly assaulted by the accused. One may be sorry for him." I pause here to mention that from this order of acquittal the applicant here appealed to the District Magistrate of Chapra who, however, refused to interfere by a short decision dated the 29th of May last and it is really in connection with this order of that date that the applicant is now applying to this Court.

The reasons which are given by the Trying Magistrate for giving as he calls it, the benefit of the doubt to the accused in this case may very shortly be stated to be that although it would seem that the Magistrate thought that the accused man had assaulted the complainant, he was quite satisfied that the circumstances under which the assault had taken place had not been truly laid before the Court. In fact he definitely stated that he is unable to hold in any way that the occurrence took place in the manner as related by the complainant. This, of course, at once raises a very large question as to what might have been the circumstances under which the alleged assault took place. It indeed may have been that there was a fight in which the complainant had in fact been the aggressor or at any rate these circumstances according to the Trying Magistrate and according to the view of the District Magistrate were not disclosed and in view of that fact it certainly would seem that it would not have been safe to have convicted the accused of any offence. I mention the circumstances in some detail because I think it is perhaps convenient that I should deal specifically with the facts in this case. But apart from these particular facts, there is, as has been many times pointed out in this Court, the greatest difficulty in the way of a private person coming to this Court in revision and asking successfully for the setting aside of a decision of acquittal. The practice in this Court is not to grant applications made by private persons for setting aside orders of acquittal. The reason for this practice is not far to seek, and indeed this Court has gone so far in at least one decision, as to state that a private person has no legal *locus standi* to make any application. I have not considered that point carefully and only draw attention to it as showing that it may be possible to justify the practice of this Court by a conclusion that there may be no *locus standi* on the part of a private person to make applications of this character. I should, however, like to say that, for reasons which I have already given, I do not think that in any case this would have been a matter in which we should have thought it fit or desirable to interfere. I am satisfied, however, that there is always a remedy in the hands of person who feels himself really aggrieved by an order of acquittal; he can always go to the Govern-

ment's legal advisers and I am confident that if he could show them that he had good grounds for being aggrieved by an order of acquittal that they would on his behalf take it up; and, in such circumstances, of course, the position of the Crown which, as has been said, alone has the conduct of prosecutions is entirely different when applying to this Court against an order of acquittal from the position that which a private person has. However, as I have said, in this case there is no reason of interference and the application must be rejected.

Adami, J.—I agree.

K. S. D. *Application rejected*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 124 OF 1924.

August 14, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

RAHIMADDI JAMADAR—FIRST PARTY

versus

SHER ALI AND OTHERS—SECOND PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Magistrate, power of—Verdict, whether can be split up—Costs.

Under s. 133, cl. 2 of the Cr. P. C., a Magistrate has only the power to order the removal of an obstruction, and the section does not provide for the re-construction of a *bundh* which has once been removed under it. [p. 357, col. 2; p. 358, col. 1.]

A Magistrate is not entitled to split up a verdict in order to give himself jurisdiction to deal with the matter under s. 133 of the Cr. P. Code. [p 358, col. 1.]

There is no provision in Chap. X of the Cr. P. Code for the payment of costs by any party to a proceeding under s. 133 of the Code. [*ibid.*]

Criminal reference made by the Additional District Magistrate, Backargunj, dated the 21st June 1924, recommending revision of order made by the Sub-Divisional Magistrate, Patuakhali, dated the 10th April 1924.

Babu *Abinash Chunder Guha*, for the First Party.

Babus *Suresh Chunder Talukdar* and *Jatindra Nath Sanyal*, for the Second Party.

JUDGMENT.

Chotzner, J.—This is a Reference by the learned Additional District Magistrate of Bakarganj recommending that the order made by the learned Sub-Divisional Officer of Patuakhali should be vacated.

It appears that there was a proceeding under s. 133 of the Cr. P. C. with regard to a certain *bundh* upon the Kashinath *Khal*. An application for its removal was made by the first party to those proceedings and objections were raised by the second party. A conditional order was drawn up by the Magistrate and a Jury was appointed and they made certain suggestions which the Magistrate accepted with regard to the form of the order, passing an order in this form on the 12th of October 1923: "The conditional order of removing the *bundh* is therefore made absolute with this modification that the *bundh* be reconstructed from *Agrahayan* of each year and removed again at the end of *Chaitra* at the cost of both parties equally in future."

A Reference questioning the legality of this order was submitted to this Court and the learned Judges disposed of it in these terms: "As the Additional Magistrate points out, this is not an order which could be made under s. 133 and we accordingly accept the Reference but we direct that the matter should go back to the Sub-Divisional Officer for his consideration and we point out to him that it will be open to him under s. 133 to make an order for the removal of the offending *bundh* during certain months in the year." When the record reached the Sub-Divisional Officer he drew up fresh proceedings; but without empanelling a fresh Jury, he made the following order: "The majority of the Jurors found the conditional order reasonable and proper with the modification that the *bundh* be removed for six months of the year from *Baisakh* to *Aswin* both inclusive. I accept the modification and this modification makes the order absolute. Issue notice on the 2nd party to remove the *bundh* on the Kashinath *Khal* from the 1st of *Baisakh* or within a week of the service of the notice whichever is later informing them that in the case of disobedience they will be liable to the penalty provided by s. 188, Indian Penal Code."

The learned Additional District Magistrate has pointed out in his letter of reference that the "present order is absolutely impracticable." He says: "The appellants will have to destroy and re-erect the *bundh* every year for the good of the 1st party. This, I submit, is not justice. Moreover this *bundh* has been in existence for twenty years and the *bundhs* which have been erected by the other party and have altered the drainage have only been in existence a few years."

What we have to consider is whether the order made by the learned Sub-Divi-

sional Officer can be supported and we think it is plain that it cannot be supported.

The verdict of the Jury finding the conditional order reasonable was accepted by the Sub-Divisional Magistrate presumably on the supposition that he had the power of ordering the reconstruction of the *bundh* under s. 133. It is evident, however, that under s. 133, cl. (2) it is only the power to order the removal of an obstruction which is given him. There is no provision for the reconstruction of a *bundh* which has once been removed under this section. It seems, therefore, not imporbable that if the Jury had known that the modification which they suggested and which was accepted by the Magistrate was in itself *ultra vires* they would not have returned the verdict which they did. They might very well have said that if the Magistrate has no power to order the reconstruction of the *bundh*, the *bundh* had better remain where it was; and in fact it appears from the verdict that one of the Jurors actually took that view.

Then again the learned Sub-Divisional Officer's order was founded not upon the entire verdict of the Jury but only upon a part of it. Their verdict provided, firstly, for the removal of the *bundh* and, secondly, for its reconstruction. The Magistrate's order however, was limited only to the removal of the obstruction. I do not think he was entitled to split up the verdict so as to give himself jurisdiction to deal with the matter under s. 133.

There is a further point with regard to the question of costs. Two of the Jurors were of opinion that the costs of removal and reconstruction should be borne by the petitioner. One Juror thought that the question of costs did not arise and two of the Jurors said that they had no opinion. The learned Sub-Divisional Magistrate thought that the costs should be borne equally by both parties. Here, again, there is the difficulty that there is no provision in this Chapter (Chapter X) for the payment of costs by any party to the proceeding. It may, therefore be doubted, whether the Jury would have returned the verdict which they did if they had thought that the question of costs would have to be left open. That is a factor which might have been beyond their consideration.

The result, therefore, is that we think that this Reference should be accepted and the order of the Sub-Divisional Officer vacated. At the same time we leave it to him and to the parties to take such further proceedings as they may be advised.

Sanderson, C. J.—I agree with the judgment which has just been delivered by my learned brother.

The point that weighs with me is that the Sub-Divisional Officer has passed his last order upon a part of the finding of the Jury which was given at the beginning of the proceedings. It is not clear to me that the Jury would have come to a conclusion that the *bundh* should be removed, unless they had felt themselves entitled to add the conditions which were embodied in the first order. My learned brother has pointed out that those conditions are not within the purview of s. 133.

Therefore, it appears to me that the learned Sub-Divisional Officer ought not to have accepted a part only of the finding of the Jury as a basis of his second order.

For these reasons I agree with my learned brother that the Reference should be accepted, the order of the learned Sub-Divisional Officer must be set aside and the matter remanded, and, it should be left to the parties, and the Sub-Divisional Officer to take such further proceedings as they may be advised.

K. S. D. *Reference accepted.*

RANGOON HIGH COURT.

CRIMINAL REVISION No 371-B OF 1924.

July 31, 1924.

Present:—Mr. Justice Lentaigne.

MA WET—PETITIONER

versus

MG PO TAIK—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 517, 520—Order for disposal of exhibits—Court, power of—Question, whether can be separately considered.

Section 517 of the Cr. P. C. does not limit the power of the Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to subsequently pass orders for the disposal of the property. [p. 359, col. 2.]

Similarly a Court of Appeal or Revision is not so limited. Section 520 of the Code expressly authorises the separate consideration, where necessary, of matters referred to in the section. [*ibid.*]

In re Laxman Rangu Rangari, 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169, distinguished.

Criminal revision, being review of the order of the Sessions Judge, Hanthawaddy, in Criminal Revision No. 261 of 1924.

JUDGMENT.—The applicant prosecuted the respondent for an alleged offence under s. 408, Indian Penal Code, before the

First Additional Magistrate of Twante, and that Magistrate passed judgment on the 11th February, 1924 convicting the respondent and sentencing him to four months' rigorous imprisonment. The prosecution had reference to some paddy reaped by the respondent and four bullocks alleged to have been entrusted to the respondent. The judgment convicting the respondent contained no order as to the disposal of the property; but on the same day the Magistrate passed an order which is recorded in the Diary Sheet directing that the paddy and four bullocks which had been seized by the Court be handed to the complainant on her giving security in respect of the same.

The respondent appealed against such conviction and on appeal the Sessions Judge passed judgment on the 13th March, 1924, setting aside the conviction and acquitting the respondent. The appellate judgment contained no order reversing the order passed under s. 517 for the disposal of the property presumably because such order had not appeared in the judgment under appeal; and it is probable that the Sessions Judge, when passing such judgment, was not even aware of the order as to the disposal of property which had only been entered in the Diary of the Convicting Magistrate.

The respondent then applied to the Magistrate for a return of the paddy and four bullocks, but on the 28th March, 1924, the Magistrate refused to pass such order. The respondent then applied to the Sessions Judge for an order under s. 520 of the Cr. P. C. directing that the properties which had been taken out of the possession of the respondent be returned to the respondent; and on the 6th May, 1924, the Sessions Judge, who was a successor to the Sessions Judge who had heard the regular appeal, passed the order for the return to the respondent of the paddy and four bullocks.

The applicant, the original complainant, has applied for revision of that order, on the ground that the Sessions Judge had no jurisdiction to pass the order, because such order had not been included in the original judgment reversing the conviction. It is urged that s. 423, cl. (*d*) of the Cr. P. C. would have authorised the Sessions Judge as a Court of Appeal to pass the said order as part of the judgment of the 13th March; and that such judgment must be construed as a judgment refusing such return of the property, and that consequently the Sessions Judge had no jurisdiction to pass the subsequent order and was debarred by s. 369 from so altering his judgment.

In my opinion this contention is not sound. The order under s. 517 was not in fact the subject of the appeal to the Sessions Judge, and it had apparently been passed behind the back of and without notice to the respondent. It is quite true that the Sessions Judge could under s. 423, cl. (*d*) have passed the later order as part of the order of the 13th March; but that does not necesssarily mean that the Code compels him to limit all his orders under s. 520 to his judgment reversing the conviction. If the applicant's contention is sound, it would have equally debarred the Magistrate from passing the subsequent order on the 11th February, for the disposal of the property. It is obvious, however, that s. 517 does not limit the power of the Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to subsequently pass orders for the disposal of the property. Similarly, I do not think that a Court of Appeal or Revision is so limited. I think that s. 520 expressly authorises the separate consideration, where necessary, of matters referred to in the section.

Reliance has been placed on the decision in *In re Laxman Rangu Rangari* (1) in support of the contention of the applicant, but I think that that decision merely recognises the principle that, in a case like this, the Appellate Court, which would hear the appeal, would be the proper Court to exercise the jurisdiction under s. 520.

In my opinion the order passed by the Sessions Judge was a proper order and one which it was the duty of the Court to pass once the conviction had been set aside. The judgment of the Sessions Judge of the 13th March was to the effect that no offence had been committed; consequently it implied that the Magistrate had no jurisdiction under s. 517 to dispose of the property in respect of which no offence had been committed, and it was only right that such illegal order should be set aside.

For these reasons I do not think that the Court should interfere, and I dismiss the application.

K. S. D. *Application dismissed.*

(1) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 140 OF 1924.
October 22, 1924.
Present :—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A.J.C.
Pandit BISHAMBHAR NATH—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 347—Warrant case, trial of—Charge framed—Commitment to Sessions for portion of charge—Procedure.

Section 347 of the Cr. P. C. authorises a Magistrate at any stage of the trial of a warrant case to commit the accused for trial to the Court of Session instead of completing the trial himself. The new charge which is then drawn up by the Magistrate has the effect of cancelling any previous charge framed by him but this is so only with respect to the subject-matter of the new charge. So far as this subject-matter is concerned the previous proceedings before the Magistrate must be regarded as proceedings in an enquiry preliminary to commitment but this alteration of the character of the enquiry does not extend to any matter which is not the subject of the new charge. [p. 361, col. 1.]

Where a Magistrate after having taken cognizance of a warrant case finds that the accused ought to be committed to the Court of Session in respect of a portion of the subject-matter of the charge, but that he has not committed a part of the offence with which he has been charged, his duty is to commit the accused for trial in respect of the subject-matter of the former portion of the charge and to acquit him so far as the latter portion of the charge is concerned. [p. 361, col. 1.]

Section 347 of the Cr. P. C. does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the Court of Session that the proceedings are taken out of Ch. XXI of the Code and the other proceedings of the Magistrate continue to be governed by the provisions of that Chapter. [p. 361, col. 2.]

Revision under ss. 435/439 of the Cr. P. C. against an order of the District Magistrate, Unao, dated the 23rd September 1924.

Messrs. *Hyder Husain* and *K. P. Misra*, for the Applicant.

The Government Pleader, for the Opposite Party.

JUDGMENT.—This is an application under ss. 435/439 of the Cr. P. C. for revision of an order of the District Magistrate of Unao for further enquiry under s. 436, Cr. P. C., into a case in which an accused person had been discharged by a Magistrate of that District.

The facts of the case are that one Pandit Bishambhar Nath Bajpai was sent up for trial by the Police under s. 409, Indian Penal Code. The Magistrate before whom the case came, Pandit Shiam Singh Pathak, proceeded to deal with the case as a warrant case under Ch. XXI of the Cr. P. C., and after hearing the evidence produced for the prosecution, framed a charge against the accused under s. 409, Indian Penal Code of criminal breach of trust in respect of a sum of Rs. 24,000. At the end of charge it was noted that this sum was made up of two items of Rs. 17,000 and Rs. 7,000. The accused was called on to enter upon his defence and pleaded not guilty. The prosecution witnesses were now cross-examined, additional evidence was produced on behalf of the prosecution, and witnesses were called and heard for the defence. At the end, however, the learned Magistrate decided that as the amount of misappropriation was large, the accused ought to be committed to the Court of Session, but he came to the conclusion that "so far as the amount of Rs. 7,000 is concerned, the prosecution has failed to show the accused's responsibility." On these grounds he discharged the accused of the offence in respect of this amount, and framed a new charge under s. 409 in respect of Rs. 17,000 only. He also cancelled the charge which he had previously framed.

The District Magistrate being doubtful whether the case should not have been committed for trial in respect of the whole Rs. 24,000, took action under s. 436, Cr. P. C. His order against which the present application is made is a very brief one. It runs: "Present Pandit Bishambhar Nath Bajpai. Under s. 436, Cr. P. C. I decide to make further enquiry myself. Case for 11th October 1924. Government Pleader be informed and he should be ready with any evidence which he wishes me to take."

In the application for revision several grounds of objection are taken to this order, but we need only consider the first which runs: "That the Court below had no jurisdiction to interfere with the order of the First Court which is one of acquittal." From the whole of the Magistrate's proceedings it is clear that he took up the case to begin with as a warrant case under Ch. XXI of the Code. In his final order he distinctly says: "I framed the charge against the accused knowing that I could dispose of the case myself, but my subsequent study of the case-law tells me that where the amount of misappropriation is large the accused ought to be committed to

the Court of Session." The contention of the learned Counsel for the applicant is that having framed a charge under Ch. XXI, the Magistrate could not discharge the accused but could only acquit him, unless he convicted him or decided to commit him to Sessions under s. 374, Cr. P. C. We agree with this contention. Had the case been taken up from the first under Ch. XVIII, as on enquiry preliminary to commitment, the Magistrate could no doubt under s. 213 (2), have cancelled the charge and discharged the accused, even after hearing witnesses for the defence, if he were satisfied that there were no sufficient grounds for committing the case. The learned Government Pleader argues that this is what he must be considered to have done, but it is clear that the charge which is referred to as capable of cancellation under this section is a charge committing the accused for trial to the Sessions Court, and not a charge framed by the Magistrate when trying a warrant case. Section 347, no doubt, authorises a Magistrate at any stage of the trial of a warrant case to commit the accused for trial instead of completing the trial himself. It is clear that the new charge which will then have to be drawn up by the Magistrate will have the effect of cancelling any previous charge framed by him, but this case can only be with respect to the subject-matter of the new charge. So far as this subject-matter is concerned, the previous proceedings before the Magistrate must be regarded as proceedings in an enquiry preliminary to commitment, but this alteration of character cannot be extended to any matter which is not the subject of the new charge. What has happened is that the Magistrate having taken cognizance of the case has found that the accused is not proved to have committed a part of the offence with which he has been charged. Of this offence, therefore, he is bound to pass an order of acquittal. With respect to another part of the offence he has found that there are *prima facie* grounds for believing it to have been committed and that the circumstances are such that it ought to be tried by a Court of Session, and he has accordingly taken action under s. 347, Cr. P. C. to commit it to that Court. But the power conferred by that section to commit the case in respect of that portion of the offence should not affect the obligation imposed on the Magistrate to acquit in respect of the other portion of the offence. Section 347 does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the Court of Session that the proceedings are taken out of Ch. XXI, and the other proceedings of the Magistrate must remain governed by the provisions of that Chapter.

In this view of the case, the order passed by the Magistrate relating to the sum of Rs. 7,000, though it purported to be an order of discharge, was really an order of acquittal, and as such was not an order which the District Magistrate could interfere with under s. 436, Cr. P. C. The application must, therefore, be allowed and the order of the District Magistrate set aside, and we accordingly hereby do so.

Z. K. *Application allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 859 OF 1923.
(CRIMINAL REVISION PETITION No. 687 OF 1923).

July 14, 1924.

Present:—Mr. Justice Venkatasubba Rao.

BASINA APPANNA—PETITIONER—APPLICANT

versus

PETA AKKANNA—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499—Criminal Procedure Code (Act V of 1898), s. 198—Defamation—Words uttered by another—Confirmation by conduct—Offence—Unchastity imputed to married woman—Husband, whether aggrieved—Complaint by husband.

An accused person cannot escape liability for defamation merely because he did not himself utter the words complained of. Where by his conduct and by words which he did speak he intended to give and gave the impression that he adopted as his own the words uttered by another, he must in effect be deemed to have uttered the words imputed to him. [p. 362, col. 1.]

Where a married woman is defamed by an imputation of unchastity, her husband is a person aggrieved within the meaning of s. 198 of the Cr. P. C. and has the right to prefer a complaint of defamation. [p. 362, col. 2.]

Chellam Naidu v. *Ramaswami*, 14 M. 379; 1 M. L. J. 242; 2 Weir. 230; 5 Ind. Dec. (N. S.) 265, *Chotalal Lallubhai* v. *Nathabhai Bechar*, 25 B. 151, 2 Bom. L. C. 665 (F. B.) and *Ananta Goundan* v *Emperor*, 15 M. L. J. 224; 2 Cr. L. J. 381; 2 Weir. 231, followed.

Petition, under ss. 435 and 439 of the Cr. P.C., 1898, praying the High Court to revise

the judgment of the Court of Session of the Ganjam District, in Criminal Appeal No. 8 of 1923, preferred against the judgment of the Court of the Sub-Divisional Magistrate, Chicacole, in C. C. No. 59 of 1922.

Mr. *S. Subramania Sastri*, for the Petitioner.

Mr. *B. Pocker*, for the Respondent.

ORDER.—The first question to be decided in this case is, is the evidence of P. W. No. 5 true ? The learned Sessions Judge has not said that he disbelieves his evidence. The witness was the Vakil of the accused himself in the proceeding in connection with which the defamatory words in question were said to have been used. No ground has been shown for rejecting his evidence. If his evidence is believed, is there sufficient material on which a conviction for defamation can stand? P. W. No. 5 advised the accused to compromise the civil suit between P. W. No. 1 and the accused. Thereupon he replied : "There are other reasons for the dispute I shall disclose them in private." Then one Ramanujayya, who was listening to the conversation, said: "There is nothing else. It appears that there is intimacy between P. W. No. 1's wife and the accused and hence the accused says that P. W. No. 1 has been trying to trouble the accused". And P. W. No. 5 proceeds to say :— "I warned the accused that he should not give vent to such language since it is defamatory and he would be legally liable. The accused replied that he would not be faulty by exposing P. W. No. 1 when he was trying to bring loss to his credit. Then I went away." It is argued on behalf of the accused that the words complained of were not actually uttered by him. This contention, though literally true, does not avail the accused at all. By his conduct and by a few words which he did speak he undoubtedly intended to give and gave the impression that he adopted as his own the words reported to P. W. No. 5. I am not in the least prepared to hold that merely because the accused did not himself utter the words complained of, he can escape liability for defamation. The Explanation 3, for instance, to s. 499, Indian Penal Code by way of analogy throws some light upon the question in controversy :— "An imputation in the form of an alternative, or expressed ironically, may amount to defamation." In this case by assenting by conduct and suggestion to what he himself was reported to have said the accused in effect uttered the words imputed to him. I must disagree with the Sessions Judge and hold that the offence of defamation has been made out.

It was next argued that the person defamed was the complainant's wife and that the complainant had no right to initiate the prosecution. *Brahmanna* v. *Ramakrishnama* (1) was relied on in support of this proposition. This case, however, related to a civil action and it was held that the injury caused to the husband was remote and not immediate and that although the imputation of unchastity on the part of plaintiff's wife caused him pain of mind, that did not give him a right to claim damages. But in the present instance we are not concerned with the civil rights of the parties and the authorities bearing on this subject clearly establish that where a married woman is defamed by imputation of unchastity, her husband is a person aggrieved under s. 198 of the Cr. P. C. In other words, the combined effect of s. 499 of the Indian Penal Code and s. 198 of the Cr. P. C. is that the husband of the woman to whom unchastity is imputed has the right to prefer a complaint of defamation. See *Chellam Naidu* v. *Ramasami* (2), *Chhotalal Lallubhai* v. *Nathabhai Bechar* (3) and *Anantha Goundan* v. *King-Emperor* (4).

I am acting in revision and as I cannot convert the finding of acquittal into one of conviction, all that remains to be done is, to send the case back to the present Sessions Judge to re-hear the appeal and dispose of it according to law in the light of the observations I have made.

V. N. V. *Case remanded.*

(1) 18 M. 250; 5 M. L. J. 89; 6 Ind. Dec. (N. S.) 524.
(2) 14 M. 379; 1 M. L. J. 242; 2 Weir. 230; 5 Ind. Dec. (N. S.) 265.
(3) 25 B. 151; 2 Bom. L. R. 665 (F. B.).
(4) 15 M. L. J. 224; 2 Cr. L. J. 381; 2 Weir. 231.

RANGOON HIGH COURT.

CIVIL REVISIONS NOS. 239 OF 1922.
June 15, 1923.
Present:—Mr. Justice Duckworth.
VALAB DAS AND OTHERS—APPELLANTS
versus
MAUNG BA THAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—

Perjury committed in judicial proceeding—Order for prosecution, when can be made—Reasonable probability of conviction—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—High Caurt, when will interfere.

Where perjury is alleged to have been committed in the course of a judicial proceeding and is duly brought to the notice of the Court, the Court is justified in taking action under s. 476 of the Cr. P. C., and order prosecution of the offender. [p. 364, col. 1.]

It is not necessary that the Court should form its opinion as to the desirability of prosecuting the offender during the progress of the actual case. [*ibid.*]

It is not fair to allow proceedings for perjury to take their course where the evidence is evenly balanced and there is no reasonable probability of securing a conviction. [p. 365, col. 1.]

Under s. 25 of the Provincial Small Cause Courts Act the High Court should only interfere to remedy injustice and when substantial justice has been done it will not interfere even though the Small Cause Court may technically have erred. [p. 363, col. 2.]

The High Court will not interfere in findings of fact when the Judge has decided them on evidence and there is evidence to support the finding. [p. 364, col. 2.]

Revision against an order of the Small Cause Court, Rangoon in Civil Miscellaneous No. 524 of 1922.

Mr. *Giles* (with him Messrs. *N. M. Cowasjee* and *S. A. Rahman*), for the Appellants.

Mr. *Chari*, for the Respondent.

JUDGMENT.—These two cases, Civil Revision Nos. 238 and 239 of 1922 have been heard together and I shall deal with them both in this order.

The facts have been very fully set out by the learned 3rd Judge of the Small Cause Court, Rangoon and I need not go into them again.

These applications can only lie under s. 25 of the Provincial Small Cause Courts Act. The case of *San Gaing* v. *King-Emperor* (1) and the Full Bench case of *Har Prasad Das* v. *Emperor* (2) are adequate authorities that, where a Civil Court has taken action under s. 476, Cr. P. C., the Revisional Court cannot act under s. 439, Cr. P. C. Unless, therefore, grounds for revision of the orders of learned Third Judge of the Small Cause Court have been established under s. 25 of the Provincial Small Cause Courts Act, this Court has no power to interfere. The High Court's powers under this section have been clearly set out in the case of *Poona City Municipality* v. *Ramji Raghunath* (3) in which Farron, C.J., and Parsons, J., held *inter alia*, that an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by s. 25 of the Provincial Small Cause Courts Act; but that the powers so conferred are purely discretionary and there is nothing in the nature of an appeal either on law or fact. The Court should only interfere to remedy injustice, and, where substantial justice has been done it will not interfere, though the Small Cause Court may technically have erred. At the same time it was held, after comparing s. 622 (now 115) C. P. C. with s. 25 of the Small Cause Court Act, that the latter was of the widest scope in conferring discretion upon the High Court, in contradistinction to the narrow terms of s. 622, C. P. C.

Learned Counsel for the applicants has animadverted strongly upon the *demi*-official letter dated the 14th September 1922 from the Registrar of the Chief Court to the Chief Judge of the Small Cause Court, asserting that this letter was of such a nature as to force the hands of the Third Judge, when forwarded to him by the Chief Judge, and to leave him no judicial discretion. I do not agree. That letter directing nothing more than that an inquiry should be held, and it added that if it appeared that anyone had committed perjury *steps should be taken to have him prosecuted*, that was all. Except that it directed an inquiry, it in no other way forced the hands of the Third Judge nor laid down what procedure he was to adopt. In my opinion the facts, as stated by the Commissioner of Pegu and Maung Ba Than to the Chief Court warranted this letter, which merely brought to the Small Cause Court's notice that there might have been perjury committed in the suit. It is argued by learned Counsel for the applicants that an *ex parte* decree had been passed and that the proceedings in question were over and that the mere fact that Ba Than had applied for removal of the attachment order on his salary, and to set aside the *ex parte* decree did not continue the said suit. The alleged offences of the 3 applicants were committed before the Third Judge in the course of a judicial proceeding, and they were brought to his notice by the Chief Court's letter during subsequent execution and miscellaneous proceedings after that proceeding was concluded. The Judge did not in fact hold an inquiry owing to his own opinion and clearly he had no

(1) 4 L. B. R. 339; 9 Cr. L. J. 24.
(2) 19 Ind. Cas. 197; 40 C. 477; 17 C. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647.
(3) 21 B. 250; 11 Ind. Dec. (N. S.) 169.

opinion on the matter until the inquiry was concluded. It is, therefore, contended that what was done, did not comply with the provisions or intention of s. 476, Cr. P. C. which lays down that when a Court is "of the opinion that there is ground for inquiring into any offence referred to in s. 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry," etc. This clearly shows that the Court must have formed its own opinion before taking action. I agree with the opinion of Geidt, J., in the Full Bench case of *Begu Singh* v. *Emperor* (4) where he states that the terms of s. 476, Cr. P. C., indicate that the desirability of prosecuting the offender must be present to the mind of the Court during the proceedings in the course of which the offence was committed, or brought to its notice. But I do not agree that this means that, unless it is during the progress of the actual case in which the offence is committed that this opinion is formed, no prosecution can be ordered under s. 476, Cr. P. C. The fallacy of this argument has been pointed out in the case of *In re Lakshmidas Lalji* (5) and in the very clearly argued case of *Girwa Prasad* v. *King Emperor* (6) the contentions of Geidt, J., in *Begu Singh's case* (4) even as qualified by him on p. 562 of the decision, would preclude a Court from taking action, where in a subsequent judicial proceeding any such offence is brought to its notice and it forms an opinion that there are grounds for ordering a prosecution. Clearly here it was, in the course of a judicial proceeding, *i.e.*, when Maung Ba Than had moved the Court to cancel the prohibitory order and to set aside the *ex parte* decree that the alleged commission of offences in question was brought to the Judge's notice and after a preliminary inquiry he formed his opinion that prosecutions were called for. In the case of *Girwar Prasad* v. *King Emperor* (6) on p. 399* the passage "a judicial proceeding was in full course before him. In the course of it, it was brought to his notice that an offence had been committed and he then and there held an inquiry into that offence, and followed it up until he passed his order," very aptly fits the present case. In the Allahabad case the offences were committed in suits filed at two different places whilst the "judicial proceedings" in question were execution proceedings transferred to the Munsif's Court at Havali. A casual witness brought the offences to the Munsif's notice. His subsequent action under s. 476, Cr. P. C. were held to be good. In my opinion the Judges in *Bagu Singh's case* (4) did not attach sufficient weight to the words "brought to its notice" in s. 476, Cr. P. C. It is not suggested that an Appellate or Revisional Court would not have jurisdiction to act under s. 476 Cr. P. C., in the case of appeals or revisions actually before it.

In the case of *Awadh Behari Lal* v. *Emperor* (7) it was indicated that the text was whether the Court purporting to order a prosecution under s. 476, Cr. P. C., did so after forming its own opinion. This was what occurred here. I, therefore, do not consider that the proceedings of the learned Judge of the Small Cause Court were illegal or without jurisdiction, or that he did not form his own opinion on the evidence.

Incidentally he was in error in using the word "sanction" when complaining as to the offences which he considered had been committed by the 3 applicants. Section 195, Cr. P. C., deals with "sanction" whereas s. 476 does not. This, however, was merely a terminological error, and is of no importance. As to the merits it is a well established principle of law that, under s. 25 of the Provincial Small Cause Courts Act the High Court will not interfere on findings of fact when the Judge has decided them on evidence, and there is evidence to support the said findings. The learned Judge in this instance came to all his findings on evidence. *Prima facie* then there are no valid reasons of fact for the interference of this Court on revision. But it is urged that the facts even as stated by the learned Judge after full enquiry clearly indicate that there is no reasonable probability of these 3 applicants being convicted by any Criminal Court. It is, therefore, argued that this Court should use its wide discretion in setting aside the order of the learned Third Judge. This objection was taken before Jwala Prasad, J., in the case of *Awadh Behari Lal* v. *Emperor* (7), already referred to, on page 164 of the

(4) 34 C. 551 at p. 560 to 562; 11 C. W. N. 568; 5 C. L. J. 508; 5 Cr. L. J. 398; 2 M. L. T. 298.

(5) 32 B. 184; 10 Bom. L. R. 28; 7 Cr. L. J. 35; 3 M. L. T. 116.

(6) 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219.

*Page of 6 A. L. J.—[*Ed.*]

(7) 50 Ind. Cas. 162; 20 Cr. L. J. 274.

report, and he disallowed it, but there no less than two Courts had decided that the satisfaction petition was a forgery, and there was evidence to this effect. Here matters are different. The question arises not under s. 115, C. P. C., but under s. 25, Provincial Small Cause Courts Act, and there is not before the Court the judicial opinions of a District and a Munsif's Court as to the credibility of the affidavit and evidence.

In my opinion, the evidence adduced was so evenly balanced in weakness on the one hand that this Ba Than was the lessee of the room, on the other that it was another Ba Than—that unless, which is not alleged, there was a considerable amount of further evidence affirming that the lessee was not this Ba Than, the prospects of the conviction of the three applicants would be slender indeed. The learned Third Judge stated that there were many discrepancies in the statements of the parties and their witnesses. The evidence of Ma Ma and Daw Kyok that the lessee was not this Ba Than is little, if anything better than the evidence to the contrary of Thein Maung and Maung Thein Pe, which the learned Judge did not believe, and his order shows that he had a very poor opinion of the statements of the two women, who are not of a respectable class. I am convinced that it would be an injustice on such evidence to allow proceedings to take their course, and the applicants to stand their trials on the charges named, inasmuch as there would be no reasonable probability of their conviction.

I feel that I must comment adversely on the action of the Commissioner of Pegu in refusing to act on the two prohibitory orders of the Small Cause Court in the case of one of his clerks, and in communicating, as he did, direct with the Chief Court, instead of directing his clerk, if aggrieved and wronged, to take such ordinary legal and remedial steps as the case which he set up warranted.

There having been, in my view of the case, an injustice committed, the order of the lower Court sending the proceedings to the District Magistrate, Rangoon, for the prosecution of the 3 applicants Jivandas Savchand, Valabdas and Changu Panday, under ss. 200, 193 and 193, Indian Penal Code, is set aside.

The matter being of a criminal nature, I make no order as to costs.

K. S. D. *Revision allowed.*

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 73 of 1924.

July 29, 1924.

Present:—Mr. Justice Martineau.

AMIR CHAND AND HIS WIFE *Musammat* PERMESHRI—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 171—Bigamy and abetment of bigamy—Jurisdiction.

The offences of bigamy and abetment of bigamy are triable only in the district in which the second marriage or the abetment takes place.

Application for transfer of a criminal case under s. 526, Cr. P. C., from the Court of the Magistrate, First Class, Jhelum, to the District of Rawalpindi or to the some other Magistrate in the District of Jhelum.

Mr. *Shamair Chand*, for the Petitioners.

Mr. *I. C. Chopra*, for the Respondent.

ORDER.—The Magistrate has replied to the petitioners' allegations and there appears to be nothing in his proceedings which would afford a sufficient reason for transferring the case. But I think it would be proper to transfer the case on another ground. The petitioners objected that the Chakwal Court had no jurisdiction. The Magistrate overruled the objection on the ground that the complainant's wife, Sita Devi, was said to have been enticed away in the Jhelum District, but that was not a correct view as the prosecution is not for an offence under s. 498, Indian Penal Code, but for bigamy and abetment of bigamy, the allegation being that the petitioners got Sita Devi married to Sadhu. The case would be triable only in the district in which the second marriage or the abetment took place. Up to the present the complainant has refrained from stating where it did take place, while the accused, or those of them who have appeared, deny that there has been a second marriage. Counsel for the complainants is even now unable to inform me where the second marriage took place. Now the petitioners live in the Rawalpindi District, apparently in a very remote part of the district. There have been many hearings of the case, and it is exceedingly inconvenient for them to take the long journey to Chakwal for each hearing. There is at present nothing to show whether or not there is any evidence against them, as no evidence has yet been recorded, the case having been repeatedly adjourned on account of the attendance of the princi-

pal accused, Sita Devi, not having been secured. It is apparently not known where Sita Devi is.

In these circumstances, I think it is not right that the petitioners should be harassed by having continually to take journeys to Chakwal for the hearing of a case with regard to which it is still not known whether the Court at Chakwal has jurisdiction.

I transfer the case to the Rawalpindi District to the Court of such Magistrate of the First Class as the District Magistrate of Rawalpindi may nominate for the trial of the case.

K. S. D. *Case transfered.*

MADRAS HIGH COURT.

(CRIMINAL REVISION CASE No. 604 OF 1924.)

CRIMINAL REVISION PETITION No. 505 OF 1924.

September 4, 1924.

Present:—Mr. Justice Wallace.

In re VADIGALAPYDIGADU—COMPLAINANT—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 350 (a)—De novo *trial—Accused, right of, to re-examine some witnesses only—Procedure.*

Under proviso (*a*) to s. 350, Cr. P. C., the right given to an accused person is the right of demanding that the prosecution witnesses or any of them be re-summoned and re-heard, and it rests on the accused to say who shall be re-summoned and re-heard. The complainant, however, has no such right, and when the accused is exercising his right under the proviso in regard to some witnesses only, the complainant cannot claim a *de novo* trial from the beginning. It is open to the accused at any time to say that he does not wish certain witnesses to be re-summoned and re-heard, even though previously he had asked for them to be re-summoned and re-heard. [p. 366, col. 2.]

Daroga Chowdhury v. *Emperor*, 52 Ind. Cas. 398; 20 Cr. L. J. 638, *Jago Singh* v. *Emperor*, 53 Ind. Cas. 820; 20 Cr. L. J. 820 and *Sahib Din* v. *Emperor*, 66 Ind. Cas. 826; 23 Cr. L. J. 330; 3 L. 115, relied on.

Petition under ss. 435 and 439 of the Cr. C. P., 1898, praying the High Court to revise the judgment of the Court of the Second Class Magistrate, Viziyanagaram, dated the 11th August 1924, in C. C. No. 107 of 1924.

Mr. *Y. Suryanarayana*, for the Petitioner.

ORDER.—The point raised in this revision case is of some interest. The petitioner as the complainant in C. C. No. 107 of 1924 on the file of the Second Class Magistrate of Viziyanagaram charged the respondents with theft. The Magistrate has acquitted the accused. His predecessor had examined 8 witnesses for the prosecution, and when the present Magistrate took up the case, the accused asked for the witnesses to be re-summoned and re-heard. The complainant was accordingly re-summoned and again examined. The accused appears then to have stated that he did not want the other witnesses re-called, and the Magistrate proceeded to judgment. The petitioner argues that the Magistrate had no right to break off a *de novo* trial in the middle and that he was bound to re-summon and re-hear all the witnesses again and that the omission to do so vitiates the trial.

Now, as I read s. 350 of the Cr. P. C., it may be right to describe a fresh enquiry as a *de novo* trial when the Magistrate himself decides to re-commence the trial; but when proviso (*a*) of the section is brought into force it does not seem to me that there is any question of a *de novo* trial. Under proviso (*a*) the right given to an accused person is the right of demanding that the prosecution witnesses or any of them be re-summoned and re-heard. It does not say that the trial must be begun again from the beginning. The provision is one entirely in the interests of an accused person and allows him to have any witness whom he wishes, re-summoned and re-heard; and obviously he may, at any time say, that he does not wish certain witnesses to be re-summoned and re-heard even though previously he had asked for them to be re-summoned and re-heard. That is to say, it rests on the accused to say who shall be re-summoned and re-heard. The complainant in the case is not given this right and to accord such a right to him would obviously work against the interests of the accused. Fresh evidence might be concocted, and blunders in the previous evidence might be explained away. I am clear that when the accused is exercising his right under the proviso (*a*), (the complainant) cannot claim that he must demand *de novo* trial from the beginning.

The petitioner calls my attention to three reported rulings, none of which seems to affect this conclusion. The ruling in *Daroga Chowdhury* v. *Emperor* (1) deals with a case of an accused person who had demanded and been granted a *de novo* trial, which trial by the procedure adopted had been in fact frustrated. It is true that the learned Judge uses language implying that

(1) 52 Ind. Cas. 398; 20 Cr. L. J. 638.

when a *de novo* trial is granted to an accused person the proceedings are "completely blotted out and superseded." But it must be remembered that he was looking at the case from the point of view of the accused and if the accused insists that the trial be gone on with again from the beginning and does not resile from that position, undoubtedly so far as he is concerned the previous proceedings are blotted out. *Jago Singh* v. *Emperor* (2) is an exactly similar case. *Sahib Din* v. *Emperor* (3) is wholly off the point. It is to the effect that when a witness has been re-examined at the accused's request under s. 350 of the Cr. P. C. his original statement cannot be used as evidence against the accused. This has no application to a case where the accused himself has agreed, by waiving his right to re-examine the witness, to the former statements of the witness being used against him.

I can find no authority in support of the petitioner's contention. The idea that when a Magistrate has himself thought it unnecessary to recommence the trial, but when he re-calls witnesses because the accused exercises his right under proviso (*a*), the accused has no option of withdrawing from the exercise of that right at a later stage of the case and that, therefore, the Cr. P. C. compels the Magistrate to go on re-examining witnesses though neither he nor the accused wants to do so, is not one that commends itself to me.

As to a further point raised, the ruling in *Tanguturi Sriramulu* v. *Nalam Karishna Row* (4) is authority for the correctness of the Magistrate's order as one of acquittal and not of discharge.

I, therefore, find nothing illegal in the procedure and dismiss the petition with costs.

V. N. V. *Petition dismissed.*

(2) 53 Ind. Cas. 820; 20 Cr. L. J. 820.
(3) 66 Ind. Cas. 826; 23 Cr. L. J. 330; 3 L. 115.
(4) 25 Ind. Cas. 1001; 38 M. 585; (1914) M. W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 39 OF 1924.
November 3, 1924.
Present :—Mr. Dalal, J. C.
HAFIZ KHAN—COMPLAINANT—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 250, 435, 439, 440—Case instituted upon information to Police—Compensation, order for, whether can be made—Order directing compensation, whether exempts complainant from criminal liability—Question of fact—Revision—Parties, whether entitled to be heard.

Under s. 250 of the Cr. P. C. compensation can be awarded in a case instituted upon information given to a Police Officer.

A complainant does not escape liability for prosecution under s. 211 of the Penal Code by reason of an order directing payment of compensation having been passed against him under s. 250 of the Cr. P. C.

A Magistrate trying a case is entitled to his opinion on facts and his order is not liable to be set aside in revision merely because he has not acted according to a superior Court with "fair mindedness and breadth of vision".

Under s. 440 of the Cr. P. C. no party has any right to be heard either personally or by Pleader before any Court while exercising its powers of revision.

Reference made by the Sessions Judge, Fyzabad, under s. 438, Cr. P. C.

ORDER.—I have gone through the record and the order of reference of the learned Judge dated 9th August 1924. I fail to discover any point of law which would entitle this Court to interfere with an order under s. 250, Cr. P. C., which is not open to appeal under cl. 3 of that section. The fine imposed in the present case is one of Rs. 40 and whenever the fine by way of compensation exceeds Rs. 50 an appael is allowed under the law. There must, therefore, be some difference in the treatment of the two cases, one where the compensation ordered is Rs. 50 or under and the other where it is over Rs. 50.

I am not very clear whether the learned Judge accuses the Magistrate or not on not acting "forthwith" as directed in s. 250 (1). So far as I can make out the Magistrate did act forthwith and as the complainant was not present, summons had to be issued to him to appear and show cause as laid down in cl. (1) of the section. Cause was shown by the complainant Hafiz Khan and it was not held by the Magistrate to be satisfactory. The learned Judge viewed the evidence on the record differently from the manner in which the Magistrate had viewed it. This, however, is not a point of law. If the matter had come up before the learned Judge in appeal, his valuable observations on facts would have been entitled to the greatest consideration. The application, however, was one by way of revision. The Magistrate is entitled to his opinion on facts even where he has not acted, according to a superior Court, with "fair mindedness and breadth of vision".

I am most averse to interfering on facts by way of revision as that would remove the difference specifically laid down by Statute between appeal and revision.

In drawing attention to the provisions of s. 211 the learned Judge appears to overlook cl. (2C) of s. 250 which lays down that no person who has been directed to pay compensation under this section shall by reason of such order be exempted from any civil or criminal liability in respect of the complaint made or information given by him. Hafiz has in no way escaped a liability for prosecution under s. 211, Indian Penal Code, by reason of the order passed by the Magistrate under s. 250.

The interference of the Police prosecuting Nageshar Panda is beside the point. Section 250 specifically lays down that compensation can also be awarded in a case instituted upon information given to a Police Officer.

This Court will receive considerable help and will not be puzzled if learned Judges when making reference would put down the points of law serially as 1, 2, 3 and so on. In a mass of writing this Court finds considerable difficulty in discovering the exact point of law which the learned Judge considers would arise in the revision. In the present case I have tried to discover as best I could the points of law probably raised by the learned Judge in his order of reference.

Under s. 440 of the Cr. C. P, no party has any right to be heard either personally or by Pleader before any Court when exercising its powers of revision. So I have not called upon the parties to appear here. The learned Judge's order is a lengthy one and the applicant could in the nature of things have nothing more to say.

I refuse to interfere with the order of the Magistrate and direct that the record be returned.

Z. K. *Record returned.*

RANGOON HIGH COURT.

CRIMINAL REFERENCES NOS. 78 AND 79 OF 1924.
November 7, 1924.
Present:—Mr. Justice Carr and Mr. Justice Godfrey.
EMPEROR—PROSECUTOR
versus
PO YIN AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 110—General repute—Evidence of witnesses living near accused, admissibility of—Magistrate, duty of.

In proceedings under s. 110, Cr. P. C., evidence of general repute given by witnesses who live sufficiently near to the accused to be in a position to know his real reputation should not be rejected merely on the ground that they are not his immediate neighbours. [p. 369, col. 1.]

In proceedings under s. 110, Cr. P. C., it is not for the Magistrate to consider whether the Police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties. [p. 369, col. 2.]

Reference by Mr. Justice Baguley against an order of the Sub-Divisional Magistrate, Bassein, in Criminal Miscellaneous Trials Nos. 55 and 56 of 1924.

Mr *Gaunt*, Assistant Government Advocate, for the Crown.

JUDGMENT.

Carr, J.—The facts of these two cases are almost identical and it is not necessary to discuss them separately.

The respondents were called upon by the Sub-Divisional Magistrate to furnish security for one year under s. 110, Cr. P. C. and in default were committed to prison. On appeal the Sessions Judge set aside the orders. In the case of Po Yin there were five witnesses who spoke to his general reputation as an habitual thief. None of those witnesses actually resided in the same hamlet as Po Yin. The first witness was the village headman of the tract within which Po Yin resides. He speaks of his village as being "about half an hour's walk" from Po Yin's.' The next witness resides in the same village as the headman. He gives the distance as "over a call." The third and fourth also live in this village. They say it is "about two calls" from accused's village. The last witness is the headman of a neighbouring village, which he says is over a call" from accused's. There were no witnesses who lived actually in the same hamlet as the accused, which, it is stated, contains only four or five houses. The accused himself called no witnesses. In allowing the appeal the Sessions Judge relied mainly on the *dicta* of Fox, J., in *Crown* v. *Nga Nyein* (1) and *King-Emperor* v. *Nga Shwe U* (2).

In the first of these cases the learned Judge following a Calcutta case, said that "A man's general reputation is the reputation which he bears in the place in which he lives amongst the body of the inhabitants of that place." That definition may be accepted

(1) 1 L. B. R. 90.
(2) 2 L. B. R. 166.

as correct in the great majority of cases, but I can hardly recognize it as conclusive. It is quite possible for a cunning rogue to conceal his real character from his immediate neighbours. That question, however, hardly arises in this case. Where the Sessions Judge has erred, I think, is in attaching a too-restricted meaning to the word "place." It is not possible to set any definite bounds to the meaning of this term. The meaning must necessarily vary with the circumstances of the case. It certainly cannot rightly be restricted to the group of houses in which the accused happens to reside, however, small that may be. Nor is it right to discard the evidence of witnesses who speak to the reputation of the accused merely because they are not his immediate neighbours. What the Court has to do is to satisfy itself that the evidence of the witnesses is true, and if it is satisfied on this point, then it is entitled to accept the evidence. Where a witness lives at a considerable distance from the person of whose reputation he speaks, the Court should, of course, enquire how he came by that knowledge and should take the answers into consideration in framing its estimate of the value of the evidence.

In the present cases it is clear that all the witnesses lived sufficiently near to the accused to be in a position to know his real reputation and their evidence should not have been rejected merely on the ground that they were not his immediate neighbours.

At the same time the fact that no such immediate neighbours were called should have been explained and the Magistrate should have gone into this question.

In the second case quoted the learned udge said: "If it is proposed to prove by evidence of general repute that a person called on to give security is an habitual offender of one of the types mentioned in s. 110, the form which the chief question put to the witnesses should take should be 'What, as far as you know, is the repute of the accused amongst the body of villagers of the village in which he has been living?' In order to satisfy himself that an accused's *general repute* is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities. Inquiries under s. 117 should, if possible, be conducted in the place where the accused has lived, and the Magistrate should himself pick out at haphazard some of the villagers, and examine them as to the accused's general repute. He should not be contented with the evidence of merely such witnesses as the Police or village authorities choose to send up to him. He should also consider in evey case whether the necessity for putting the alleged habitual offender on security has been proved, and whether the Police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties."

With most of this I agree. But I do not think that the learned Judge meant to lay down that in every case all these steps must necessarily be taken. Nor can I hold that if they have not all been taken, the proceedings are bad. If the evidence actually taken is sufficient to prove that the accused is a fit person to be placed on security, that is all that the law requires.

From the learned Judge's dictum that the Magistrate "should also consider . . . . whether the Police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties," I must respectfully dissent. It seems to me to be not justified by anything in the law. It is impossible for the Police or the village authorities to keep such a vigilant watch over a known criminal as to leave him no opportunity of committing crime, and it is for just that reason that the preventive provisions now in question have been enacted. I do not think that it is necessary to interfere in the two cases now before us. Nearly six months have elapsed since the original orders were passed, and, if the accused persons have not mended their ways, it will be open to the authorities concerned to institute fresh proceedings.

I would, therefore, direct that the proceedings be returned with these remarks.

Godfrey, J.—I agree. It is obvious that in cases where the accused person lives in one of an outlying collection of two or three houses, evidence as to his general repute could not properly be confined to the statements of their occupants, nor could it be expected to be independent or reliable, if it were.

K. S. D. *Proceedings returned.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 121 OF 1924.
September 25, 1924.
Present:—Mr. Dalal, J. C.
BAHADUR AND ANOTHER—ACCUSED—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Defence evidence reliable, effect of—Desire of Police to get rid of accused, whether can be taken into consideration.

There is no legal bar to a prosecution for bad livelihood of men acquitted of the substantive offence of dacoity, but in weighing the evidence against them this matter must be taken into consideration as indicating the desire of the Police to get rid of the presence of such men from villages, whether satisfactory evidence of the bad character be available or not.

Where in proceedings under s. 110 of the Cr. P. C. a large number of witnesses who are considered to be respectable and reliable by the Magistrate, depose that the accused are men of good character, there is no justification for an order requiring security to be passed against the accused.

Revision against an order of the Sessions Judge, Rae Bareli, dated the 30th May 1924, in an appeal preferred against an order of the Magistrate, First Class, Rae Bareli, dated the 13th December 1923.

Mr. *R. F. Bahadurji*, for the Applicants.
The Government Pleader, for the Crown.

JUDGMENT.—Bahadur and Faqir were bound over to be of good behaviour by a Magistrate of the Rae Bareli District on 13th December 1923. Their appeal was filed in the Court of Session on 5th January 1924 and it was dismissed on the 30th of May 1924. The learned Judge has done his best to cover the unsatisfactory judgment of the Magistrate but I am afraid that greater reliance should be placed on the state of mind of the Magistrate, who heard the evidence of witnesses, than on that of the learned Judge who decided on paper evidence just I am required to do. The view taken by the Magistrate is most peculiar, unless we consider the present desire for the determination of every matter by the vote of the majority to be equally well-adopted to judicial proceedings. The Magistrate first took the quality of the witnesses and dismissing on both sides those whose evidence he considered faulty, he came to the bottom rock of 15 witnesses thoroughly reliable on the side of the prosecution and 10 equally reliable on the side of the defence. Then he went by the vote of the majority and decided against the defence. He had no fault whatsoever to find with the 10 defence witnesses as to their veracity and fully believed them. If once we proceed by counting of heads, next time there may be an inclination to proceed by the physical weight of each witnesses. Personally I should not consider that a desirable procedure from the point of view of a Judge. The fact remains that as many as 10 witnesses who are considered to be respectable and reliable by the Trial Court have deposed that the applicants are men of good character. This is quite sufficient to entitle the appellants to an acquittal. If the First Court had good reasons why these 10 men in spite of their respectability and substantial position in the village had deposed in favour of the applicants there would have been reason to prefer the evidence produced on behalf of the prosecution. There is also a suspicion in this case that these two men have been run in as bad characters because their prosecution for dacoity has once failed. Personally I see no legal bar to a prosecution for bad livelihood of men acquitted of the substantive offence of dacoity, but in weighing evidence such a matter is to be taken into consideration as indicating the desire of the Police to get rid of the presence of such men from villages whether satisfactory evidence of their bad character be available or not. I think that there is no legal proof that the applicants are bad livers, so I discharge the order binding them over. They shall be released if in custody for want of giving security; at the same time a note shall be made that Faqir is probably undergoing a separate sentence for a dacoity and would not be released while that sentence is in operation.

Inquiry shall be made as regards the pendency of criminal appeals in the Court of Session at Rae Bareli. If appeals are kept pending there ordinarily for over 4½ months, it is time that some help may be rendered to the Sessions Judge. In a majority of cases such delay would be tantamount to denial of justice. In the present case the prisoners, if in Jail, have already suffered imprisonment for 3/4 of the time for which they were bound over, though the order has been finally quashed by this Court. Such a state of things should not be permitted.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 674 OF 1923.
December 12, 1923.
Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

MAULU AND ANOTHER—CONVICTS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 302—Assault by less than five persons resulting in death—Accused, whether guilty of murder—Evidence Act (I of 1872), s. 30—Confessional statement of exculpatory nature—Admissibility against co-accused.

Where it is not proved that five persons took part in an assault resulting in death, the accused cannot be held constructively guilty of murder under s. 149 read with s. 302 of the Penal Code, because s. 149 only applies where there is an unlawful assembly. [p. 371, col. 2.]

A statement to the effect that the person making it and his co-accused struck the deceased in exercise of their right of private defence is in no sense a confession and cannot be taken into consideration against the co-accused. [p. 371, col. 2.]

Appeal from an order of the Sessions Judge, Rawalpindi, dated the 26th May 1923.

Mr. *B. A. Cooper*, for the Appellants.

Mr. *J. M. Mackay*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Sessions Judge of Rawalpindi convicting Maulu and Dinu of the murder of Shera son of Waris on the 17th May 1922 and sentencing them to transportation for life. Nine persons were before the Committing Magistrate but he discharged four, namely, Muhamadu, Khuda Bakhsh, Lal Din and Ali. The other five were committed to the Court of Session, namely, Maulu, Dinu, Ibrahim, Burhan Din and Faiza. The three last named were acquitted by the learned Sessions Judge. Maulu and Dinu were convicted chiefly for the reasons that they admitted their presence at the scene of the occurrence and that they were consistently named by Amira and *Musammat* Kammon wife of Maulu and because Maulu in a statement made by him to the Committing Magistrate admitted that he and Dinu had struck Shera in the course of a fight.

The facts are fully given in the judgment of the learned Sessions Judge and we need not repeat them at length. It is sufficient to state that *Musammat* Kammon, the wife of Maulu, had left her husband and had been taken away by Shera son of Waris, her brother-in-law, when the appellants' party came up and a fight ensued which resulted in the death of Shera. In addition to Amira and *Musammat* Kammon the only other eye-witness who professed to have identified any of the assailants was Haider (P. W. No. 4) and the learned Sessions Judge in his judgment has conclusively shown that he is not a person upon whose statement any reliance can be placed. *Musammat* Kammon and Amira state that Maulu was among the persons who attacked the deceased, but they both attribute the most serious and the first injuries inflicted to Ibrahim, Faiza and Muhamadu all of whom have been acquitted. They stated that these three persons struck Shera on the head with axes and that Maulu used a *lathi* which he had with him. Neither of the witnesses states that Maulu hit the deceased on the head. Having regard to the medical evidence it is extremely improbable that any blows were struck with axes because only one injury had the appearance of having been caused by a sharp-edged weapon, and in regard to it also the Doctor was of opinion that it could have been caused with a *lathi*. In regard to Dinu neither of these two witnesses states that he took any part in the attack upon Shera. It is not proved that five persons took part in the assault and, therefore, there was no unlawful assembly within the meaning of s. 141 of the Indian Penal Code and neither of the appellants can be held constructively guilty of murder under s. 149 read with s. 302 of the Indian Penal Code, because s. 149 only applies where there is an unlawful assembly. The statement of Maulu made before the Committing Magistrate is clearly one of an exculpatory nature. He stated in effect that he and Dinu struck Shera in exercise of their right of private defence. It is in no sense a confession and cannot be taken into consideration against Dinu. There is, therefore, no evidence against Dinu, having regard to the finding that no unlawful assembly is proved, which can support a charge of murder or any other offence against Dinu.

As regards Maulu we agree with the learned Sessions Judge that he is certainly guilty of taking part in the assault upon Shera. Shera was very seriously injured, there being an extensive fracture of the skull. The principal part in the attack, however, has been ascribed by the witnesses to persons other than Maulu, and, as already pointed out, there is no evidence that

Maulu struck the deceased on the head at all. Under the circumstances we find it impossible to hold that the persons who attacked him had the common intention of causing death. Some of those persons may have had such an intention, but we do not see how it can be held that Maulu had such an intention. We, therefore, are of the opinion that he cannot be convicted of an offence under s. 302 of the Indian Penal Code. At the same time when he joined other persons in making such a murderous attack upon Shera, we think, it must be held that he had the knowledge that death was likely to be caused, and, therefore, he is guilty of culpable homicide not amounting to murder under s. 304-II, and we convict him accordingly and sentence him to seven years' rigorous imprisonment. Dinu is acquitted.

K. S. D. *Appeal partly accepted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 236 OF 1924.

August 18, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

KHIRODE KUMAR MUKERJI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 222 (2), 303 (1)—Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust, conviction for—Finding as to misappropriation of definite sum, whether necessary—Verdict not simple one of guilty or not guilty—Judge, duty of—Precedents, value of.

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. [p. 374, col. 1.]

In a case of criminal breach of trust in respect of a sum of over seven thousand rupees, the Jury returned a unanimous verdict of guilty but recommended the lightest punishment consistent with justice as in their opinion the amount misappropriated by the accused was much less than the amount stated in the charge. As to the amount embezzled they were not unanimous and they said they were not able to ascertain it definitely, but the majority of them were of opinion that it might be a thousand rupees or so out of the amount mentioned in the charge. The Judge agreed in the verdict. He, however, was of opinion that the amount embezzled was not a thousand rupees or so but nearly rupees five thousand. He accepted the verdict and convicting the accused under s. 408, Penal Code, sentenced him to undergo rigorous imprisonment for three years. On appeal:

(1) that the verdict returned by the Jury was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict, to ascertain the exact scope and import of which it was the duty of the Judge to ask the Jury such questions as were necessary; [p. 374, col. 1.]

(2) that the Judge should have endeavoured to ascertain how the Jury arrived at the amount of "about a thousand rupees or so" which in their opinion the accused was guilty of having embezzled; [*ibid.*]

(3) that his omission to put questions to the Jury in this respect had deprived him of the opportunity of finding out whether the said amount or any part of it was included within the figure which he himself arrived at, so as to determine whether he really agreed with the verdict or not; [*ibid.*]

(4) that it could not under the circumstances be decided whether the verdict was a proper one or not, for it was not known upon what materials it was founded or what it really meant; [p. 374, col. 1.]

(5) that, therefore, the conviction must be set aside, it being left open to the prosecution, should they so desire, to proceed afresh against the appellant in respect of such gross sum or specific item or both as he may be charged with, in accordance with the provisions of the law. [*ibid.*]

The object of the amendment made by the introduction of sub-s. (2) to s. 222, Cr. P. C., was not to amend the Penal Code, but merely to get rid of a technical difficulty in framing a formal document, *viz.*, the charge. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Penal Code. [p. 373, col. 2.]

Under s. 303 (1), Cr. P. C., the Judge is always entitled to ask the Jury such questions as are necessary to ascertain what their verdict is. [p. 374, col. 1.]

A case decided years before upon another Statute cannot be any guide to the Court in interpreting the particular Statute before it. [p. 373, col. 2.]

Reg. v. *Moah*, (1856) 7 Cox C. C. 60; Dears C. C. 626; 25 L. J. M. C. 66; 2 Jur. (N. S.) 213; 4 W. R. 255, followed.

Appeal against the conviction and sentence, passed by the Additional Sessions Judge, Khulna.

Mr. *K. N. Chaudhuri*, (with him Babus *Satindra Nath Mukherji* and *Kunja Behary Mukerji*), for the Appellant.

Babu *Debendra Narain Bhattacharji*, for the Crown.

Babu *Profulla Kamal Das*, for the Complainant.

JUDGMENT.

Mukerji, J.—The appellant Khirode Kumar Mukerji was tried by the Additional Sessions Judge of Khulna with the aid of a Jury on a charge under s. 408, Indian Penal Code. The charge was to the effect that between *Jaistha* 1329 and *Baisakh* 1330 the accused committed criminal breach of trust in respect of a sum of Rs. 7,434. That figure was arrived at upon a calculation which is to be found set out in the learned Judge's charge to the Jury.

The total amount collected by the accused was said to be Rs. 16,290-14-0, consisting of 16 sums of money. The amount of Government revenue paid by the accused was Rs. 7,868-14-9. Rs. 889-9-0 was sent by the accused to the proprietors and the accused was entitled to Rs. 407 as the stipulated amount of pay for the year. Deducting the last three items from the amount of collections the balance left was Rs. 7,125-6-3. To this was added Rs. 311 being the cash in hand at the close of the previous year and this gave a total of Rs. 7,436-6-3.

The Jury returned a unanimous verdict of guilty but recommended the lightest punishment consistent with justice as in their opinion the amount misappropriated by the accused was much less than the amount stated in the charge. As to the amount embezzled they were not unanimous and they said they were not able to ascertain it definitely, but the majority of them were of opinion that it might be a thousand rupees or so out of the amount mentioned in the charge. The learned Judge agreed in the verdict. He, however, was of opinion that the amount embezzled was not a thousand rupees or so but nearly rupees five thousand. He accepted the verdict and convicting the appellant under s. 408, Indian Penal Code, sentenced him to undergo rigorous imprisonment for three years. Hence the appeal.

The question is whether upon such a verdict the conviction can stand.

On behalf of the Crown reliance is placed upon the provisions of s. 222, sub-s. (2) of the Cr. P. C. as justifying a verdict of this nature. It is said that the law permits a charge being framed in respect of a general deficiency in accounts and even if the Jury are unable to find what particular amount has been embezzled, if they are satisfied that there is a general deficiency, so long as the amount of the deficiency is a part of the amount stated in the charge, they may bring in a verdict of guilty and the Court is entitled to act upon the verdict. In support of this proposition reliance is placed on the case of *Reg* v. *Lambert* (1).

Now, the object of the amendment made by the introduction of sub-s. (2) to s. 222, Cr. P. C., was "not to amend the Penal Code, but merely to get rid of a technical difficulty in framing a formal document, *viz.*, the charge." By this amendment the procedural law was altered to meet two difficulties. Under the law as it stood before, there was very great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled or to which it was attributable. The other difficulty was what was experienced in the case of *Queen Empress* v. *Pursotam Dass Morarjee* (2). In that case thare was a charge of embezzlement of Rs. 9,168-6-0 which might have been made up of many hundred items. Under s. 234, Cr. P. C., it was not allowed to have more than three offences of the same kind, and so the charge could not legally stand. The law on these two points was altered and altered for the better. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Indian Penal Code.

As to the case of *Reg.* v. *Lambert* (1), it is no doubt an authority for the proposition that an indictment for embezzlement might be supported by proof of a general deficiency of moneys that ought to be forthcoming, without showing any particular sum received and not accounted for. There is on this point under the English Law a conflict of judicial opinion, which perhaps it is not possible to reconcile [see *Rex.* v. *Grove* (3), *Reg.* v. *Moah* (4), and *Reg.* v. *King* (5), for the one view and *Reg.* v. *Jones* (6), *Reg.* v. *Chapman* (7) and *Reg.* v. *Wolstenholme* (8) for the other]. The words of the Stututes under which the above-mentioned cases were decided are widely different from those of the Statutes with which we are concerned and they can have no application here. As Martin, B., observed in the case of *Reg.* v. *Moah* (4): "If there have been decisions of the Courts upon the Statutes, we are bound by those decisions; but I protest against the idea that a number of cases decided years before upon another Statute can be any guide to us in interpreting the particular Statute before us."

(1) (1847) 2 Cox C. C. 309.

(2) 24 C. 193; 12 Ind. Dec. (N. S.) 791.
(3) (1837) 7 Car. & P. 635; 1 M. C. C. 447.
(4) (1856) 7 Cox C. C. 60; Dears C. C. 626; 25 L. J. M. C. 66; 2 Jur. (N. S.) 213; 4 W. R. 255.
(5) (1871) 12 Cox C. C. 73; 24 L. T. 670.
(6) (1838) 8 Car. & P. 288.
(7) (1843) 1 Car. & K. 119; 1 Cox C. C. 48.
(8) (1869) 11 Cox C. C. 313.

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction. The verdict of the Jury read in the light of their explanation suggests that they found that the accused had succeeded in accounting for the whole with the exception of about a thousand rupees.

The verdict so returned by the Jury was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict to ascertain the exact scope and import of which it was the duty of the learned Judge to ask the Jury such questions as were necessary. He should have endeavoured to ascertain how they arrived at the amount of "about a thousand rupees or so" which in their opinion the accused was guilty of having embezzled. His omission to put questions to the Jury in this respect has deprived him of the opportunity of finding out whether the said amount or any part of it was included within the figure which he himself arrived at, so as to determine whether he really agreed with the verdict or not. The omission has also created a difficulty which stands in the way of our deciding whether the verdict was a proper one or not, for we do not know upon what materials the verdict is founded or what it really means. Under s. 303 (1), Cr. P. C., the Judge is always entitled to ask the Jury such questions as are necessary to ascertain what their verdict is; and in a case like this it was his duty to question them.

In the view that I take of this matter I do not think it necessary to hear the appeal further. I would set aside the conviction and sentence passed upon the appellant and direct that he be discharged. It will be open to the prosecution, should they so desire, to proceed afresh against the appellant in respect of such gross sum or specific item or both as he may be charged with, in accordance with the provisions of the law.

The appellant will be discharged from his bail.

Walmsley, J.—I agree.

N. H. *Conviction quashed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 374 OF 1924.

September 2, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

RAHAM SHAH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (XLV of 1860), s. 300, Excep. 1—Husband finding wife in bed with paramour and killing both—Grave and sudden provocation—Offence.

The accused on returning home late at night found his wife in the same bed with her paramour who escaped, but the accused ran after and killed him with a knife. He then came back to his own house and killed his wife:

Held, (1) that the paramour's presence in the house was a grave and sudden provocation sufficient to deprive the accused of his power of self-control, and the accused's act in killing the paramour was in such circumstances culpable homicide not amounting to murder; [p. 375, col. 2.]

(2) that the offence which he committed in killing his wife was one of the same character as he killed her immediately after, before he had time to regain his self-control. [*ibid.*]

Gohra v. *Emperor*, 7 P. R. 1890 Cr., distinguished.

Appeal from an order of the Sessions Judge, Dera Ghazi Khan, dated the 9th April 1924.

Mr. *Sagar Chand*, for the Appellant.

Lala *Jai Lal*, R. B., Government Advocate, for the Respondent.

JUDGMENT.—The appellant Raham Shah has been sentenced to death for the murder of his wife, *Musammat* Ghulam Khatun, and one Imaman. He admits having killed them, but pleads that he did so under grave and sudden provocation.

Musammat Ghulam Khatun lived at Tamancha Wala about ten miles from Dera Ghazi Khan, where her husband lived with another wife. On the evening of the 5th of March last Raham Shah left Dera Ghazi Khan for Tamancha Wala. He stopped on the way at the house of *Musammat* Ghulam Khatun's brother Nur Husian Shah at Pir Adil, had his diner there, and at about 11 P. M., left his house for Tamancha Wala, which is about a mile from Pir Adil. His story is that he found Imaman on the same bed with his wife and caught hold of him, but that Imaman got away, and that he ran after him, caught him as he was entering his house (48 *karams* off), and killed him with a knife which he had with him, and then came back to his own house and killed his wife.

The learned Sessions Judge, while he is of opinion that the appellant had some suspicion against his wife and came home at a late hour in order to surprise her with her paramour, does not believe that he found them together. He says that there is nothing to show that Imaman ever left his house that night, but on this point the learned Sessions Judge is clearly wrong, as Imaman's presence in *Musammat* Ghulam Khatun's house is proved by the statements of the latter's servant *Musammat* Gauhar and her step-daughter *Musammat* Fatteh, who were sleeping in the house with her. *Musammat* Fateh says that she heard Imaman whispering to *Musammat* Ghulam Khatun, and presently heard her father's and Imaman's shouts outside the door, and that then her father came in and said he had killed Imaman, after which he called *Musammat* Ghulam Khutun outside and killed her. *Musammat* Gauhar says that she woke up on hearing the appellant pushing the door, and saw Imaman running out, and that the appellant ran after him. There is further the evidence of the *chowkidar* Kadra, whose house adjoins *Musammat* Ghulam Khatun's as to his waking up at midnight on hearing two men running past his house. The prosecution evidence itself proves the truth of the appellant's story that he found Imaman in *Musammat* Ghulam Khatun's house, and we are unable to agree with the view of the learned Sessions Judge that because the appellant does not allege that he caught them in the act of committing adultery the question of grave and sudden provocation does not arise. It is only reasonable to suppose that it was for the purpose of committing adultery with *Musammat* Ghulam Khatun that Imaman went to her house in the middle of the night. It is possible that the appellant suspected his wife's infidelity and took the knife with him with the intention of killing her and her paramour if he found them together in the house, but it is not certain that this is so, as we have it from Nur Hassan Shah that the appellant was in the habit of keeping a knife or sword with him. In any case the fact of the appellant entertaining a suspicion about his wife would not render the 1st Exception to s. 300, Indian Penal Code, inapplicable. The facts in *Gohra* v. *Empress* (1), which has been cited by the learned Government Advocate, are not similar to those of the present case. It does not appear that the appellant had any reason to believe that he would find his wife and her lover together in the house, but the most that can be said is that the possibility of his finding them together may have presented itself to his mind. Imaman's presence in *Musammat* Ghulam Khatun's house at midnight was, in our opinion, a grave and sudden provocation sufficient to deprive the appellant of his power of self-control and the appellant's act in killing Imaman was in such circumstances culpable homicide not amounting to murder. We think the offence which he committed in killing his wife was one of the same character, as he came back to his house and killed her immediately after killing Imaman, before he had had time to regain his self-control.

We accept the appeal and alter the conviction for each offence to one under the 1st part of s. 304, Indian Penal Code, and the sentence to one of seven years' rigorous imprisonment. The sentences for the two offences will run concurrently.

K. S. D. *Appeal partly accepted.*

(1) 7 P. R 1890 Cr.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 806B OF 1924.
October 7, 1924.
Present:—Mr. Justice May Oung.
BARAN SHANTA—PETITIONER
versus
MA CHAN THA MAY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—'Unable to maintain itself,' meaning of—Maintenance for child—Child's ability to earn something, relevancy of—Reference to High Court—Referring Court, duty of.

The words "unable to maintain itself" in s. 488 of the Cr. P. C. mean "unable to earn a livelihood for itself,"—that is to say, a complete livelihood, such as an adult person might earn, without depending on any other person. [p. 376, col. 2.]

In fixing the sum payable for maintaining a child, it is not permissible in law to take into consideration the fact that the child is able to earn something towards its own support. [p. 376, col. 1.]

In all cases where a reference is made to the High Court in proceedings for maintenance it is desirable that the Referring Court should itself hear both parties before making any recommendation. [*ibid.*]

Criminal revision from an order of the Sub-Divisional Magistrate, Buthidaung, in

Criminal Miscellaneous Trial No. 12 of 1924.

JUDGMENT.—The petitioner was ordered by the Sub-Divisional Magistrate of Buthidaung to pay a monthly sum of Rs. 5 for the maintenance of his son, aged eleven years. He applied in revision to the Court of Session, which, without issuing notice to the opposite-party, submitted the proceedings to this Court with the recommendation that the allowance be reduced from Rs. 5 to Rs. 3, the reason stated being that the boy "is old enough to make about Rs. 2 a month by coolie labour." There was evidence to show that the boy had occasionally been employed to tend cattle, earning, once Rs. 5 for a period of five months' work, and, at another time, Rs. 12 for a similar period. From this the conclusion was drawn that his earning capacity is about Rs. 2 a month.

I must first note that the boy's mother, in whose favour the order of maintenance was passed, should have been heard in answer to the petition. In all such cases it is desirable that the Referring Court should itself hear both parties before making any recommendation. Otherwise, in most cases, it would be necessary for the High Court, if it proposed to act on such recommendation, to issue notice to the opposite party, who, it is more than probable, would not possess the means to appear, but who, if summoned before a local Court, would find it much easier to defend his or her cause. The procedure indicated above is, I have noticed, very often adopted by Courts of Session, and I can see no reason why it should not invariably be followed.

As to the recommendation in the present matter, a principle of some importance seems to be involved. It may be stated thus :—In fixing the sum payable as maintenance for a child, is it permissible in law to take into consideration the fact that the child is able to earn something towards its own support ?

In *Krishnaswami Iyer* v. *Chandravadhana* (1), wherein the "child" was a daughter said to be seventeen years' old, Sankaran Nair, J., said : "The word "child' has not been defined in the Cr. P. C. In England it has got apparently various statutory definitions. But in the absence of any definition or anything to the contrary in an Act, I am of opinion that a 'child' is a person who has not reached full age. It is only then that she becomes competent to enter into any contract or enforce her claims; as this daughter has not attained the age of majority, *i.e.*, eighteen, I think she is a 'child' within the section."

In that case, it was urged that the child was able to maintain herself, inasmuch as she could exercise the calling of her mother and ancestors, *viz.*, dancing and prostitution, but it was held that it is against public policy to treat prostitution as a profession.

Similarly, in my view it would be contrary to public policy to encourage child labour by holding that a boy of eleven years should contribute towards his own support by work as a coolie when he should be in school. That he belongs to the labouring class is no argument, since, in these days, every child has a right to at least a primary education especially if his father has the means to give him one.

Apart from this, moreover, the words "unable to maintain itself" in s. 488, seem to me to mean "unable to earn a livelihood for itself."—That is to say a complete livelihood, such as an adult person might earn, without depending on any other person.

In *Ma Hnin Byu* v. *Maung Myat Pu* (2), it was laid down that s. 488 of the Cr. P. C., is based upon the proposition that there is a continuing obligation upon a father who has sufficient means to maintain his child, that he cannot contract himself out of that obligation and that the fact that the child is not in a starving condition cannot be set up as an answer to an application.

The essential point is that a man is bound to feed and clothe his minor offspring, and he cannot be heard to say that the latter should help him to fulfil his obligation. The sum he should be ordered to pay is fixed according to his means, the status of the parties and the age of the child. No other consideration should come in. Were it otherwise, the Courts would, in most cases, be obliged to enter upon calculations of some nicety as to the proportion of the expense which the child itself should bear. Every able-bodied boy or girl over ten years of age is a potential wage-earner. For instance, a town-bred boy of twelve or fourteen, even if attending school, might easily, in his spare time, earn an anna or two every day by hawking newspapers, but it does not follow that this should be taken into consideration in fixing the sum which his

(1) 20 Ind. Cas. 1005; 37 M. 565; (1913) M. W. N. 695; 14 M. L. T. 224; 25 M. L. J. 349, 14 Cr. L. J. 525

father should be ordered to pay for his maintenance.

My conclusion is that a father who has sufficient means is bound to maintain his child who is under the age of majority; and, in fixing the sum payable, no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind.

I, therefore, see no reason to interfere.

K. S. D. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 96 OF 1924.

October 21, 1924.

Present :—Mr. Justice Martineau.

KHAIRATI RAM—ACCUSED—PETITIONER

versus

MALAWA RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (c)—Prosecution for forgery, when can be entertained —Penal Code (Act XLV of 1860), ss. 463, 467.

A prosecution for forgery cannot be entertained except upon the complaint of the Court before which the forged document was produced in evidence. [p. 377, col. 2.]

Bhawani Das v. *Emperor*, 35 Ind. Cas. 161; 38 A. 169; 14 A. L. J. 74; 17 Cr. L. J. 289, *Nalini Kanta Laha* v. *Anukul Chandra Laha*, 39 Ind. Cas. 490; 44 C. 1002; 25 C. L. J. 255; 21 C. W. N. 640; 18 Cr. L. J. 522 and *Teni Shah* v. *Bolahi Shah*, 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280, followed.

Section 463 of the Penal Code is used in a comprehensive sense in s. 195 (1) (c) of the Cr. P. C., so as to embrace all species of forgery and includes a case falling under s. 467, Penal Code. [p. 377, col. 2; p. 378, col. 1.]

Queen-Empress v. *Tulja*, 12 B. 36; 6 Ind. Dec. (N. S.) 509 and *Teni Shah* v. *Bolahi Shah*, 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280, followed.

Application under ss. 435 and 439, Cr. P. C., praying that the High Court may be pleased to quash the proceedings instituted in the Court of the Magistrate, First Class, Ferozepore.

Lala *Fakir Chand*, for the Petitioner.

Mr. *G. S. Salariya*, for the Respondent.

JUDGMENT.—Khairati Ram sued Malawa Ram for rent at the rate of Rs. 3-9-0 per mensum on the basis of a deed executed by Malawa Ram. The Court found that the rate agreed upon was only Re. 0-9-0 per mensum and decreed accordingly, and Malawa Ram has now prosecuted Khairati Ram for forgery, alleging that Khairati Ram altered the rate of rent in the deed from Re. 0-9-0 to Rs. 3-9-0. It was contended for the accused that the Court could not take cognizance of the offence except on the complaint of the Judge who had decided the civil suit, but the Magistrate overruled this contention on the ground that the forgery, if committed, had been committed before the civil suit was instituted, and he proceeded to frame a charge of an offence under s. 465, Indian Penal Code, against Khairati Ram. The latter has applied to have the proceedings quashed and his application must be accepted.

The Magistrate's view is not supported by the wording of s. 195 (1)(c) of the Cr. P. C., which prohibits the Court from taking cognizance of an offence described in s. 463, Indian Penal Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. In *Bhawani Das* v. *Emperor* (1), it was held that the words "when such offence has been committed by a party to any proceeding in any Court" refer, not to the date when the offence was committed, but to the date on which the cognizance of the Criminal Court is invited. In *Nalini Kanta Laha* v. *Anukal Chandra Lal* (2), it was held that where, before complaint has been made, a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery. The same view has been taken in *Teni Shah* v. *Bolahi Shah* (3). It is clear, therefore, that a prosecution for forgery in the present case could not be entertained except on a complaint by the Court.

It is urged for the respondent that the complaint was of an offence under s. 467 and not one under s. 465, but this is clearly immaterial. Section 195 (1) (c) of the Cr. P. C. refers to an offence described in s. 463 of the Indian Penal Code, and in *Queen-Empress* v. *Tulja* (4) and also in *Teni Shah* v. *Bolahi Shah* (3), it was held that s. 463 is there used in a compre-

(1) 35 Ind. Cas. 161; 38 A. 169; 14 A. L. J. 74; 17 Cr. L. J. 289.

(2) 39 Ind. Cas. 490; 44 C. 1002; 25 C. L. J. 255; 21 C. W. N. 640; 18 Cr. L. J. 522.

(3) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280

(4) 12 B. 36; 6 Ind. Dec. (N. S.) 509.

hensive sense so as to embrace all species of forgery and thus includes a case falling under s. 467.

It is then pointed out for the respondent that the complaint was not only of an offence under s. 467, Indian Penal Code, but also of one under s. 474, namely, possession of a forged document with the intention that it should be used as genuine, and it is urged that such an offence is not one mentioned in s. 195 (1) (c) of the Cr. P. C. It is true that s. 474, Indian Penal Code, is mentioned in the heading of the complaint but the complaint itself is clearly one of forgery only, and the charge which the Magistrate has framed against Khairati Ram is only of an offence under s. 465. There is, therefore, no force in the respondent's contention.

I accordingly quash the proceedings taken by the Magistrate on the complaint of Malawa Ram as having been taken without jurisdiction.

K. S. D. *Application accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 213 OF 1924.

October 21, 1924.

Present:—Mr. Justice Mukerji.

Sheikh MUHAMMAD AKBAR—APPLICANT

versus

EMPEROR THROUGH DEEPU—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer of case by District Magistrate—Sub-Divisional Magistrate, power of, to re-transfer case—Use of strong language by Court.

Under s. 528 of the Cr. P. C. a Sub-Divisional Magistrate has the power to withdraw a case pending before a Subordinate Magistrate. But the section cannot be so read as to imply that after a District Magistrate has transferred a case from the file of one Magistrate to that of another, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the case to his own file. [p. 379, col. 1.]

The use of strong language by a Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions but as soon as he expresses himself strongly he gives himself away, and if he raises by his language an apprehension in the mind of a party that he is prejudiced he has only himself to thank. A calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal. [p. 379, cols. 1 & 2.]

Application against an order of the Magistrate, Azamgarh District.

Mr. *Saila Nath Mukerji*, for the Applicant.

Mr. *Lalit Mohan Banerji* (Government-Advocate), for the Crown.

Mr. *Narmadeshwar Parsad Upadhiya*, for the Opposite Party.

JUDGMENT.—This is an application for transfer of two cross-cases now, *de facto*, pending before Mr. Janki Nath Sahai, a Magistrate of Azamgarh, exercising the powers of a Sub-Divisional Magistrate.

It appears that one Deepu filed a complaint against one Akbar. The case was sent to the Court of an Honarary Magistrate, Rai Sahib Babu Din Dayal Sahu. Akbar filed a cross-complaint, which was also pending before the said Honorary Magistrate. Akbar induced the Officer to send the cases back to the Sub-Divisional Magistrate, evidently because Akbar did not want that Sahu Din Dayal should hear the cases. The learned Sub-Divisional Magistrate returned the cases. Akbar then applied to the District Magistrate for transfer. The learned District Magistrate transferred both the cases from the file of Sahu Din Dayal to the file of the Tahsildar Magistrate. Then, it appears that, Deepu put in an application before the Sub-Divisional Magistrate asking him for transferring the cases from the Court of the Tahsildar Magistrate. Babu Janki Nath Sahai passed an order dated the 27th of August 1924 and thereby purported to have the cases transferred from the file of the Tahsildar Magistrate to his own file.

In this transfer application two points are made. One is that the Sub-Divisional Magistrate had no jurisdiction to practically set aside the order of the District Magistrate transferring the cases to the Court of the Tahsildar Magistrate. The second point is that having regard to the temper expressed in his order dated the 27th of August 1924, the applicant Akbar feels that he would not have impartial justice at the hands of the learned Sub-Divisional Magistrate.

On the first point, it is pointed out by Deepu's Counsel and also by the learned Sub-Divisional Magistrate that the learned District Magistrate has, so to say, condoned the order of transfer passed over his head by the Sub-Divisional Magistrate. There can be no doubt that under s. 528 of

the Cr. P. C., a Sub-Divisional Magistrate has the power to withdraw any case pending before a Subordinate Magistrate. This would give jurisdiction to Babu Janki Nath Sahai to withdraw the cases pending before the Tahsildar Magistrate. But, in my opinion, the section cannot be so read as to imply that after a District Magistrate has transferred certain cases from one file to the file of another Magistrate, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file. There is a clash of jurisdiction and authority in a case like this and it must be ruled and I do rule that, the Sub-Divisional Magistrate's order dated the 27th of August 1924 was *ultra vires*. The cases must, therefore, be still, in law, taken as pending before the Tahsildar Magistrate.

It has been urged that the District Magistrate's order, which I will quote presently, may be taken as withdrawing, by his own authority, the cases from the Court of the Tahsildar Magistrate and transferring them to the Court of Babu Janki Nath Sahai. The language is this :—

"Seen. The cases will be disposed of by the Sub-Divisional Officer. He has every right to take them on his file."

I am not satisfied that the learned District Magistrate was really, by the use of the language mentioned, transferring the cases from the Court of the Tahsildar Magistrate to the Court of the Sub-Divisional Officer. He does not assign any reason which would be necessary for him to record under cl. (5) of s. 528 of the Cr P. C. The statement that the Sub-Divisional Officer has every right to take the cases on his file goes to show that the learned District Magistrate was merely *approving* of the action taken by the Sub-Divisional Officer.

I, accordingly, set aside the order of the learned Sub-Divisional Officer passed on the 27th of August 1924 as also the order of the learned District Magistrate dated the 9th of September 1924, lest the latter should create any further complication in the case.

In the view of the law I take, it is not necessary to discuss the second point. I will, however, point out to the learned Sub-Divisional Officer that use of strong language by a Court is never calculated to satisfy the litigant public before it. An Officer is sometimes bound to feel strongly on particular occasions, but as soon as he expresses himself strongly, he gives himself away and if he raises, by his language, an apprehension in the mind of a party that the Officer is prejudiced, the Officer has only himself to thank. Besides, a calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal.

On the ground already stated, I order that the cross-cases now on the file (but without jurisdiction) of Babu Janki Nath Sahai be transferred to the Court of some stipendiary Magistrate other than Babu Janki Nath Sahai, at the head-quarters at Azamgarh, as the learned District Magistrate may choose.

Z. K. *Case transferred.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1017 OF 1924.

September 26, 1924.

Present:—Mr. Justice Campbell.

NANDU MAL—PETITIONER

versus

MUNICIPAL COMMITTEE, SIMLA—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 3 (2) – Wooden shed on wheels, whether "building."

A wooden shed mounted on wheels and intended to be a permanent fixture to the site is a "building" within the meaning of s. 3 (2) of the Punjab Municipal Act. The fact that its construction permits it to be moved from one part of that site to another does not render inapplicable to it the description "any hut or shed."

Stevens v. *Gourley*, (1859) 29 L. J. C. P. 1; 7 C. B. (N. S.) 99; 1 L. T. 33; 6 Jur. (N. S.) 141; 8 W. R. 85; 141 E. R. 752; 121 R. R. 397 and *Richardson* v. *Brown*, (1885) 49 J. P. 661, referred to.

Application for revision of an order of the Sessions Judge, Ambala, dated the 6th May 1924, affirming that of the Magistrate, First Calss, Simla, dated the 14th April 1921.

Mr. *Balwant Rai*, for the Petitioner.

Mr. *Abdul Rashid*, for the Respondent.

JUDGMENT.—This is a petition by Nandu Mal for revision of the order of the Magistrate, First Class, Simla, convicting him of an offence under s. 219 of the Punjab Municipal Act and fining him Rs. 10.

The facts as they appear from the judgments of the Courts below are these;

The petitioner constructed on a piece of ground which is owned by him within the limits of the Simla Municipality a wooden shed having a tin sheeting roof with floor measurements 10 feet by 8 feet and 8 feet in height. The structure is not fixed to the ground but is mounted upon wheels and is admittedly used "for sleeping purposes at night." No notice of intention to erect it was given to the Municipal Committee under s. 189 of the Punjab Municipal Act. The Committee served the petitioner with notice under s. 195 of the Act to demolish the shed and this notice was disobeyed. Prosecution under s. 219 followed with the result stated.

The petitioner in a petition for revision presented to the Sessions Judge on 29th April 1924 described the structure as "a shed on wheels" and called it a shed in his statement before the Magistrate. There has never been any allegation that it was primarily designed as a vehicle. So far as the present record indicates, it is capable of being moved on its wheels a distance of six feet on the petitioner's site but there is nothing to show that its construction and the nature of the ground to be traversed is such that it can be wheeled off that site. I understand Mr. Balwant Rai, who has appeared before me for the petitioner, to admit that the shed was placed on wheels for the purpose of evading the exercise by the Municipal Committee of its powers to control the erection of buildings which the Act confers upon it.

The case for the petitioner is that the structure does not fall within the exceedingly wide definition of a building contained in s. 3 (2) of the Act. According to this, "buliding" means the whole or part of any house, hut, outhouse, shed and stable, whether used for the purposes of human habitation or otherwise, and whether of masonry, bricks, wood, mud, thatch, metal or any other material whatsoever and includes a wall and a well. The petitioner himself calls his structure a shed, and by the terms of the definition any shed of any material whatsoever is a building.

Mr. Balwant Rai has argued that notwithstanding the definition a structure portable or moveable cannot be a building, that only a permanent edifice can be a building and that an edifice cannot be permanent if it is not affixed to the soil on which it stands. There are, however, English cases where structures have been held to be buildings in spite of the fact that they were not let into the ground. One such case is *Stevens* v. *Gourley* (1), where in order to evade the provisions of the Municipal Building Act (18 and 19 Vict. c. 122) a wooden shop had been constructed which had no foundations in masonry and had been lifted off the ground and carried from one site to another without drawing a single nail. This was held to be a building. Another case is *Richardson* v. *Brown* (2) of which I have only seen the abbreviated report in Mew's Digest, but according to that report an erection of wood 30 feet long and 13 feet wide, which was brought along the streets on wheels and put at the corner of a new street was held to be a new building.

The petitioner's shed, so far as the record shows, is intended to be a permanent fixture to his site and the fact that its construction permits it to be moved from one part of that site to another does not, in my judgment, render inapplicable to it the description "any hut or shed."

The petition is dismissed.

K. S. D. *Petition dismissed.*

(1) (1859) 29 L. J. C. P. 1; 7 C. B. (N. S.) 99; 1 L. T. 33; 6 Jur. (N. S.) 141; 8 W. R. 85; 141 E. R. 752; 121 R. R. 397.

(2) (1885) 49 J. P. 661.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 691 OF 1924.

July 7, 1924.

Present:—Mr. Justice Broadway, Mr. Justice Fforde and Mr. Justice Campbell.

BRAY—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 275, 446—Accused, claim of, to be tried by Jury—Magistrate, duty of—Assessors—Nationality of accused.

When an accused person claims that he should be tried under Ch. XXXIII of the Cr. P. C., the duty of the Magistrate inquiring into or trying the case is to satisfy himself that the complainant and the accused person are respectively European and Indian British subjects, or *vice versa* and that in view of such status of the accused and the complainant respectively it is expedient in the interests of justice that the case should be tried under the provisions of that Chapter. [p. 381, col. 2.]

When the Magistrate is so satisfied the trial must take place under the provisions of s. 446 of the Code *i. e.*, the accused must be tried by a Jury, the majority

of whom shall if the accused so requires, be of the category within which the accused himself comes. [p. 381, col. 2.]

But when the trial before the Court of Session would in the ordinary course be with the aid of Assessors, the accused has the right under the proviso to s. 446 of the Code to be tried with the aid of Assessors, all of whom shall be Europeans or Americans or Indians according to the category within which the accused comes. [*ibid.*]

By "ordinary course", in s. 446 of the Cr. P. C., is meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Ch. XXXIII of the Code, or in the absence of a notification by the Local Government under the provisions of s. 269 of the Code. [*ibid.*]

Application for revision of an order of the Sessions Judge, Lahore, dated the 28th April 1924.

Mr. *O'Connor*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.

Broadway, J.—The point before this Court is whether, in the case of a person committed to a Sessions Court under s. 446 (1) of the Cr. P. C., the trial must be with the aid of Assessors or by Jury. On behalf of the petitioner it has been contended by Mr. O'Connor that the proper construction of this section leads to the conclusion that the trial must of necessity be by Jury, the proviso to sub-cl. (2) of s. 446 merely giving the person accused the right to claim to be tried by Assessors—all of whom, under s. 284-A should be of his own nationality.

The learned Government Advocate has conceded that the intention of the Legislature was to place Indian British subjects and European British subjects on the same footing and to make all trials falling within the purview of Ch. XXXIII of the Cr. P. C. trials by Jury. He has also submitted that the intention of the Legislature has been carried out by the provisions of s. 446.

In my judgment, this is the only construction to be placed on the provisions of this section, and the view taken by the learned Sessions Judge is erroneous. The trial of the present petitioner was by law bound to be by Jury unless he himself desired to be tried by European Assessors. He has not exercised the right given to him by that proviso and the trial, therefore, must be by Jury. I direct accordingly.

Fforde, J.—When this case first came before us, it appeared to me that Mr. O'Connor was trying to make out a case that an European British subject was in a specially privileged position which entitled him to a trial by Jury as of right merely because he happened to be of that class. He has now abandoned that position, and merely contends that an European British subject and an Indian British subject are both in precisely the same position once they claim under s. 443 of the Cr. P. C. a right to trial under the provisions of Ch. XXXIII of that Code.

When an accused person claims that he should be tried under this Chapter—which contains special provisions relating to cases in which European and Indian British subjects are concerned—the duty of the Magistrate inquiring into or trying the case is to satisfy himself that:—

(1) the complainant and the accused person are respectively Europeon and Indian British subjects, or *vice versa*;

(2) that in view of such status of the accused and the complainant respectively, it is expedient in the interests of justice that the case should be tried under the provisions of this Chapter.

If the Magistrate satisfies himself as above, he must record a finding that the case is such as should be tried under the provisions of this Chapter. Should the Magistrate arrive at this finding, the trial must then take place under the provisions of s. 446 of the Cr. P. C. which provides for trial in accordance with s. 275 and the other provisions of Ch. XXIII so far as they are applicable. That is to say, the accused must be tried by a Jury, the majority of whom shall, if the accused so requires be of the category within which the accused himself comes.

But when the trial before the Court of Session would, in the ordinary course, be with the aid of Assessors, the accused has the right, under the proviso to s. 446, to be tried with the aid of Assessors, all of whom shall be Europeans or Americans or Indians according to the category within which the accused comes.

By "ordinary course" is here meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Ch. XXXIII of the Code, or in the absence of a notification by the Local Government under the provisions of s. 269.

The learned Government Advocate, I understand, agrees with this view as to the

effect of the recent amendments to the Cr. P. C.

Campbell, J.—I agree and have nothing to add.

K. S. D. *Revision accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 642 OF 1924.

October 21, 1924.

Present:—Mr. Justice Mukerji.

RAM SEWAK—APPELLANT

versus

EMPEROR—OPPOSITE-PARTY.

Penal Code (Act XLV of 1860), ss. 97, 100—Quarrel picked by accused—Attack with lathis—*Right of private defence, extent of—Death caused by* lathi *blow—Offence.*

Accused picked a quarrel with another and tried to hit him but was set upon by his opponent and the deceased and tried to run away. After running some distance he found that he could not make his escape; he then turned round and hit a blow on the deceased which resulted in his death:

Held, that the accused had acted in the exercise of the right of private defence and was not guilty of any offence [p. 383, col. 1.]

An attack with *lathis* is likely to create a reasonable fear of grievous hurt being caused, and the person attacked is justified in striking with a *lathi* in self-defence to the extent of causing grievous hurt or even death, under s. 100 of the Penal Code. [*ibid.*]

Criminal appeal from an order of the Second Additional Sessions Judge, Cawnpore at Fatehpur, dated the 19th July 1924.

Dr. *N. C. Vaish*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant Ram Sewak has been convicted by the learned Additional Sessions Judge of Cawnpore, sitting at Fatehpur, of the offence under s. 304 of the Indian Penal Code, inasmuch as he caused the death of one Kalka Singh, and of the offence under s. 323 of the Indian. Penal Code, on the ground that the caused hurt to Baij Nath.

The case for the prosecution was this. Baij Nath was purchasing some sugar at the shop of one Bhagwandin. Ram Sewak arrived and asked Baij Nath how it was that, he had taken his own labourers (Ram Sewak's labourers) to do his (Baij Nath's) work while his (Ram Sewak's) work was suffering. Baij Nath replied that he had done the act already and proposed that the labourers should work for Ram Sewak on the following day. Ram Sewak was not statisfied with this reply and he tried to strike a blow with a *lathi* on Baij Nath. The *lathi* struck partially the roof under which Baij Nath, was and it partially struck Baij Nath also. Kalka Singh, a relation of Baij Nath arrived at this moment; and some helpers of Ram Sewak, namely, Ram Raj and Gayadin, also arrived on the scene. The three last mentioned beat Kalka Singh and Baij Nath and Kalka Singh fell unconscious on the ground. Two days later Kalka Singh died. This story for the prosecution has not been believed by the learned Additional Sessions Judge in the main portion of it. Gayadin was never sent up, and the learned Sessions Judge has acquitted Ramraj. The learned Judge has found that human blood was found at or near the platform of Gayadin, a relation of Ram Sewak and he has believed the defence story in so far as it states that Kalka Singh received his injuries near the platform of Gayadin. To reconcile the fact that blood was found near the platform of Gayadin' and the alleged fact that a part of the tiled roof of Bhagwandin's shop was found, damaged, the learned Judge came to the conclusion that the fight must have started at the shop of Bhagwandin and must have continued till the parties arrived at the platform of Gayadin. Indeed the Judge's finding is that Ram Sewak, the appellant, drew the quarrel upon himself by hitting, or trying to hit Baij Nath, that he was thereupon attacked by Baij Nath and Kalka Singh that Ram Sewak ran away for his safety to the house of Gayadin but, there instead of taking shelter in the house, he turned back and used his *lathi* against Baij Nath and Kalka Singh. It has been urged by the learned Counsel, appearing for the appellant that even if we accept this story, as found by the learned Sessions Judge, the appellant was striking in self-defence and he committed no offence. The learned Judge has got over this argument by stating that Ram Sewak drew the quarrel upon himself by trying to hit Baij Nath and that therefore, he had no subsequent right of self-defence. I have already indicated that the learned Judge was of opinion that Ram Sewak's duty it was to have taken shelter in the house of Gayadin.

Taking the findings of the learned Sessions Judge, I am not sure that his conclusion in law is correct. Assuming that Ram Sewak picked the quarrel and tried to hit Baij Nath, he ran for his safety from the

subsequent attack made on him by Baij Nath and Kalka Singh. If, after running some distance, Ram Sewak found that he could not very well make his escape; and if he turned round and hit a blow, it must be said that he hit in self-defence: Ram Sewak might be punished for having picked the quarrel and having struck the first blow at the shop of Bhagwandin. But Kalka Singh and Baij Nath Singh had no right to take the law into their own hands and chastise Ram Sewak by trying to hit him with *lathis*. As a matter of law, therefore, Ram Sewak would be, in my opinion, justified in turning back and defending himself against an attack with *lathis*. I would also mention that an attack with *lathis* was likely to create a reasonable fear of grievous hurt being caused to Ram Sewak and Ram Sewak would be justified in striking with a *lathi* in self-defence to the extent of causing grievous hurt, or even death, *vide* s. 100 of the Indian Penal Code. The medical evidence shows that there was only one fatal blow that was received by Kalka Singh. The injuries received by Baij Nath are admittedly simple. Baij Nath admits that after Kalka Singh fell no further blows were inflictad upon him. On the finding therefore of the learned Sessions Judge Ram Sewak would be entitled to an acquittal on the ground that he struck in self-defence.

On examining the evidence for myself, I find it very difficult to come to a definite conclusion as to what actually happened. In the first information report Baij Nath never mentioned the name of Bhagwandin, in front of whose shop, it is said, the fight took place. Bhagwandin would be the first person to be mentioned as an eye-witness unless it was suggested that he was not there. I have not come across any such suggestion on the record. Then the anxiety of the prosecution witnesses to conceal the fact that Kalka Singh received his mortal injury and blood was found on the platform of Gayadin is very suspicious At least three witnesses have been examined to show that Baij Nath and Kalka Singh, and perhaps a few others, came to the house of Gayadin, a relation of the appellant, and picked a quarrel. If the prosecution witnesses do not tell the truth, it cannot be expected on behalf of the Crown that the accused person would be convicted on mere suspicion. It has been urged, and the argument has found favour with the learned Sessions Judge, that this much being admitted that, Ram Sewak used his *lathi*, and that a *lathi* blow killed Kalka Singh, it was for Ram Sewak to prove positively that he did so in self-defence. Accepting this argument as valid, there is the defence evidence to show that, Ram Sewak struck in self-defence. But if this evidence is not to be believed, and if the prosecution evidence is also not to be believed, it is impossible to say what actually happened and it would be unfair to disbelieve the defence story simply because a man has been killed.

I hold that either on the facts accepted by the learned Additional Sessions Judge, or on the story tried to be established on behalf of the defence, Ram Sewak struck in self-defence and he is entitled to an acquittal.

I set aside the conviction and the sentence and order that Ram Sewak be released.

Z. K. *Conviction set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 12 OF 1924.

October 31, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

PARAS RAM—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 369, 439—Review—High Court, power of, to review order—Order enhancing sentence, in absence of accused, validity of.

The High Court has no jurisdiction to review or revise its own orders in criminal matters. [p. 384, col. 2.]

Queen-Empress v. *Durga Charan*, 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867, *In the matter of Gibbons*, 14 C. 42; 7 Ind. Dec. (N. S.) 29 and *Queen-Empress* v. *Fox*, 10 B. 176; 5 Ind. Dec. (N. S.) 502, relied on.

An order of enhancement of sentence passed without opportunity being given to the accused of being heard either personally or by Pleader, is null and void *ab initio*, as being without jurisdiction, and does not bar the Court from dealing with the matter a second time. [*ibid.*]

In re Tadi Somu Naidu, 84 Ind. Cas. 850; 47 M. M. 428; 46 M. L. J. 456; 34 M. L. T. 218; 20 L. W. 18; (1924) A. I. R. (M.) 640; 26 Cr. L. J. 370, relied on.

Criminal Revision against an order of the Officiating Additional Sessions Judge, Kheri, dated the 26th February 1924.

Mr. *K. P. Misra*, for the Appellant.

The Government Pleader, for the Crown.

ORDER.—The matter has come before me again under somewhat extraordinary circumstances. Those circumstances are as follows:—The prisoner, Paras Ram, was convicted and sentenced to one year's rigorous imprisonment by the Additional Sessions Judge of Kheri on the 26th February 1924. The quarterly session's statement of the cases decided by the Judge mentioned above was perused on the 31st March 1924 by Mr. E. R. Neave, who was then Officiating as First Additional Judicial Commissioner. He then ordered a notice to issue to the prisoner calling upon him to show cause why the sentence should not be enhanced. Notice was accordingly issued and was served on the prisoner in jail on the 12th April 1924. On the 24th April 1924 the notice was heard by Mr. A. G P. Pullan, who was then Officiating as Second Additional Judicial Commissioner. On that date neither the prisoner nor any Pleader on his behalf was present before the Court. Mr. Pullan passed an order enhancing the sentence to five years' rigorous imprisonment. On the 10th July 1924 the prisoner's petition of appeal was received by the office of this Court from jail. On the 16th July 1924 the appeal was placed before Mr. Pullan for orders. He admitted the appeal and directed the issue of a fresh notice to the prisoner to show cause why the sentence should not be enhanced. The issue of this fresh notice was obviously due to the fact that the office had failed to bring to the notice of the learned Judge his previous order of enhancement of the sentence. The last mentioned notice and the appeal came before me for hearing on the 26th August 1924. By my order of that date I dismissed the appeal and also cancelled the notice. Thus there came to be two conflicting orders of this Court in the matter of the notice relating to the enhancement of the sentence. The Trial Court brought this fact to the notice of this Court by its letter dated the 3rd September 1924. Thereupon I issued a fresh notice in the following terms:—

"Issue notice to the Government Pleader and to the prisoner, Paras Ram, why the order of this Court dated the 26th August 1924 cancelling the notice as to the enhancement of sentence be not withdrawn and the former order dated the 24th April 1924 enhancing the sentence to five years rigorous imprisonment be not maintained or in the alternative both the orders mentioned above be not withdrawn and fresh orders passed."

At the hearing the prisoner is represented by Mr. K. P. Misra Barrister-at-Law *amicus curiae*. He argued that the Court had no jurisdiction to review or revise its own orders. This contention is to my mind perfectly correct. Section. 369 of the Cr. P. C. is quite clear and there is a concensus of opinion of all the High Courts in India on that point: *Queen-Empress* v. *Durga Charan* (1), *In the matter of Gibbons* (2), *Queen-Empress* v. *Fox* (3) and *Kunhammad Haji* v. *Emperor* (4).

The learned Counsel has further argued that Mr. Pullan's order dated the 24th April 1924 enhancing the sentence to five years' rigorous imprisonment was without jurisdiction and, therefore, must be held as of no effect. I am again compelled to accept this argument. It has already been stated that on the date of the order mentioned above neither the prisoner was present personally nor through any Pleader. The provisions of sub-s (2) of s. 439 of the Cr. P. C. are imperative: "No order under this section shall be made to the prejudice of the accused unless he has had an oppotunity of being heard either personally or by Pleader in his own defence." In a recent decision of the Madras High Court in the case of *In re Tadi Soma Naidu* (5), it was held that an order passed in contravention of the sub-section mentioned above is null and void *abinitio* as being one passed without jurisdiction. I, therefore, declare Mr. Pullan's order enhancing the sentence to be of no effect. It follows that the only legal order which remains as effective is the one passed by me on the 26th August 1924 and this order should be complied with.

Z. K.

(1) 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867.

(2) 14 C. 42; 7 Ind. Dec. (N. S.) 29.

(3) 10 B. 176; 5 Ind. Dec. (N. S.) 502.

(4) 72 Ind. Cas. 599; 46 M. 382; (1923) M. W. N. 94; 44 M. L. J. 450; (1923) A. I. R. (M.) 426; 24 Cr. L. J. 439.

(5) 84 Ind. Cas. 850; 47 M. 428; 46 M. L. J. 456; 34 M. L. T. 218; 20 L. W. 18; (1924) A. I. R. (M.) 640; 26 Cr. L. J. 370.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 136 OF 1924.

August 13, 1924.

Present:—Mr. Justice Venkatasubba Rao.

BRAHMA SUBBAYA—DEFENDANT No. 1 AND RESPONDENT No. 1—PETITIONER

versus

KANALA RANGA RAO—PETITIONER—PLAINTIFF No. 1—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence, admission of—Evidence, whether can be admitted on application of party—Procedure.

Under O. XLI, r. 27, C. P. C., an Appellate Court has power to receive additional evidence in appeal not merely of its own motion but also on the application of parties.

When the application is by a party to receive additional evidence, the Appellate Court can make an order upon the application even without hearing the appeal, although in most cases it would be desirable to hear the application and the appeal together if possible., [p. 386, col. 2.]

Indrajit Pratap Bahadur Sahi v. *Amar Singh*, 74 Ind. Cas. 747; 50 I. A. 183; 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277; 39 C. L. J. 318 (P. C.), relied on.

Kessowji Issur v. *Great Indian Peninsula Railway Co.*, 34 I. A. 115; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 31 B. 381; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.), distinguished.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the District Court, Kurnool, in C. M. P. No. 148 of 1923, in A. S. No. 48 of 1922, O. S. No. 42 of 1920, Sub-Court, Kurnool.

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—The District Judge of Kurnool has made an order, admitting at the instance of the 1st plaintiff, additional evidence while hearing an appeal and the 1st defendant attacks the correctness of this order in the civil revision petition before me. The point in controversy is:—Had the District Judge jurisdiction to make the order in question. O. XLI, r. 27, C. P. C., deals with the production of additional evidence in an Appellate Court;

The material portion runs thus:—

27 (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the Appellate Court.

(*b*) But if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence of document to be produced, or witness to be examined. The argument of Mr. Seshachari, the learned Vakil, for the 1st defendant is, that under this provision of law a suitor cannot apply for admission of additional evidence but that its provisions can be invoked only when the Appellate Court itself discovers some inherent lacuna or defect and requires evidence to fill up the gap or remedy the defect. In other words, that the Appellate Court can act under this section of its own motion and not at the instance of the parties and reliance is placed upon the decision of the Judicial Committee in *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1). It is no doubt true that some passages in the judgment in this case lend apparent support to this argument; the observation that is most relied upon being the following:—

"This is important, because the legitimate occasion for s. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in s. 623."

Section 623 referred to above is the section relating to review of judgments and orders. I understand the argument to be that a party wishing to give additional evidence must be able to bring himself within the provisions relating to review and that his proper procedure is to apply to the Trial Court for review and not to apply for admission of additional evidence to the Court which hears an appeal from the decision. According to this contention, the two sets of rules, one relating to review and the other relating to admission of additional evidence in appeal are mutually exclusive. If the party wishes to have additional evidence taken he must take advantage of the review provisions; but the Court acting *ex mero motu* and not at the instance of the parties can supply deficiencies by taking evidence under O. XLI, r. 27.

I do not think that this position is tenable in the face of the most recent pronouncement of the Judicial Committee in *Indrajit Pratap Bahadur Sahi* v. *Amar*

(1) 34 I. A. 115; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 31 B. 381; 17 M. L. J. 347; 2 M. L. T. 435 (P. C.).

Singh (2). An argument similar to the one now advanced was urged before the Board and after a very full consideration their Lordships refused to give effect to the contention. The case in *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1) was relied on before the Board as it has been before me and indeed the High Court of Patna decided on the authority of that ruling that it had no jurisdiction to receive additional evidence in appeal on the application of the parties. The Board in reversing the decision of the High Court points out that the earlier case was peculiar in its character and after analysing the facts and circumstances of that decision clearly lays down the rule that an Appellate Court has power to receive additional evidence in appeal at the instance of parties. The law has been stated in such un-mistakeable terms that the matter now admits of not doubt and I am quite clear that the contention of the petitioner must fail.

A second argument has been advanced, namely, that an order for admission of additional evidence cannot be made upon a special or preliminary application but that the proper occasion for it is when the appeal is heard and the evidence is examined by the Appellate Court. In this case I am satisfied that the District Judge has made the order in question in the course of the hearing of the appeal and has not dealt with the application as independent of and detached from the appeal. On this short ground this argument fails, but I am prepared to hold that there is no warrant for the position that when the application is by the party to receive additional evidence the Appellate Court cannot make an order upon the application without hearing the appeal. Here again the case relied on by the petitioner is *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (1). But it will be seen from the observations of the Lords of the Judicial Committee that the limitation referred to above applies only to cases where the Court of its own motion makes an order for admission of additional evidence. The reason is obvious. The Court cannot make up its mind to receive additional evidence acting *ex mero motu* without going into the evidence and becoming satisfied that there is a lacuna or defect. It is a power to be exercised by the Court on its own initiative and that function can be performed only when the Court being appraised of all the facts appearing on the record sees reason to think that there is a gap to be filled up or a defect to be remedied. If a party makes the application entirely different considerations apply and I do not see why the application should not be dealt with independent of the appeal, although in most cases it would no doubt be desirable to hear the application and the appeal together, if possible. Even when it may not become necessary to hear the appeal fully the Judge may make up his mind to allow or reject the application very early during the hearing of the appeal.

It is then said that the District Judge finds that the plaintiff was negligent and that, therefore, he ought not to have allowed the application. The rule vests the discretion in the Appellate Judge and I am not satisfied that in this case the discretion has not been judicially exercised. In complying with sub-r. 2 of O. XXVII the learned Judge states his reasons very fully for the step he has taken. A case has not been made out for the exercise by the High Court of its revisional jurisdiction and I am, therefore, not prepared to interfere with the order of the learned Judge.

There only remains one other matter to be dealt with, D. W. No. 1 did not offer himself as a witness in the Trial Court. A statement made by him previous to the suit is now allowed to be admitted as additional evidence. The plaintiffs wish to rely upon it as an admission. The defendant may justly complain that he must be allowed not only to explain his statement but also to adduce additional evidence, on account of the turn the events have taken. Similarly, D. W. Nos. 6 and 7 were not examined in regard to the relationship at all before the Trial Court. It is now proposed to cross examine them with reference to some previous statements made by them on this subject and the District Judge has given permission. This may also render necessary additional evidence being given on the part of the defendant. Very great indulgence has been shown to the plaintiff with the result that in some respects a fresh trial of the issue may be demanded and rightly by the petitioner. These are matters which I must

(2) 74 Ind. Cas. 747; 50 I. A. 183; 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277; 39 C. L. J. 318 (P. C.).

leave to the Appellate Court and I have no doubt that on a proper case being made out the petitioner will be given necessary facilities.

It has been said that the District Judge in his order has shown that he has prejudged the matter and all but given a finding in favour of the plaintiff on the question of pedigree. But it is not, however, necessary to order a transfer of the appeal as in the usual course, I am assured that the appeal will be heard by a different Judge and not by the Judge who has made the order in question,

As the District Judge points out in his order the plaintiff has been guilty of considerable negligence. While dismissing the civil revision petition, I direct that he do pay to the 1st defendant the costs of the civil revision petition as well as all the costs occasioned in the lower Court by the taking of the additional evidence in any event and irrespective of the result of the appeal.

V. N. V. *Petition dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 185 OF 1923.

September 16, 1924.

Present:—Mr. Neave, A. J. C.

RAM NIDH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JANKI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Co-sharers—Adverse possession—Denial of title, proof of—Recital in previous judgment summarising defence, value of—Appeal, second—Question of fact abandoned in lower Appellate Court, whether can be raised.

A question of fact which is abandoned before the lower Appellate Court cannot be allowed to be raised in second appeal [p. 388, col. 1]

The ordinary presumption of law is that the joint possession of co-sharers is continued until there is some overt act of ouster or separation. [p. 388, col. 2.]

In a suit by a co-sharer for possession of certain property by partition the defendants set up title by adverse possession and in proof of their allegation relied upon a recital in a previous judgment in which the defence was summarised as stating that the plaintiffs had not been in actual possession or receipt of rent of the property:

Held, that in the absence of the written statement of the defendants filed in the previous suit the recital in the judgment summarising the defence could not be relied on as an overt and public denial of the plaintiff's title as co-sharer, inasmuch as it was impossible to say exactly what the assertion made by the defendants in that case was or precisely to what extent they denied the title of the plaintiff and set up title in themselves.

Second appeal against a decree of the Sub-Judge, Partabgarh, dated the 26th February 1923, in an appeal preferred against the decree of the Munsif, Kunda at Partabgarh, dated the 31st July 1922.

Messrs. *Radha Krishen* and *G. N. Misra*, for the Appellants.

Mr. *H. K. Ghose*, for the Respondents.

JUDGMENT.—This is a defendants' appeal from an order of the Sub-Judge of Partabgarh decreeing in part the plaintiffs-respondents' suit for possession of certain property by partition. The parties are descended from one Thakur, who obtained a decree from the Settlement Court giving him certain heritable but non-transferable rights in certain plots of land. The exact nature of the tenure is not of importance, but it is evidently a kind of occupancy right. Thakur had two sons Satlu and Nil Kanth, and it appears that his holding was equally divided between them. We are only [concerned with the share which came to Satlu. He had five sons, Sheo Dat, Ramma, Tikai, Bhairon and Ajodhia. Plaintiff No. 1 is the grandson of Ramma, and the other two plaintiffs are the grandsons of Tikai. The defendants-appellants are the descendants of Sheo Dat. The plaintiffs' case was that Bhairon and Ajodhia, for reasons which it is not necessary to detail here, lost their rights in the property, and that, therefore, the representatives of the remaining three brothers were each entitled to one-third of it. They, therefore, jointly claimed two-thirds. The main defence set up was that the plaintiffs had never been in possession of the shares they claimed, and that the defendants had acquired a title to them by adverse possession. It was also pleaded that in any case the plaintiffs were not entitled to more than one-fifths, they representing only two of the five sons of Satlu. This latter plea was not pressed before the lower Appellate Court, and even in the memorandum of appeal to this Court, reference is only made to the share of Ajodhia, that of Bhairon being ignored. Obviously the decision of the question of the shares to which each party is entitled is one of

fact, and depends on evidence. The appellants cannot be allowed to raise it in second appeal after abandoning it before the lower Appellate Court.

The only question, therefore, for decision in this appeal is whether the defendants have acquired a title to the property by adverse possession. In support of this contention they rely almost entirely on a copy of a judgment of the Tahsildar of Kunda in the Partabgarh District, in a suit brought by plaintiff No. 2 and the father of plaintiff No. 3 in 1904, against certain of the defendants. This was for profits for the years 1309 to 1312 *F*. The written statement filed in that case has not been produced. The defendants rely on a recital in the judgment of the Tahsildar in which he summarises the defence. It contains these words "*Na Mudayan kabiz arazi hain aur na kabhi munafa paya hai.*" This suit was dismissed but no finding was come to on this point, the Court holding that it had no jurisdiction to decide the case which should have been brought in a Civil Court. The Deputy Commissioner in appeal took the same view.

The apppellants rely on these decisions not as *res judicata*, but as evidence of an overt and public denial in 1904 of the plaintiffs' title to the share now in suit. They claim that they denied then that the plaintiffs had any right to the land, and that they themselves have continued in unbroken possession ever since. It is to be noted that in any case Janki, plaintiff No. 1, was no party to that litigation, and whatever effect the statements made in it may have, they cannot affect his title.

The learned Counsel for the respondents contends that this summary contained in the Tahsildar's judgment does not amount to a denial of the plaintiffs' title, but says no more than that they were not in possession at the time and had not actually received profits. He argues that mere non-receipt of rents and denial, in the course of previous litigation, of a party's title, are not sufficient by themselves to constitute adverse possession against that party, and he refers to a ruling of their Lordships of the Privy Council in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1) and a ruling of this Court in *Bharat Prasad* v. *Ganga Bakhsh* (2). The Court below has relied on a decision of the Privy Council in *Arab Ali Khan* v. *Mahmud Ali Khan* (3).

One important point to notice in this case is that the actual written statement put in before the Tahsildar has not been filed, and we have, therefore, nothing but the brief summary of it contained in the Tahsildar's judgment to go upon. In the absence of the document itself it is impossible to say exactly what the assertion made by the defendants in that case was, or precisely to what extent they denied the title of the plaintiffs and set up title in themselves. The parties are admittedly descended from a common ancestor, and held the land in suit originally in common as co-sharers. There is no definite evidence of partition having taken place at any definite time, though there is some evidence that some at least of the brothers separated. Plaintiffs Nos. 2 and 3 are now residing in another village in another district, and there is no question that they are any longer joint in residence or in food. That however would not make it impossible that the defendants should have been cultivating the land on their behalf when they first left the village, and the ordinary presumption of law is that the joint possession of co-sharers is continued until there is some overt act of ouster or separation. In the present case, the only overt action relied on by the defendant is the assertion contained in their written statement in 1904. Unfortunately, as already mentioned, that written statement is not before the Court. The Court below has found that there is no satisfactory evidence of adverse possession, and I am not prepared on the strength alone of the recital in the Tahsildar's judgment to differ from this finding. The defendants have not attempted to distinguish between the cases of plaintiff No. 1 and plaintiffs Nos 2. and 3. With regard to the former, there is clearly no evidence at all, and with regard to the two latter the evidence is insufficient. The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 74 Ind. Cas. 476; 26 O. C. 231; (1923) A. I. R (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321; 50 I. A. 202 (P. C.).

(2) 9 Ind. Cas. 425.

(3) 67 Ind. Cas. 444; 20 A. L. J. 545 at p. 566; 25 C. L. J. 554; (1922) A. I. R. (P. C.) 84; 43 M. L. J. 104; 31 M. L. T. 94; 24 Bom. L R. 951 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1435 OF 1921.
September 5, 1924.
Present:—Mr. Justice Madhavan Nair.

PULUGURTA SOMARAJU—PLAINTIFF—APPELLANT

versus

MACHIRAJU VENKATA SUBBARAYUDU—DEFENDANT—RESPONDENT.

Pro-note, suit on—Pro-note invalid—Plaintiff, whether can fall back on original cause of action—Procedure.

The principle that in a case where a pro-note is executed for an antecedent debt, a suit on the pro-note failing, an action on the debt would lie is applicable only where the antecedent debt is anterior in point of time to the pro-note. Where no such prior and independent agreement is proved, the plaintiff's suit must fail. [p. 389, col. 2.]

Muthu Sastrigal v. *Visvanatha Pandara Sannadhi*, 21 Ind. Cas. 864; 38 M. 660; 14 M. L. T. 520; 26 M. L. J. 19; (1914) M. W. N. 58, followed.

Shanmuganatha Chettiar v. *Srinivasa Aiyar*, 35 Ind. Cas. 219; 40 M. 727; (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172 and *Chokkalingam Chetty* v. *Annamalai Chetty*, 34 Ind. Cas. 417; distinguished.

Appeal against the decree of the Court of the Additional Subordinate Judge, Cocoanada, in A. S. No. 82 of 1920 (A. S. No. 188 of 1920 of the District Court, Godavari), preferred against the decree of the Court of the Additional District Munsif, Rajahmundry in O. S. No. 355 of 1917 (O. S. No. 343 of 1917 of the District Munsif's Court, Amalaput).

Mr. *P. Somasundaram*, for the Appellant.

Messrs. *G. Lakshmanna* and *V. Viyyanna* for the Respondent.

JUDGMENT.—The plaintiff-appellant's suit out of which this second appeal arises was for the recovery of Rs. 1,600 the value of two gold jewels given to the defendant and also for the recovery of Rs. 300 the value of 20 sovereigns together with interest on these amounts. The first item was covered by an unstamped promissory-note and the promissory-note said to have been executed in support of the second item has been lost. The plaintiff also set up two agreements prior in date to these promissory-notes under which the defendant agreed independently to pay the plaintiff these amounts. These agreements have been found against the plaintiff by the lower Appellate Court.

As regards the claim which was then put forward by the plaintiff, based upon the original cause of action, apart from the promissory notes, the learned Subordinate Judge, following a decision of this Court in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) dismissed the claim. Mr. Somasundaram who appears for the appellant admits that the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) would govern this case, but he presses me to say that in view of two subsequent decisions of this Court and also of other Courts the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) requires re-consideration and on that ground he asks me to refer this case to a Bench. I do not think that the subsequent decisions of this Court referred to, namely, *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (2) and *Chokkalingam Chetty* v. *Annamalai Chetty* (3) can be said to have shaken the authority of the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1). In *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (2) Abdur, Rahim, J., refers to *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) and distinguishes it in these terms. "The promissory-note on which action was brought in that case, was inadmissible in evidence as it was an unstamped note. The view taken by the learned Judges was that as the suit was based on the note and that was inadmissible in evidence, the suit must fail. In that case, there was no question of the liability of the partners on account of the debt evidenced by the promissory-note" At page 730* there is this observation made by the learned Judge, namely: "There is no doubt so far as it appears from the authorities referred to at the Bar that where there exists an antecedent debt and a promissory-note is executed for such debt, a suit on the promissory-note failing, an action on the debt would lie." In view of the fact that the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) has not distinctly been dissented from by the learned Judge, the antecedent debt that is referred to in the second extract from his Lordship's judgment can only mean debt anterior in time, with reference to the promissory-note debt. The two prior agreements pleaded have been found against the appellant by the lower Court. The decision in *Chokkalingam Chetty* v. *Annamalai Chetty* (3) also cannot be said to have shaken the authority of the decision in

(1) 21 Ind. Cas. 864; 38 M. 660; 14 M. L. T. 520; 26 M. L. J. 19; (1914) M. W. N. 58.

(2) 35 Ind. Cas. 219; 40 M. 727; (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172.

(3) 34 Ind. Cas. 417.

*Page of 40 M.—[*Ed.*]

Muthu Sastrigal v. *Visvanatha Pandara Sannadhi* (1).

As regards the question at issue, different High Courts have taken different positions and seeing that our High Court has consistently refused to give relief based upon antecedent debts in such circumstances I do not think that there is any justification for my referring this matter to a Bench for a re-consideration of the decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1).

I may point out that the most recent decisions of the Lahore High Court in *Chanda Singh* v. *Amritsar Banking Company* (4) and *Gurdas Mal Singh* v. *Ishar Das* (5) take the same view as the one contained in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1).

Following *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (1) I dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

(4) 66 Ind. Cas. 201; 2 L. 330; (1922) A. I. R. (L.) 307.

(5) 60 Ind. Cas. 107; 3 L. L. J. 157; 3 U. P. L. R. (L.) 15.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 446 OF 1924.

July 31, 1924.

Present :—Mr. Justice Dalal.

Pandit SHIAM LAL—JUDGMENT-DEBTOR—APPELLANT

versus

KOERPAL—DECREE-HOLDER AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 39, 41—Transfer of decree—Certificate of execution—Jurisdiction.

The Court to which a decree is transferred for execution under s. 39 of the C. P. C. has jurisdiction only up to the time that it issues the certificate prescribed by s. 41 of the Code. It has no jurisdiction to deal with the matter after having certified the result of execution proceedings, when the application for execution must be made to the Court which passed the decree. [p. 391, col. 1.]

Second appeal from a decree of the District Judge, Agra.

Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondents.

JUDGMENT.—I am of opinion that the Subordinate Judge has acted without jurisdiction in this matter. A decree passed by the Court of Small Causes of Agra was transferred for execution under s. 39 of the C. P. C. to the Court of the Munsif of Agra. The Munsif took proceedings and finally dismissed the application for execution maintaining attachment of a house. The Munsif then certified the result of execution proceedings under s. 41 to the Court of Small Causes. After this the appellant purchased the house. The decree-holder subsequently applied afresh to the Court of the Munsif for execution and the appellant objected. The Munsif held that the house having been purchased during attachment, the appellant could not stop the claim of the decree-holder by virtue of his own sale-deed. On appeal it was pointed out to the District Judge that the Munsif had no jurisdiction because he had certified the result of the execution proceedings to the Court of Small Causes under s. 41. The learned District Judge held that the procedure was incorrect and dismissed the appeal.

However incorrect the procedure may be, the Munsif after having certified the result of execution proceedings under s. 41, had no jurisdiction to deal with the matter. The application for execution must now lie to the Court which passed the decree. It may be pointed out that there is a mistake in the heading of the form certificate of execution of decree transferred to another Court (Appendix E, No. 5, C. P. C.). The reference in brackets after the heading should be s. 41 and not O. XXI, r. 6. The attention of the Registrar of this Court will be drawn to this mistake. The mistake is in the form prescribed by the Act itself and has been followed in the forms printed by the High Court No. 32—XX. In *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simbulu Bahadur* (1), it was held by the Privy Council that the proper Court to which an application for execution lay was the Court to which the decree was transferred under s. 39 until the Court to which the decree was transferred issued a certificate under s. 41 and returned the copy of the decree to the original Court. That ruling referred to corresponding sec-

(1) 36 Ind. Cas. 682; 39 M. 640; 31 M. L. J. 300; 18 Bom. L. R. 809; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 511; 21 C. W. N. 162; 1 P. L. W. 26; 43 I. A. 238 (P. C.).

tions of the previous Code of 1882. It is clear, therefore, that the Court to which the decree is transferred under s. 39 has jurisdiction only up to the time that it issues the certificate prescribed by s. 41. That stage was passed in this case whether the certificate was issued rightly or wrongly. After the issue of the certificate the Court of the Munsif ceased to have jurisdiction.

I pronounce no opinion as to the effect of continuation of the attachment of the house on a proper application for execution being presented to the Court of Small Causes and a fresh transfer of the decree is made to the Court of the Munsif.

I set aside the decree of the two Subordinate Courts and dismiss the decree-holder's application for execution dated 11th September 1923. The respondents were not represented. This order is passed *ex parte*. The appellant shall receive his costs in this Court and the Court below.

ब्रिक. S. D. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 193 OF 1923.

October 30, 1924.

Present:—Mr. Neave, A. J. C.

SHEO RATAN SINGH—PLAINTIFF—APPELLANT

versus

Babu RAM SINGH—DEFENDANT RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Transfer of Property Act (IV of 1882), s. 68 (c)—Mortgage—Failure of mortgagor to deliver possession—Suit for possession, dismissal of—Suit to recover mortgage-money, whether maintainable—Cause of action, what is.

A cause of action for a suit is the bundle of essential facts which it is necessary for the plaintiff to prove in order to succeed. [p. 391, col. 2.]

Sonu v. *Bahinibai*, 33 Ind. Cas. 950; 40 B. 351; 18 Bom. L. R. 45, referred to.

Where a mortgagee is entitled to possession of the mortgaged property and the mortgagor fails to deliver possession the mortgagee becomes entitled to either of two reliefs, *viz.*, recovery of possession or recovery of the mortgage-money. In suing for either of these reliefs he is to prove the same facts, *viz.*, that a mortgage-deed had been executed and that the mortgagor had failed to secure him in possession. Proof of these facts would entitle the mortgagee not only to possession but also to a decree for money. He is bound, therefore, to sue for both reliefs in the alternative in the same suit and where he sues for possession of the property and fails, he cannot subsequently bring a suit against the mortgagor for recovery of the mortgage-money.

Gahi Mal v. *Shera*, 90 P. R. 1881 and *Harnam Singh* v. *Bhola Singh*, 56 Ind. Cas. 966; 2 U. P. L. R. (L.) 108, relied on.

Second appeal against the decree of the District Judge, Fyzabad, dated the 17th March 1924, against that of the Subordinate Judge, Fyzabad, dated the 1st December 1923.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Bisheshwar Nath*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The defendant-respondent Ram Singh on the 6th of June 1916 executed in the plaintiff's favour a usufructuary mortgage for Rs. 300. Possession was however never delivered. On the 19th September 1917 the respondent executed a deed of further charge over the same property for Rs. 200. A suit was filed on the 7th of June 1921 by the mortgagee for possession on foot of his mortgage. The other members of the family of Ram Singh resisted the suit on the allegation that the property was joint family property, and that Ram Singh could not validly mortgage it. This plea was accepted, and the suit was dismissed. The plaintiff filed an appeal without success.

On the 25th of May 1922 the plaintiff filed a suit, out of which this appeal arises, claiming a simple money decree for 1,090 against Ram Singh alone. Both the Courts below have dismissed his suit, holding that it is barred by O. II, r. 2 of the C. P. C. inasmuch as it is based on the same cause of action as the former suit, and the relief now claimed could have been claimed as an alternative relief in that suit.

It is contended on the appellant's behalf that the Courts below have misunderstood the character of the suit, which is really one to recover money advanced with interest which a debtor is bound to pay. It is a suit for money paid upon an existing consideration which has afterwards failed, and the cause of action is not the same as that which formed the basis for the previous suit.

The learned Pleader for the appellant admits that a cause of action for a suit is the bundle of essential facts which it is necessary for the plaintiff to prove in order to succeed. He further refers to *Sonu* v. *Bahinibai*, (1) where the criterion of identity is said to be that the same evidence will

(1) 33 Ind. Cas. 950; 40 B. 351; 18 Bom. L. R. 45.

maintain both actions. Before applying this criterion, reference may be made to s. 68 (c) of the Transfer of Property Act, which allows a mortgagee to sue the mortgagor for mortgage money "where the mortgagee being entitled to possession of property, the mortgagor fails to deliver the same to him". It will be seen that in both suits the cause of action was the failure of the mortgagee to get possession of the property. Had he succeeded in obtaining possession he would not have been entitled to bring either suit. On the other hand, when the mortgagor failed to deliver possession, the mortgagee became entitled to either of two reliefs, (1) recovery of possession, and (2) recovery of the mortage-money. In both suits he had to prove (1) that a mortgage-deed had been executed and (2) that the mortgagor had failed to secure him in possession. Proof of these facts would entitle him not only to possession, but also to a decree for money. In each case, threfore, the essential facts which it was necessary to prove were the same, and in each case the same evidence would be sufficient to maintain the action.

The appellant's argument that this suit should be regarded as separate and unconnected with the mortgage cannot be accepted. The contract between the parties was embodied in the mortgage, and it was necessary for the appellant to prove both execution of this deed and default on the part of the mortgagor in delivering possession. Two cases in which the facts were similar have been cited on behalf of the respondent. One of these is *Gahi Mal* v. *Shera*, (2) and the other *Harnam Singh* v. *Bhola Singh* (3). In the latter, the facts were almost identical, and it was held that the mortgagee ought to have sued in the alternative for one of the two remedies, possession of the land and ruturn of the money, and that as he had not obtained the leave of the Court to omit to sue for one of the reliefs, as required by O. II, r. 2 (3), he was precluded by that rule from bringing a later suit in respect of the other relief. A number of rulings have been referred to by the learned Pleader for the appellant, but it is unnecessary to deal with these in detail, as in all the causes of action for the two suits were clearly different. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 90 P. R. 1881.
(3) 56 Ind. Cas. 966; 2 U. P. L. R. (L.) 108.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1365 OF 1921.
April 9, 1924.
Present :—Mr. Justice Phillips.

VISHNU CHOTLA VENKATASUBBIAH —DEFENDANT No. 1—APPELLANT

versus

TALLAPRAGADA LAKSHMIPATHI, MINOR, BY FATHER AND GUARDIAN AND ANOTHER—PLAINTIFFS NOS. 1 AND 2—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Mortgage —Agreement by mortgagee to remit mortgage amount—Registration, whether necessary—Contract Act (IX of 1872), s. 74—Penalty—Interest, higher rate of, payable on default.

A receipt executed by a mortgagee evidencing an agreement to remit a sum of money in excess of Rs. 100 out of the mortgage amount is inadmissible in evidence without registration. [p. 393, col. 1.]

A mortgage-deed provided for the payment of one instalment of principal together with the interest thereon every year, and in default, there was a provision for a certain rate of interest, the default rate being slightly higher than the rate provided for in the body of the document and compound interest was stipulated for:

Held, that having regard to the unusual nature of the document the provision for a higher rate of interest on default was not by way of penalty. [p. 393, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 250 of 1920, preferred against the decree of the Court of the District Munsif, Bhimavaram, in O. S. No. 203 of 1919.

Mr. *K. Kameswara Rao*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—The first defendant is the appellant and he is one of two mortgagors. He does not dispute the execution of the mortgage-deed and his liability to some extent, but he pleads an agreement with the plaintiff under which the second defendant one of the mortgagors was exonerated by the plaintiff on payment of a sum of Rs. 900 and a portion of the mortgage-money was remitted. Both the District Munsif and the Subordinate Judge have disbelieved the oral evidence as to this agreement and it is sought to be proved by Ex. II. This purports to be a receipt executed by the plaintiff to defendants Nos. 1 and 2 and it goes further and says that the money is received towards the entire discharge of the debt due by the second defendant and he undertakes to execute a deed of relinquishment of right at his cost. If this does evidence the agreement that there should be a remission in the amount of the

mortgage-money, it is clearly inadmissible in evidence as it would require registration being a document which affects a right in immoveable property of the value of over Rs. 100. The contention that it can be used to prove this agreement because it also purports to be a discharge cannot be accepted. Either it is not evidence of the agreement in which case it will be admissible as a receipt or if it is evidence of the agreement, it requires registration. The two cases relied on by the appellant *Karampalli Unni Kurup* v. *Thekku Vittil Mutharakutti* (1) and *Goseti Subba Rao* v. *Varigonda Narasimham* (2) relate only to the proof of oral agreements and do not discuss the question of the admissibility of documents which are said to prove such agreements. As regards the admissibility of unregistered documents, I may refer to *Chundooru Lakshmana Setty* v. *Duggisetty Chenchuramayya* (3). The Subordinate Judge having found that he cannot believe the oral evidence it must be held that there was no such agreement and this plea must be disallowed.

A further point is raised that the interest provided for in the mortgage-deed is penal and should be relieved against. The conditions in this deed are somewhat unusual for there is a provision for the payment of one instalment of principal together with the interest thereon every year, and in default, there is a provision for a certain rate of interest. No doubt the default rate is slightly higher than the rate provided for in the body of the document and compound interest is to be paid. Considering the unusual nature of the document, I agree with the Subordinate Judge that this provision cannot be held to be by way of penalty.

The second appeal is accordingly dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 26 M. 195
(2) 27 M. 368.
(3) 44 Ind. Cas. 132; 7 L. W. 229; 34 M. L. J. 79; (1918) M. W. N 262.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 44 OF 1924.
November 17, 1924.
Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

MOHAMMAD ZAKA ULLAH AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS
versus
Musammat GULKANDI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2 (2), (14), 47, O. IX, r. 8—Execution of decree—Objection, dismissal of, for default—Appeal, whether lies.

Whenever a Court delivers a decision in default of the plaintiff that decision is an order and not a decree and is not subject to appeal.

Rukminimoyi Dasi v. *Poran Chunder Bhera*, 14 Ind. Cas. 823; 39 C. 341; 15 C. L. J. 334 and *Parbati* v. *Toolsi Kapri*, 20 Ind. Cas. 1; 18 C. W. N. 604; 18 C. L. J. 128, relied on.

From an order of an Executing Court, dismissing an objection of the judgment-debtor in default of appearance, no appeal is allowed either under the Oudh Rent Act or under the C. P. C. [p. 394, col. 1.]

Appeal against a decree of the District Judge, Hardoi, dated the 23rd April 1924.

Mr. *Gulam Hasan*, for the Appellants.

Mr. *Anant Ram Nigam*, for the Respondent.

JUDGMENT.—In execution proceedings the objection of two judgment-debtors, who are appellants here, was dismissed in default on 13th October 1922. From this dismissal they appealed to the learned District Judge. The Trial Court was that of an Assistant Collector of the First Class in the District of Hardoi. The objections were that the decretal amount had been paid and that the application for execution was time-barred under s. 145 of the Rent Act as the original decree of 1917 was for a sum of less than Rs. 500. The Assistant Collector did not enter into the merits but dismissed the objection in default on the decree-holder's Pleader denying the correctness of the objections.

The appeal was rejected by the learned District Judge of Hardoi on the ground that no appeal lay as the decision appealed against was an order of dismissal for default and not a decree. From such an order no appeal is allowed either under the Rent Act or the C. P. C. According to the definition of "decree" given in s. 2 (2) of the C. P. C. the word "decree" is deemed to include the rejection of a plaint and the determination of any question within s. 47 or s. 144 but that term does not include any adjudica-

tion from which an appeal lies as an appeal from an order or any order of dismissal for default. The exclusion covers the term "decree" and not only the determination of questions under s. 47 and s. 144. This exclusion implies that whenever any Court delivers a decision in default of the plaintiff that decision will be an order and not a decree. It will be an order because under cl. 14 of s. 2 order means the formal expression of any decision of a Civil Court which is not a decree. In *Rukminimoyi Dosi* v. *Poran Chunder Bhera* (1) a Bench of the Calcutta High Court held that an order dismissing for default an appeal under O. XLI, r. 17, that is on account of the absence of the appellant, is not a decree within the meaning of s. 2 of the Code and as such is not appealabe. This interpretation of the law was re-affirmed by another Bench of the Calcutta High Court in *Parbati* v. *Toolis Kapri* (2) where it was held that an order passed by a Civil Court under O. IX, r. 8, that is, when the plaintiff was absent and the defendant present, was not appealable even where the Trial Court had examined the defendant's evidence and the merits of the case.

It was inquired by the appellants' learned Counsel what the remedy of the appellants would be, his argument was that as he had no other remedy an appeal should be allowed. According to the decision of Single Judge of this Court in *Gauri* v. *Hinga* (3) he may have a remedy by applying to the Trial Court for a re-hearing under O. IX, r. 9. We give no opinion on the subject at present but even granting that the objector had no remedy open to him we could not act contrary to the explicit provisions of the C. P. C. and declare his appeal to be competent.

It was feebly argued that a question of limitation having been raised the decision of the Trial Court must be considered to be one on the merits as the Court had to consider that question whether it was pressed to its notice by the objector or not. The default of the plaintiff, however, meant for the purposes of the decision of the Trial Court that he withdrew from all his objections. There was no plea of limitation pressed to the notice of the Court and it may be taken to have been witdrawn.

We dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(1) 14 Ind. Cas. 823; 39 C. 341; 15 C. L. J. 334.
(2) 20 Ind. Cas. 1; 18 C. W. N. 604; 18 C. L. J. 128.
(3) 59 Ind. Cas. 575; 23 O. C. 349.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 162 OF 1922.

September 26, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Madhavan Nair.

ANJAPERUMAL KONAR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

PICHAMUTHU NADAR AND ANOTHER —DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Compound interest, stipulation for, on default of payment of interest—Penalty.

A bare stipulation to pay compound interest at the rate provided for in the bond on default of payment of interest is not penal. [p. 395, col. 2.]

Maddur Veera Reddi v. *Madam Subbanna Setti Row*, 8 Ind. Cas. 339; 8 M. L. T. 387; (1910) M. W. N. 784, *Thiruvengadam Pillai* v. *Ramanujulu Naidu*, 7 Ind. Cas. 874; (1912) M. W. N. 512; 8 M. L. T. 380 and *Malli Chettiar* v. *Veeranna Tevan*, 69 Ind. Cas. 812; 41 M. L. J. 470; (1921) M. W. N. 717, followed.

Venkataramiah Pillai v. *Subramania Pillai*, 37 Ind. Cas. 799, dissented from.

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in A. S. No. 6 of 1921, preferred against the decree of the Court of the District Munsif, Srivaikintam, in O. S. No. 434 of 1920.

Mr. *C. Krishnamachariar*, for the Appellant.

Messrs. *Subrahmanyam* and *Balsingh Satya Nadar*, for the Respondents.

JUDGMENT.—The main point argued in this second appeal is whether a stipulation to pay compound interest on default of payment of interest is penal.

The District Munsif decreed the plaintiff's suit. On appeal by the first defendant, the Subordinate Judge relying upon the decision of this Court reported as *Venkataramiah Pillai* v. *Subramaniam Pillai* (1) held that the stipulation to pay compound interest was penal and allowed the plaintiff's claim for interest at 24 per cent. per annum and the plaintiff has preferred this second appeal.

(1) 37 Ind. Cas. 799.

The question is whether a bare stipulation to pay compound interest on default of payment of interest is penal. The respondent's Vakil concedes that if a low rate of interest is provided for in the bond the stipulation to pay compound interest on default of payment of interest would not be penal.

A bare stipulation to pay compound interest is not penal within the meaning of s. 74 of the Contract Act. Compound interest is paid in many business transactions and the borrower who undertakes to pay the interest on the loan on a due date is bound to pay it and if he does not pay it any stipulation to pay interest on such interest is not a penalty. The decisions of this Court have been uniform on this question that a bare stipulation to pay compound interest at the rate provided for in the bond, on default of payment of interest is not a penalty. *Vide Maddur Veera Reddi* v. *Madam Subbanna Setti Row* (2) and *Thiruvengadam Pillai* v. *Ramanujulu Naidu* (3). But a Bench of this Court consisting of the Officiating Chief Justice Sir Abdur Rahim and Seshagiri Iyer, J., held in a case reported as *Venkataramaniah Pillai* v. *Subramania Pillai* (1) that a "provision for payment of compound interest may be a penalty within the meaning of s. 74 of the Contract Act and it makes no difference in principle whether the interest is payable on default at a higher rate or at the same rate." The learned Judges rely upon a decision of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (4) and a decision of a Bench of the Calcutta High Court reported as *Khagaram Das* v. *Ram Sankar Das Pramanik* (5). In *Sundar Koer* v. *Rai Sham Krishen* (4) their Lordships do not hold that stipulation to pay interest on interest on default of payment of interest is penal. They observe at page 158* "compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." The decision of the Privy Council is contrary to the view taken by the learned Officiating Chief Justice in *Venkataramiah Pillai* v. *Subramania Pillai* (1) and the decision in *Khagaram Das* v. *Ram Sankar Das Pramanik* (5) does not support his view. Mr. Justice Mookerjee observed at page 658*: "Before we examine this argument in the light of judicial decisions, it is desirable to point out, that in the solution of this question, no real assistance can be derived from the class of cases, in which there is a stipulation for payment of interest at an advanced rate on default of payment of principal or interest on the due date or the other class of cases in which, on default of payment of principal or interest, stipulation is made for payment of compound interest at the same rate as the simple interest originally agreed to be paid or at a higher rate."

With all respect to the Officiating Chief Justice, we fail to see how this judgment of the Calcutta High Court supports the view he has taken. The other learned Judge Seshagiri Iyer, J., was a party to the decision in *Ghantasala Seetharamiah* v. *Tadepalli Pitchayya* (6). There sitting with Sadasiva Iyer, J., he held following *Sundar Koer* v. *Rai Sham Krishen* (4) that a provision for payment of compound interest was not penal by itself, but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default might be penal. The decision in *Venkataramiah Pillai* v. *Subramania Pillai* (1) was dissented from by a Bench of this Court in *Malli Chettiar* v. *Veeranna Jevan* (7) and Mr. Justice Ayling and Mr. Justice Odgers held that the stipulation to pay compound interest from the date of default at the same rate as simple interest was not a penalty within s. 74 of the Contract Act. Where a borrower undertakes to pay interest on default of payment of interest at the same rate at which he contracted to pay interest on the principal sum, it is not a penalty under s. 74 of the Contract Act. That being so, we think the decree of the Subordinate Judge was wrong in disallowing compound interest as claimed by the plaintiff.

The Subordinate Judge has decreed that certain items, *i. e.*, items Nos. 2, 4 and 5, should be proceeded against first by the

(2) 8 Ind. Cas. 339; 8 M. L. T. 387; (1910) M. W. N. 784.

(3) 7 Ind. Cas. 874; (1912) M. W. N. 512; 8 M. L. T. 380.

(4) 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

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(5) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.

(6) 28 Ind. Cas. 860.

(7) 69 Ind. Cas. 812; 41 M. L. J. 470; (1921) M. W. N. 717.

*Page of 42 C.—[*Ed.*]

mortgagee. The mortgagee is entitled to proceed against all or any of the items he chooses We do not think it was open to the lower Court to direct him to proceed against certain items in the first instance, in the absence of circumstances which would justify that order.

We do not think there is any evidence in the case to justity that order. The second defendant has not chosen to put forward any defence.

In the result, the second appeal is allowed and the judgment of the Subordinate Judge set aside and that of the District Munsif restored.

As regards costs, the appellant will get his costs both here and in the lower Appellate Court from the first defendant. Time for redemption six months.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 190 OF 1933.

June 19, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Ryves.

NARAIN DAS AND ANOTHER—OBJECTORS—APPELLANTS

versus

BANKIM CHANDRA DEB, RECEIVER OF THE ESTATE OF SOHAN LAL—OPPOSITE PARTY—RESPONDENT.

Hindu Law—Joint family—Alienation by certain members—Subsequent adjudication of Manager—Receiver, whether can claim property.

The elder members of a Hindu family owning joint ancestral houses and shops and carrying on business mortgaged certain houses and shops belonging to the family. Subsequently the Manager of the family who was a junior member was adjudicated insolvent and the Receiver seized all the transferred properties. The transferee applied for recovery of these properties. It appeared that the object of the transfer was to save the property from the creditors of the insolvent:

Held, that the transfer was liable to be set aside and the Receiver was justified to claim the properties so alienated.

In re Sellamuthu Servai, 80 Ind. Cas. 108; 47 M. 87; 19 L. W. 86; 46 M. L. J. 86; (1924) M. W. N. 94; (1924) A. I. R. (M.) 411, followed.

Bawan Das v. *Chiene*, 64 Ind. Cas. 976; 44 A. 316; 20 A. L. J. 155; (1922) A. I. R. (A.) 79, referred to.

First appeal from an order of the District Judge, Jhansi, dated the 15th May 1923.

FACTS.—The following order of the District Judge reveals the facts of the case:—

"There wa sa family owning joint ancestral houses and shops and also carrying on business. The elders of the family were Puran Lal and Ram Prasad, brothers. The only one of the family that has been adjudicated insolvent is Sohan Lal, who was one of the five surviving adult sons of Puran Lal. His application was made on the 22nd of June 1921, and the date of adjudication was the 2nd of September 1921. On the 21st of May 1921, the houses and shops were sold and mortgaged by Puran Lal and Ram Prasad to Ram Dayal, whose brother Makundi was father of the claimant Narain Das. Makundi died before the transfer. Ram Dayal, Puran Lal, Ram Prasad and Sohan Lal all died after the adjudication. After they had died the Receiver seized all the transferred property save one house. Now Narain Das, on the basis of these transfer deeds, claims these properties.

Admittedly Puran Lal and Ram Prasad were, at least nominally, the *kartas* and *mukhiyas* of the family and the business stood in their names. But this was a trading family, and in the case of such families it frequently happens that the actual *karta* is a younger member. Thus it is said by the Receiver that Sohan Lal was the sole managing member and that this is why he alone applied to be adjudged insolvent after a transfer had been made by his father and his uncle to Ram Dayal. In fact the evidence called by the Receiver to the effect that Sohan Lal was the actual managing member, though rather scanty, is not at all rebutted; there is not a scrap of evidence to the contrary. Thus the Receiver's contention is held proved.

So many people have died that much of the evidence regarding the nature of the transfer has disappeared. Thus the claimant, in addition to the sale-deed and the mortgage-deed, can produce nothing but the account-book entries written by Makundi and Ram Dayal, both dead; such evidence being relevant under s. 32 of the Evidence Act and, therefore, not excluded by s. 34. Thus the position is as if Makundi and Ram Prasad were alive and in the witness-box and deposing to the genuineness and actuality of the loan transactions entered in the accounts, including the settlement of the indebtedness by execution of the sale-deed and mortgage-deed by Ram Prasad and Puran Lal. That is the highest at which can be put the evidence for the claimant. Section 54 would apply if the debt was genuine and s. 53 if it was not.

There are certainly suspicious circumstances in the case. It is Ram Prasad and Puran Lal who make the transfers and it is only Sohan Lal who applied to be adjudged

insolvent and the application for adjudication is made within a month of the date of the transfers. The property is three shops and two houses, all in one village. To explain the nature of his alleged possession Narain Das says that all are in occupation of a single tenant who pays rent and that tenant is his father-in-law. It is quite clear that the transaction is either fraudulent or done with intent to give undue preference to selected creditors.

The only difficulty left is that the actual transferors are not adjudicated insolvents, and since they are dead there are other members of the family who are not adjudicated insolvents. The sole person who became an insolvent by adjudication is Sohan Lal, manager and son of one of the transferors. This is not the ordinary case of insolvency of a Hindu father, but of a junior member who was the manager. I have examined every case I can find connected with the subject and can find nothing exactly parallel.

This is the case of a joint family owning joint ancestral houses and shops and carrying on a family business or trade. Presumably the property is part of that joint ancestral property and the object of the transfer is to save it from the creditors of Sohan Lal; that means from the creditors of the joint family also, because in the list of insolvent's debts two are marked as being trade debts; for these the whole family property is liable. Thus the transfer can be set aside as a whole and not merely in respect of Sohan Lal's share.

I annul the transfer. The Receiver will have his costs against the transferee."

Munshi *Girdhari Lal Agarwala*, for the Appellants.

Mr. *A. Sanyal*, for the Respondent.

JUDGMENT.—We agree with the decision in *In re Sellamuthu Servai* (1), which fully supports this decision. There is also a decision of this Court in *Bawan Das* v. *Chiene* (2) to the same effect. The appeal must, therefore, be dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) 80 Ind. Cas. 108; 47 M. 87; 19 L. W. 86; 46 M. L. J. 86; (1924) M. W. N. 94; (1924) A. I. R. (M.) 411.

(2) 64 Ind. Cas. 976; 44 A. 316; 20 A. L. J. 155; (1922) A. I. R. (A.) 79.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 6 OF 1924.

September 17, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

N. GANGULU NAIDU—RESPONDENT—APPELLANT

versus

NAMINENI CHENGAMA NAIDU AND ANOTHER—APPELLANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XLI, r. 4—Partnership suit—Decree against partners—Appeal—Legal representative of deceased appellant not brought on record, effect of—Abatement.

Ordinarily, to a partnership action, all the partners must be made parties, since an account cannot be taken in the absence of any partner. A plaintiff, therefore, in a partnership action is liable to have his suit dismissed if he does not make all the partners parties to his suit. [p. 398, col. 2.]

Where, however, plaintiff prays for and obtains a decree for a lump sum against all the other partners of the firm, the defendants putting forward a common case, and there are no disputes among the latter themselves or any rights or obligations to be determined or adjusted, *inter se*, the omission in an appeal by the defendants, to bring on record the legal representatives of one of the deceased appellants is not fatal to the sustainability of the appeal. [p. 399, col. 2.]

Raj Chunder Sen v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen*, 31 C. 487; 8 C. W. N. 442; 14 M. L. J. 147; 31 I. A. 71; 1 A. L. J. 145; 8 Sar. P. C. J. 623 (P. C.), distinguished.

Letters Patent Appeal against the judgment of Mr. Charles Gordon Spencer, Officiating Chief Justice, in S. A. No. 955 of 1921, and reported as 82 Ind. Cas. 420, preferred against a decree of the District Court, Chittoor, in A. S. No. 61 of 1919, (Original Suit No. 48 of 1917, Sub-Court, North Arcot).

Messrs. *A. Krishnaswami Iyer* and *B. Somayya*, for the Appellant.

Messrs. *L. A. Govindaraghava Iyer* and *L. S. Viraraghava Iyer*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—This is a Letters Patent Appeal from the decision of the Officiating Chief Justice. The facts that have led to this appeal may be briefly stated. The plaintiff sued the defendants, who are four in number, alleging that he entered into a partnership with them, that he contributed towards capital Rs. 1,745, that the defendants by suppression of the accounts of the firm and otherwise were causing loss to him, and on these grounds he asked for a decree dissolving the partnership and directing the defendants to pay

him the amount due inclusive of interest and profits.

Defendants Nos. 1 to 3, while admitting that they entered into the partnership, pleaded that as the plaintiff had made default in the payment of the capital agreed to be contributed, the partnership was dissolved within a few months of its formation, that the accounts were settled, that the amount due to the plaintiff was paid up and that the account-books of the dissolved partnership were taken by the plaintiff. The written statement of the 4th defendant is not before us, but it would appear that he did not admit that the plaintiff contributed Rs. 1,745, as capital, but he had no objection to have accounts taken and his share of the profits paid over to him.

The learned Subordinate Judge found that substantially the case of the plaintiff was true, that the defendants fraudulently withheld the account-books, and in the result he gave the plaintiff a decree for Rs. 1,745 and profits amounting to Rs. 1,100. The plaintiff claimed in the plaint the said amount as profits, and on the ground that every presumption should be drawn against parties suppressing the account-books, the Subordinate Judge accepted the figure mentioned by the plaintiff as the profits due to him and directed that amount to be paid.

From the decree of the Subordinate Judge, the first three defendants preferred an appeal to the District Judge. The 3rd appellant (3rd defendant) subsequently died and his legal representative was not brought on the record within the prescribed period. The appeal abated so far as the deceased appellant was concerned under O. XXII, r. 3, C. P. C., and the respondent applied to the District Judge for the dismissal of the appeal on the ground that all the partners were necessary parties to a partnership action and that the appeal in the absence of the legal representative of the 3rd appellant was incompetent. The District Judge on the strength of *Raj Chunder Sen* v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chuuder Sen* (1) dismissed the appeal. It may be observed in this connection that the 4th defendant was not even at the outset, made a party to the appeal, but this defect was not made a ground of the application to dismiss the appeal.

A second appeal was filed to this Court by defendants Nos. 1 and 2 from this order of dismissal. Spencer, O. C. J., holding that *Raj Chunder Sen* v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen* (1) did not apply to the facts of this case, reversed the decision of the District Judge and remanded the appeal to the lower Appellate Court for disposal on the merits. I am of the opinion that the decision of the learned Officiating Chief Justice is right. It is undoubtedly true that ordinarily, to a partnership action, all the partners must be made parties, for an account cannot be taken in the absence of any partner. Let me take an example. *A* sues *B*, *C* and *D* for an account of a dissolved partnership, *A* claims Rs. 500 as the amount payable to him. If a partnership account is taken, it may be found that *D* owes the partnership Rs. 2,000 out of which *C* is entitled to Rs. 1,000, *B* to Rs. 500 and *A* to Rs. 500.

Take another instance. *A* claims Rs. 500. The accounts may disclose that *B* and *C* owe the partnership each Rs. 1,000, Rs. 1,500 is due to *D* and Rs. 500 to *A*. These illustrations show that it is ordinarily impossible to take an account of a dissolved partnership in the absence of any one of the partners. The Courts have, therefore, invariably held that a plaintiff in a partnership action is liable to have his suit dismissed if he does not make all the partners parties to his suit.

In the present case, however, the facts are somewhat different. The Subordinate Judge has given a decree for a lump sum, being of the opinion, that accounts cannot be taken in the normal way in the absence of account-books. Whether the Judge was justified in giving the plaintiff a decree for the whole amount of profits claimed, is not a matter with which we are now concerned. It is no doubt true that his finding in effect involves taking of an account. As Mr. A. Krishnaswami Iyer, the Vakil for the plaintiff put it, the decree of the Subordinate Judge is the result of a notional taking of an account though there may be no actual taking of an account. This I am prepared to accept ; but still is the presence of all the parties necessary?

Firstly, defendants Nos. 1 and 2, who were the appellants before the District Judge,

(1) 31 C. 487; 8 C. W. N. 442; 14 M. L. J. 147; 31 I. A. 71; 1 A. L. J. 145; 8 Sar. P. C. J. 623 (P. C.).

contend that there was no partnership at all. In deciding this issue, the Court is not hampered by the absence of any of the parties. The case of those defendants is that there is no partnership to be dissolved and the rule that requires that all the partners must be made parties to a partnership action cannot apply to a case like the present where the appellants deny the existence of the partnership.

Secondly, the three defendants who originally filed the appeal put forward a common case, were represented by a single Pleader and preferred a joint appeal. They made common cause against the plaintiff and there was no dispute on any point among themselves. They urged that the plaintiff was in possession of the account-books and was responsible for their suppression. If in appeal this contention is accepted and the plaintiff is found to be in possession of the books, he being unable to produce them, (he asserts he has not got them), the appeal will be allowed and the plaintiff's suit will be dismissed. In this event again the absence of any particular party is not fatal to the appeal. Under O. XLI, r. 4, C. P. C., the decree then may be reversed not only in favour of the defendants who are before the Court, but of all the defendants. It makes no difference that the other defendants are not parties to the appeal.

Thirdly, if it is found in appeal that the defendants suppressed the account-books, two alternatives are possible; either the decree of the Subordinate Judge may be affirmed or the Appellate Court may direct an account to be taken on a different footing, different from the one adopted by the Subordinate Judge. If the decree of the Subordinate Judge is affirmed, then again the absent defendants will be bound by the result, and the fact that they are not represented in appeal causes no inconvenience. If any different basis is adopted by the Appellate Court for taking the account, even in that case, no dispute at any time having existed between the three defendants, the absence of one of them in the appeal does not stand in the way of the rights of the parties being determined. Whatever may be the amount decreed by the Appellate Court the three defendants were prepared to pay it jointly, and it must be noted that the decree of the Appellate Court cannot be for an amount larger than what was allowed by the Sub-Court. If the decree of the Appellate Court to any extent modifies the Sub-Court's decree in favour of the defendants, it may enure for the benefit of all of them; but as between the three defendants the Court is not called on to decide the measure of the liability of each one of them and determine their rights *inter se*. And the learned Vakil for defendants Nos. 1 and 2 has clearly stated to us (if any such assurance is necessary) that his clients do not propose to raise any question of this kind. In this view also, the absence of the 3rd defendant's representative is not fatal to the appeal.

Raj Chunder Sen v. *Ganga Das Seal* and *Ramgati Dhur* v. *Raj Chunder Sen* (1) is, therefore, clearly distinguishable and does not apply.

As stated at the very outset, there is no indication that an objection was taken by the plaintiff to the appeal being defectively constituted on account of the absence on the record of the 4th defendant. This is possibly due to the fact that the plaintiff realised that under XLI, r. 20, C. P. C., it was open to the Court to direct the 4th defendant to be made a party. But, however, it is unnecessary to consider this point as I find that it was not raised before the District Court.

In the result the judgment of the Officiating Chief Justice is confirmed and the Letters Patent Appeal is dismissed with costs.

Jackson, J.—I agree.

V. N. V. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 107 OF 1923.
November 21, 1924.
Present:—Mr. Dalal, J. C., and
Mr. Wazir Hasan, A. J. C.
IMDAD ALI—PLAINTIFF—APPELLANT
versus
AHMAD ALI—DEFENDANT—RESPONDENT.

Muhammadan Law—Gift—Hiba-bil-ewaz, *what is—Gift in lieu of services, whether revocable—Waiver of right of revocation, effect of—Muhammadan Law, interpretation of.*

Under the Muhammadan Law a donor may revoke a gift even where he has purported to waive his right of revocation at the time of or after the declaration of gift; provided that where he has accepted something in return for the waiver he cannot revoke the gift. Where a donor waives his right of revocation in lieu of services rendered to him by the donee in consideration of which the gift is made, the gift cannot be revoked. [p. 400, col. 2; p. 401, col. 1.]

Per *Dalal, J. C.*—A gift made in consideration only of natural love and affection or of services or of favours rendered does not fall under the category of a *hiba-bil-ewaz.* [p. 400, col. 2.]

Rahim Bakhsh v. *Muhammad Hasan*, 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429, followed.

When once a great Muhammadan Jurist has interpreted a particular precept of Muhammadan Law in a particular way that interpretation should be followed without referring back to original authorities. That is the only method of making the Muhammadan or Hindu Law certain when administered by Indian Courts. [*ibid.*]

Per *Wazir Hasan, A. J. C.*—Under the Muhammadan Law services rendered by a donee to the donor may form the consideration of a gift and such a gift must be regarded as a *hiba-bil-ewaz.* [p. 402, col. 1.]

The narrow sense in which the Muhammadan Jurists understood the term "property" is wholly unsuited to the modern and progressive state of society. [*ibid.*]

Appeal against an order of the District Judge, Sitapur, dated 12th February 1923, confirming that of the Subordinate Judge, Sitapur, dated the 18th August 1922.

Messrs. *Wasim* and *Mohammad Ayub*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.

Dalal, J. C.—The suit in the Trial Court was for the revocation of a deed of gift. The suit was dismissed by that Court and the Appellate Court. Hence this second appeal is filed by the plaintiff. Under the Hanafi Law gifts may not be revoked on two grounds: (1) when it is made in favour of a person within the prohibited degree of marriage and (2) when it is a gift known as a gift for an exchange *hiba-bil-ewaz.* The gift here is in favour of the son-in-law and will not fall within the first class mentioned above. In *Rahim Bakhsh* v. *Muhammad Hasan* (1) the great Muhammadan Jurist, Mr. Justice Mahmud, held that the gift which is made in consideration only of natural love and affection or of services or of favours rendered, as in the case before us, does not fall under the category of *hiba-bil-ewaz.* I am not prepared to disagree with the opinion of such a high authority. To me reference to original authorities appears to be unproductive of result because the precepts of law were given and subsequently interpreted by great Muhammadan Jurists under circumstances and modes of existence totally different from the present. Property had a very limited meaning in those days and if the precepts were to be strictly followed even a right to the recovery of dower may not be considered such an exchange as to render the gift made in exchange thereof *hiba-bil-ewaz.* I am in favour of certainty in law. When once a great Muhammadan Jurist of the reputation of Mr. Justice Mahmud has interpreted a particular precept of Muhammadan Law in a particular way that interpretation should be followed without referring back to original authorities. That is the only method of making the Muhammadan or Hindu Law certain when administered by Indian Courts. I hold that the gift in suit is not *hiba-bil-ewaz.*

The matter, however, does not end there. The donor in the deed in suit has definitely promised not to revoke the gift. Earlier in the document he has stated the consideration for such a promise "*bil ewaz is karkardgi ke*" (in lieu of this service). The service narrated at the commencement of the document consisted of the defendant looking after the plaintiff's affair with considerable honesty and singleness of purpose. We are not aware whether such a clause existed in the document before the Allahabad High Court in the case reported as *Rahim Bakhsh* v. *Muhammad Hasan* (1) or not. Such a case has been considered by Mr. Tayabji in his principles of Muhammadan Law, Second Edition, at page 484. In s. 420 of his book he has enunciated the proposition that the donor may revoke the gift even where he has purported to waive his right of revocation at the time of or after the declaration of gift; provided that where he has accepted some-

(1) 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429.

thing in return for the waiver, he cannot revoke the gift. In the present case the plaintiff accepted the honest services of the defendant in return for his waiver, so he cannot revoke the gift.

In the result I am of opinion that the appeal should be dismissed with costs.

Wazir Hasan, A. J. C.—This is the plaintiff's appeal in a suit for possession of 15 *bighas* 2 *biswas* land, one grove of mango trees, a house together with land on which it stands and a *nim* tree within the house situate in *Mauza* Aladinpur, *Pargana* Khairabad, District of Sitapur. The specification of the property in suit is given in list A attached to the plaint. The suit failed in both the Courts below.

The facts and circumstances on which the ground of claim rests are as follows:—

The plaintiff Imdad Ali, is the father-in-law of the defendant, Ahmad Ali. On the 20th June 1921 Imdad Ali made a gift of the property in suit in favour of Ahmad Ali and as evidence of the transaction he executed a deed of gift on the same date. The deed was registered and Ahmad Ali was put in possession of the property covered by the deed of gift. Ahmad Ali is still in possession of that property. The plaintiff prays for the recovery of the property in suit on the ground that he has cancelled the gift of the 20th June 1921 and that he had a right to do so under the Muhammadan Law. The specific relief was stated in the plaint in the following words:—"The plaintiff prays that a decree for the resumption of the *muafi* land, given in list A attached to the plaint by cancelling the deed of gift, be passed in favour of the plaintiff, against the defendant."

The motive and the object of the gift are stated in the deed of the 20th June 1921 to be that the donee had been brought up by the donor for a long time past and he is still living under the donor's *parwarish* (support). The donee had been attending to the domestic business of the donor, judiciously and honestly. The gift is, therefore, made in consideration of the services mentioned above. At the end of the deed the donor recorded the promise that neither he nor his heirs shall at any time revoke the gift made thereby.

On the authority of a decision of a learned Judge of this Court (now a Judge of the High Court of Judicature at Allahabad) in the case of *Lal Bibi* v. *Musum Ali Khan* (2), the Courts below have held that the gift in question being *hiba-bil-ewaz* was not liable to be revoked at the pleasure of the donor.

It is admitted that the view taken by the Courts below is wholly covered by the decision just now mentioned. It is argued, however, that the said decision is erroneous. The opinion to which the learned Judge gave effect is that an obligation created by past services may be an obligation which carries with it a money value and a gift made in consideration of such services would be very similar to a case where a woman foregoes her claim to dower-debt against her husband receiving in return a grant of property and that such a transaction is recognised as a valid *hiba-bil-ewaz* amongst the Muhammadans governed by the Hanafi Law in India. The learned Judge recognised that the view which he took was in direct conflict with the decision of Mahmood, J., in the case of *Rahim Bakhsh* v. *Muhammad Hasan* (1), as to the nature of a *hiba-bil-ewaz* under the Hanafi Muhammadan Law. The result was that he disagreed with the opinion of Mahmood, J.

If the gift in question can be construed to be a transaction of *hiba-bil-ewaz* that it is irrevocable is admitted. The case decided by Mahmood, J., was not a case involving the question of the right of revocation of a gift exercisable by the donor. The question as to whether the gift in that case was a *hiba-bil-ewaz* or not was relevant to the decision of the issue as to whether the delivery of possession was necessary or not to the perfection of the gift. The gift was in lieu of affection and past services. Mahmood, J., held that such a gift was not a *hiba-bil-ewaz* and, therefore, transfer of possession of the property gifted from the donor to the donee was essential to the validity of the gift and as the donor himself had never had possession of the subject-matter of the gift there was no delivery of possession to the donee. The gift, therefore, failed. The reasoning of the learned Judge may be expressed in the following form :—

A makes a gift of immoveable property to *B* in lieu of services rendered by the latter; is the transaction *hiba-bil-ewaz* ?

(1) *Hiba-bil-ewaz* consists of two separate gifts—

(2) 38 Ind. Cas. 794; 20 O. C. 41.

(*a*) A simple gift by the donor to the donee.

(*b*) A simple gift by the donee to the donor.

(2) A simple gift is a transfer of property.

(3) Services are not property.

(4) Therefore the transaction is not a *hiba-bil-ewaz*.

That the foregoing analysis truly represents the conception of *hiba-bil-ewaz*, as understood by the Muhammadan lawyers of the Hanafi School cannot be doubted. It may, however, well be doubted whether the British Courts of Justice are bound to recognise that narrow conception of "property which was entertained by the ancient Muhammadan Jurists. I entirely agree with the observation made by the learned Judge of this Court in the case mentioned above that "even an obligation created by past services is an obligation which carries money value." It is equally clear to my mind that services may constitute not only a consideration but also a valuable consideration to support a contract between two parties. The Indian Contract Act, 1872, defines consideration as follows: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise." When a man renders service to another at the request of the latter and the latter has no legal right to claim that service the service so rendered is valuable consideration for any contract resting on it between the two. See the observations of Bowen, L. J. in *In re Casey, Stewart* v. *Casey* (3) also *Fleming* v. *Bank of New Zealand* (4). In certain cases the result of a man's labour may be his property as is illustrated by the cases of works of art and inventions. In the present case the donee was under no legal obligation to manage the affairs of the donor. He may well claim a return in substance and the donee may well make such a return. In short, the truth of the matter is that the narrow sense in which the Muhammadan Jurists understood the term "property" is wholly unsuited to the modern and progressive state of society. That sense entirely excludes all incorporeal heredita-

(3) (1892) 1 Ch. 104 at p. 115; 61 L. J. Ch. 61; 66 L. T. 93; 40 W. R. 180.

(4) (1900) A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1; 16 T. L. R. 468.

ments. I need not pursue this discussion further because I am going to decide this appeal on another ground.

For the purpose of my judgment it may be assumed on the authority of the decision of Mahmood, J., that the transaction of the gift with which we are concerned in the present case is not a "*hiba-bil-ewaz*; but it does not necessarily follow that it is revocable. A *hiba-bil-ewaz* is certainly not revocable but in my judgment there are also other circumstances well-recognised by the Muhammadan Law which create a bar to revocation. Besides the gifts to persons within prohibited degrees and the gift by a husband to his wife and *vice versa*, there are other gifts also which are irrevocable. "It is further to be observed, that the bars to a retraction of gift are many, amongst which are the following:—I. The donee giving the donor a return or consideration; because this fulfils the donor's object. II. The incorporation of an increase with gift because in that instance a retraction cannot take place without including the increase, as that is implicated; and it cannot take place so as to include the increase, since that was not included in the deed of gift. III. The death of one of the parties; for if the donee should die, his property shifts to his heir, and becomes the same as if it had shifted during his lifetime; and if the donor should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given. IV. The alienation of the gift from the donee's property during his lifetime, because this is a consequence of the power vested in him by the gift, which power, therefore, cannot then be retracted; and also because the right of property has re-generated in another person, in virtue of a fresh cause, namely, conveyance to a second donee: and as a re-generation of the right of property is equivalent to an essential change in the thing the case is, therefore, the same as if the gift were to become, in effect, a different thing from what it was, and consequently not liable to retraction." Hedaya, Book XXX, Chapter II, of Retraction of Gifts. In the present case we are concerned with the first of the bars enumerated above. That bar on the face of it would prevent retraction when the transaction is one of mutual gifts but it will also preclude revocation where there is a consideration which when executed satisfies the object of the gift. "The arguments of our Doctors

upon this point are two-fold." says Hedaya, First, the prophet has said, "A donor 'preserves a right' to his gift, so long as he does not obtain a return for 'it.' Secondly, the object of a gift to a stranger is a return for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to a person of equal rank that he may obtain an equivalent; and such being the case, it follows that the donor has a power of annulment, so long as the object of the deed is not answered since a gift is capable of annulment." Hedaya, Book XXX, Chapter II, of Retraction of Gifts. The *Hadis* (Prophet's precept) translated at the opening of the last quotation is stated in the original text of the Hedaya as follows :—

Hadees—Al-waahibu ahaqqu bi-hibatihee maa lam yusib minhaa.

It will thus be seen that Hamilton has translated the word *yusib* into 'obtaining a return.' This is apt to mislead. The etymological meaning of *sawab* includes a good work (worthy of reward) and is not restricted to pecuniary advantage—Francis Johnson's Dictionary, Persian, Arabic and English, Edition 1852. Immediately following the Prophet's precept occurs the comment of the author of the Hedaya as below :—

Wa li-anna al-maqsooda bil-'aqdi huwat-t'aweezu lil-aadati fa-sabata walaayatul faskhi 'inda fawaatihee izal-'aqdu yaqbiluhoo.

[The object of the contract (gift) is a return *altahwiz* consequently the right of revocation is proved by the non-fulfilment of the object because it (the right of revocation) attaches to such a contract.] Now in a foot-note appertaining to the above quotation, *Maulana* Abdul Hai, an eminent Muhammadan Jurist of Lucknow who flourished in the middle of the last century, explains the word *ul-tahwiz* as follows :—

'Iwazan maaliyan awilkhidmata 'anilmauhoobi lahoo.

(Pecuniary return or any service rendered by the donee). Hedaya with marginal commentay by *Maulvi* Abdul Hai reprinted at Yusufi Press, Lucknow, 1324 H. Obviously this explanation is founded upon the meaning of the word *yusib* used by the Prophet. The proposition is well-illustrated by the irrevocability of a gift by a husband to his wife. Such a gift "cannot be retracted, because the object of the gift is an improvement of affection (in the same manner as in the case of presents to relations); and as the object is obtained, the gift cannot be retracted" Grady's Hedaya, p. 456. The increase of affection excited in the wife by the gift is supposed, " by the law, to be a return which she pays for it, and which consequently deprives the donor of the power of retraction. This is so because of the existence of the first bar before mentioned."—See the foot-note in Hamilton's Hedaya by Grady at page 486.

In the present case it cannot be doubted that the object of the gift was to remunerate the meritorious services rendered by the donee. Indeed the whole foundation of the present claim is laid on a supposed bald right of revocation under the Muhammadan Law.

Baillie in his Digest of Muhammadan Law enumerates the causes that prevent revocation of gifts at page 534. The fifth cause is "An exchange received for the gift." It must be conceded that the word 'exchange' here connotes mutual gifts and as the subject-matter of each gift must be specific property it cannot include any other consideration for each gift than such property. But it should be remembered that the nature of the fifth cause which prevents revocation is not exhaustively treated in the book. It only states the most conspicuous instance of frequent occurrence of a *hiba-bil-ewaz.* Fatawa Alamgiri, of which Baillie's Digest is a fairly accurate translation, if I may respectfully say so, is in itself a digest of cases though comprehensive, so far as it goes, but certainly not exhaustive. In any event it is not in conflict with the texts of the Hedaya to which reference has been made in this judgment.

My learned brother, the Judicial Commissioner, has based his judgment on the ground that the donor waived his 'right of revocation in return of the services of the donee. This, of course, assumes that the thing returned may be 'consideration' in the sense of the Muhammaden Law. I have tried to establish that the assumption is well-founded. I, therefore, agree with the order proposed by him that this appeal should be dismissed with costs.

By the Court.—For the reasons given in our separate judgments we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 742 OF 1924.

July 17, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

EAST INDIAN RAILWAY COMPANY, LTD.—DEFENDANTS—APPELLANTS

versus

DIANA MAL-GULAB SINGH—PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Suit for damages for late delivery, whether competent—Risk-Note Form B—Deterioration and loss, meaning of—Railway Company, whether liable.

Section 72 of the Railways Act does not bar a suit to recover damages caused by the late delivery of the goods consigned to a Railway Company. A fall in the market-value of the goods is not "deterioration," nor is delay in delivery "loss" within the meaning of the Risk-Note B, and the Railway Company is liable for the damage caused. [p. 404, col. 2; p. 405, col. 1.]

Madras Railway Company v. *Govinda Rau*, 21 M. 172; 8 M. L. J. 85; 7 Ind. Dec. (N. s.) 478, not followed.

Wilson v. *Lancashire & Yorkshire Railway Company*, (1861) 30 L. J. C. P. 232; 9 C. B. (N. s.) 632; 7 Jur. (N. s.) 862; 3 L. T. 859; 9 W. R. 635; 127 R. R. 814; 142 E. R. 248, discussed.

Hill Sawyers & Co. v. *Secretary of State*, 61 Ind. Cas. 926; 2 L. 133 (F. B.), distinguished.

Miscellaneous appeal from an order of the District Judge, Delhi, dated the 17th January 1924, reversing that of the Subordinate Judge, First Class, Delhi, dated the 16th May 1923.

Mr. *Jai Lal*, Government Advocate, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—On the 28th October 1920, 125 bags of sugar ordered by the plaintiffs were booked from Kidarpore Dock on the East Indian Railway to Delhi Shahdara, but at Ghaziabad Junction the waggon containing the sugar was misdirected to Lahore Shahdara. The mistake was discovered at Nowshera Doaba, and the goods were re-booked. They arrived at Delhi Shahdara on the 28th December and were delivered to the plaintiffs on the 12th January. The price of sugar having in the meantime fallen, the plaintiffs have sued the Railway Company for damages for late delivery. The Company contends that it is exempt from liability under the Risk-Note Form B under which the goods were booked, and the Subordinate Judge agreed with that contention and dismissed the suit. But the District Judge has held that the Company was not protected by the Risk-Note and has remanded the case for decision as to whether the plaintiffs are entitled to damages and if so to what amount. The Railway Company has appealed to this Court from the order of remand.

Under the Risk-Note the Company was to be free from responsibility for any loss or deterioration of the consignment, and the learned Government Advocate argues on its behalf that the fall in value of the goods due to the fall in the market-rate was a 'deterioration.' *Madras Railway Company* v. *Govinda Rau* (1) supports the argument; but the view taken in that case was based merely on the fact that in *Wilson* v. *Lancashire & Yorkshire Railway Company* (2), the learned Judges had spoken of such a fall in value as a 'deterioration.' The question of the interpretation of the term 'deterioration' did not, in any way, arise in the latter case, and the mere fact that, the fall in value was described in the judgments as a deterioration cannot, in our opinion, be regarded as an authority on the question of the meaning of the term. It is moreover to be observed that one of the learned Judges in that case, namely, Byles, J., while in one sentence he referred to the fall in value as a deterioration, in the preceding sentence used the more accurate word 'depreciation.' The 'deterioration' of a thing, whether it be in quality or in value, implies in ordinary parlance a change for the worse in the thing itself. If a thing is worthless than it was before only because the market-rate has gone down it would be correct to say that it has depreciated in value, but not that it has deteriorated. We hold, therefore, in the present case that there was no deterioration of the consignment.

It is next argued, though the point does not seem to have been raised in the Courts below, that delay in delivery of the consignment is included in the term 'loss' used in the Risk-Note, and that on that account also the Railway Company is not liable. In support of this argument *Hill Sawyers & Co.* v. *Secretary of State* (3) has been cited, in which Scott-Smith

(1) 21 M. 172; 8 M. L. J. 85; 7 Ind. Dec. (N. s.) 478.

(2) (1861) 30 L. J. C. P. 232; 9 C. B. (N. s.) 632; 7 Jur. (N. s.) 862; 3 L. T. 859; 9 W. R. 635; 127 R. R. 814; 142 E. R. 248.

(3) 61 Ind. Cas. 926; 2 L. 133 (F. B.).

J., expressed the opinion that the temporary loss of an article was included in the word 'loss.' But that was a case of misdelivery and not of late delivery, and the question for decision was whether the word 'loss' in Ch. VII of the Railways Act meant only a loss to the Railway or included loss to the owner of the goods. The opinion expressed that loss included a temporary loss seems, therefore, to have been an *obiter dictum.* If it had been intended in the present case that the Railway Company should not be liable for delay in delivery an express stipulation to that effect would surely have been entered in the contract as was done in the contract mentioned in the Madras ruling referred to above. We think that the term 'loss' was not meant to include delay in delivery, and we cannot agree with the learned Government Advocate's contention on this point. Lastly, it is contended that no claim can be brought against a Railway Administration except in respect of loss, destruction, or deterioration of goods. But s. 72 of the Railways Act, to which reference has been made, does not support this contention, and we do not agree with it.

The appeal fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

STAMP REFERENCE No. 12004 OF 1923.

April 4, 1924.

Present:—Mr. Justice Krishnan.

In re GARAPATI BUTCHI SEETHAYAMMA—APPELLANT.

Court Fees Act (VII of 1870), s. 7 (v), Sch. I, Art. 1—Decree for possession of land on payment of money—Appeal by defendant—Court-fee payable.

Where a plaintiff obtains a decree for possession of a certain land on payment of a sum of money, and the defendant appeals on the ground that the plaintiff is not entitled to the land at all, the land itself is the subject-matter of the appeal, and for the purposes of valuation, the rules laid down in the various sub-clauses of clause (*v*) of s. 7 of the Court Fees Act as applying to various kinds of immoveable properties should be applied and the defendant should value his appeal for the purposes of Court-fees, quite irrespective of the condition imposed by the decree on the plaintiff to recover the land. [p. 406, cols. 1 & 2.]

If the plaintiff appeals in such a case and contends that the amount payable by him is too large, and that it should be reduced by any particular amount, the subject-matter of the dispute in the appeal would be the difference between what he admits is due and what the lower Court has declared to be due. [p. 406, col. 2.]

The words "the value of the subject-matter" in Sch. I, Art. 1 of the Court Fees Act mean the same thing as "the value of the subject-matter" as set out in various sub-clauses of clause (*v*), s. 7. [p. 406, col. 1.]

Case referred under s. 5 of the Court Fees Act, by the Taxing Officer of the High Court in respect of the amount of Court-fees payble on the memorandum of appeal sought to be preferred to the High Court against the decree of the Court of the Additional Subordinate Judge, Coconada, in O. S. No. 33 of 1920.

Messrs. *G. Lakshmanna* and *V. Viyanna*, for the Appellant.

Mr. *C. V. Ananta Krishna Iyer*, Government Pleader, for the Respondent.

JUDGMENT.—This is a Reference under the Court Fees Act that has been referred to me for disposal by the learned Chief Justice, the Taxing Officer having referred the matter for the decision of the Court. In this case the plaintiff obtained a decree so far as the 11th defendant, the appellant before me, is concerned, for the recovery of possession of a half share of the lands sold to him under Ex. V by his father on payment of Rs. 12,000. The appellant's appeal asks this Court to hold that the plaintiff is not entitled to the lands at all and that the suits should be dismissed as against the appellant. The question raised is, what is the Court-fee that the appellant has to pay on his appeal. No doubt as Sir Kumaraswami Sastri, J., has remarked in *In re Porkodi Achi*(1): "The current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which a party wishes to get rid of." Turning to the Court Fees Act, we find the governing rule applicable to appeals is the one in Sch. I, cl. (1) of the Act. It says, leaving out the unnecessary words, the proper fee payable upon a memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court, except those mentioned in s. 3 with which we are not concerned, is to be calculated on the amount or value of the subject-matter in dispute. The way in which the fee is to be fixed is by taking "the amount or value

(1) 68 Ind. Cas. 444; 45 M. 246 at p. 256; 16 L. W. 624; 41 M. L. J. 587; (1921) M. W. N. 854; 30 M. L. T. 88; (1922) A. I. R. (M.) 211.

of the subject-matter in dispute." The question before me, therefore, really turns upon the interpretation to be put upon the expressions "the subject-matter in dispute" and "its value."

Turning to s. 7, cl. (*v*), of the Court Fees Act, we find that: "In suits for the possession of land, houses, and gardens—the Court-fee is to be calculated according to "the value of the subject-matter." The same words "the value of subject-matter" are used there, and it says "such value shall be deemed to be" in the various cases referred to as mentioned in cl. (*a*) to (*e*). In the absence of any guiding rule in the Act itself as to computing the value on appeal, I think it is proper to take the "value of the subject-matter" in Sch. I, cl. (1) as meaning the same thing as "the value of the subject-matter" as set out in various sub-clauses of cl. (*v*), s. 7.

It is contended, however before me that the subject-matter in dispute in this appeal is not the land but the market-value of the land reduced by Rs. 12,000 which has already been declared as payable to the appellant. I am unable to accede to this argument. In my view the subject-matter of the appeal is the land itself, as the appellant is seeking to get rid of a decree against him, which has given the respondent the right to recover the possession of the land from him. He does not seek to get the amount which the lower Court has directed to be paid to him, increased by any sum of money, in which case no doubt the difference between what he claims in appeal, and what the lower Court has granted to him, would be the subject-matter of the appeal. But here what the appellant claims is the land itself, and his contention in appeal is that the land should not be taken away from him under any circumstances. He is not asking in the appeal, that the condition laid down by the lower Court should in any way be varied. But he wants the suit itself to be dismissed as regards the claim for the land in his possession is concerned. Such being his prayer in appeal, I must hold that the land itself is the subject-matter of the appeal and for the purposes of valuation, the rule laid down in s. 7, cl. (*v*), in various clauses as applying to the various immoveable properties or lands and houses and gardens should be applied in this case. The lands here are partly *inam* land and partly *ijara-yoti lands*, and therefore, they will have to be valued under cls. (*a*) and (*b*). This view is not in conflict with the views expressed in the cases cited to me. On the other hand, it is supported by the view expressed by Mr. Justice Piggot in *Rup Narian* v. *Biswanath Singh* (2). The learned Judge says at page 632:* "The position of the appellants is different. Even on the principle suggested by the Stamp Reporter, the report is unjust to them, for the *ad valorem* fee would require to be calculated on Rs. 10,000, less Rs. 4,000 which the plaintiff has been ordered to pay, *i. e.*, on Rs. 6,000. I think, however, that they are entitled to appeal against the decree as it stands and to value their appeal for the purposes of the Court Fees Act under s. 7 (*v*) (*a*) of the said Act" The appeal there was similar to the appeal here. The suit was brought by a member of a joint Hindu family to avoid the sale of a joint property by one of the members of the family and to recover his share from the property. The lower Court had granted a decree to the plaintiff, subject to the payment of Rs. 4,000 by him to the defendants who were the alienees. Those defendants-appellants contended that the decree was not correct, and the suit should be dismissed and they were entitled to keep the lands. The learned Judge held that in such an appeal, the defendants should value their appeal for the purposes of Court-fees, under s. 7 (*v*) (*a*) of the Act, quite irrespective of the condition imposed by the decree on the plaintiff to recover the land. If the plaintiff in the present case before me had appealed and contended that the amount of Rs. 12,000 was too large, and that it should be reduced by any particular amount no doubt the subject-matter of the dispute in the appeal would be the difference between what he admits is due and what the lower Court has declared to be due. But it is the defendant that appeals in the present case, and he seeks to have the decree of the lower Court which directed the possession of the lands to be given to the other side, set aside. It is clear in such a case that the subject-matter of the appeal is the land and not any money; and, therefore, as the Court Fees Act directs a certain method of valuation to be adopted in cases where the subject-matter in dispute is land, that method should be adopted in this case. I direct that the Court-fees be paid on such a valuation. The appellant

(2) 68 Ind. Cas. 265; 44 A. 629 at p. 632; 20 A. L. J. 587; (1922) A. I.R. (A.) 358; 4 U. P L. R (A.) 192.

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will be given time for one week after the re-opening to pay the extra Court-fees.

V. N. V. *Ordered accordingly.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 OF 1923.
November 25, 1924.
Present:—Mr. Dalal, J. C.
SANTU—PLAINTIFF—APPELLANT
versus
TARA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (5)—Declaration by person as to his parentage, whether admissible.

A declaration by a person as to his parentage made *ante litem motam* is admissible in evidence under s. 32 (5) of the Evidence Act in proof of such parentage.

Appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 20th April 1923, in Civil Appeal No. 8 of 1923, upholding and modifying that of the First Court, Probationary Munsif, Fyzabad, dated the 6th December 1922.

Mr. *Ali Zaheer*, for the Appellant.

Messrs. *M. Wasim*, *E. R. Qidwai* and *Niamat Ullah*, for the Respondents.

JUDGMENT.—This second appeal desires this Court to disturb a finding of fact of two Subordinate Courts. One Santu sued for possession of half share in a property as reversioner of a Hindu widow on the ground that the Revenue Court's order entering his name and that of one Kamta in the village records as owners in half was unjustified. He wanted possession of property declared by the Revenue Court to be in possession of Kamta. Kamta died after the suit was instituted and his place was taken by his son Tara Prasad. Santu denied that Kamta was in any way related to Hanuman husband of *Musammat* Maharaji. Kamta's defence was two fold: (1) that Santu was a nobody and an unknown person unconnected with Hanuman and (2) that he himself was the grandson of Ram Dayal a brother of Hanuman. Both the Courts held that Santu was descended through males from one brother of Hanuman and Kamta from the other. The lower Appellate Court has accepted the oral evidence produced on behalf of the defendant, so it is difficult to understand how this appeal by the plaintiff can be entertained.

The ground of appeal on this subject is No. 2 and is to the effect that the lower Appellate Court was wrong in believing the statements of the respondents' witnesses whom the Court of first instance had called a pack of shameless liars. These witnesses were not designated as such by the Trial Court with respect to the statements as regards the descent of Kamta. The Trial Court disbelieved them when some of them went further and asserted that Santu was no way related to Hanuman. It was perfectly open to the Appellate Court to believe the oral evidence. Ground of appeal No. 2, therefore, has no force.

In ground of appeal No. 1 it is urged that the lower Courts were wrong in law in admitting the documents that were inadmissible under the Indian Evidence Act. The portion of that ground that the lower Court relied exclusively on these documents in arriving at the decision is incorrect as I have already pointed out. The lower Appellate Court has fully relied on the oral evidence of the witnesses for the defence. One of the documents is a copy of a *khewat* (Ex. A-2) bearing the signatures of Hanuman, Ram Dayal and Sita Ram. This proves that Ram Dayal was a brother of Hanuman and the learned Counsel for the appellant admitted so far. He argued that Gur Sahai was not proved to be the son of Ram Dayal, nor Kamta of Gur Sahai. Two mortgage-deeds (Exs. A-4 and A-5) were produced by one Lachman Singh witness on behalf of the mortgagee. He testified that the Gur Sahai, who executed these documents, was the father of the defendant Kamta. He lives not far from Kamta's village and knows of the relationship. It was urged that the declaration of Gur Sahai that he was the son of Ram Dayal was not admissible in evidence. Lachman Singh's evidence proves that Gur Sahai did make such a statement to the scribe and it is difficult to understand how it can be held that Gur Sahai had no special means of knowledge. He had no special means of knowledge in the sense that he could not have been conscious of his own birth, but otherwise as he grew up he must have had means of knowledge that his father was Ram Dayal and not any other person. Similarly there is the fact mentioned in the *khasra* (Ex. A-8) that Kamta Prasad was

the son of Gur Sahai. Kamta was alive at the date of the suit and he had all along contended in the Revenue Court that he was the son of Gur Sahai. In a mortgage-deed, which was admitted by the plaintiff and which Kamta executed in 1906 before the dispute as regards parentage arose, Kamta described himself as the son of Gur Sahai (Ex. A-10). In my opinion such a statement is certainly admissible in evidence and illustration (*k*) to s. 32 does not indicate that a declaration by a son as to his parentage would not be admissible in evidence. The descent of the defendant Kamta is proved both by oral and documentary evidence.

The Trial Court did not allow costs to the defendant while the Appellate Court did. I see no reason to interfere with the discretion of the lower Appellate Court. I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 207 OF 1922.

August 25, 1924.

Present:—Mr. Justice Madhavan Nair.

VEPARI DOLAPPADU AND OTHERS —DEFENDANTS—APPELLANTS

versus

THOTTADI SURANNA—PLAINTIFF —RESPONDENT.

Practice—Consent order, when can be set aside.

An order consented to by the Pleader of a party even if due to a mistake cannot be set aside except on proof that serious and substantial injustice would result to the party from letting the consent order stand.

Jamnabai v. *Fazalbhoy Heptoola*, 77 Ind. Cas. 355; 47 M. L. J. 164; (1923) A. I. R. (P. C.) 184; 18 L. W. 437; 46 M. L. J. 160; 26 Bom. L. R. 189; 33 M. L. T. 376; 40 C. L. J. 272 (P. C.), relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in A S. No. 273 of 1920, preferred against that of the Court of the District Munsif, Rajamundry, in O. S. No. 600 of 1918.

Mr. *P. V. Ramachandra Raju*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—Plaintiff's suit was for putting up certain *bunds* shown in the plaint plan and also for damages against the defendants on account of their negligence in not helping the plaintiff. Both the lower Courts dismissed the plaintiff's suit. In the Appellate Court, the learned Subordinate Judge while dismissing the appeal added to the judgment a note. "But plaintiff's Vakil asks me to pass a decree ordering an *amin* to be sent for having straight *bunds* put up as per terms of the agreement Ex. A between the survey stones demarkating the parties' land from each other. Mr. P. L. Narasimham for the defendants has no objection, provided the appeal is dismissed in other respects with costs." The decree which has been passed, as it appears from the judgment, by consent of the Vakil for the defendants, is objected to by the defendants-appellants. They have filed an affidavit in this Court to the effect that they never gave any permission to their Pleader to consent to such a decree. A counter-affidavit has been filed by the respondent's Vakil. It is argued, that under such circumstances, a report should be called for from the lower Court asking it whether the defendants' Pleader had the consent of his client in allowing such an order to be passed. It is stated that some of the rights of the defendants are surrendered by the Pleader by consenting to such an order especially with reference to their claim to plot B. I do not think, in the circumstances of the case, it is necessary to call for a report at all. I find that what the learned Vakil for the plaintiff urged was only to enforce the agreement as contained in Ex. A. The defendants did not object to this agreement in their written statement. Without expressing any opinion on the question whether the land B belonged to the plaintiff or to the defendants, I would say for purposes of this second appeal that in the First Court, the issue, relating to it, was not argued by the Vakil for the defendants and that the first defendant also stated in his evidence that the plaintiff is in enjoyment of the land. It does not appear to me that the defendants' Pleader has surrendered any right of the defendants in allowing the order to be passed by consent. In a case reported as *Jamnabai* v. *Fazalbhoy Heptoola* (1), it was held, that even in the case of an admitted mis-

(1) 77 Ind. Cas. 355; 47 M. L. J. 164; (1923) A. I R. (P. C.) 184; 18 L. W. 437; 46 M. L. J. 160; 26 Bom. L. R. 189; 33 M. L. T. 376; 40 C. L. J. 272 (P. C.).

take, if there was no injustice to the parties concerned, an order, which was in point of fact consented to by the Advocate of a party cannot be set aside except on proof that serious and substantial injustice would result to the party from letting the consent order stand. As I have found that in this case defendants do not suffer any loss of rights by this consent order, I do not think, there is any need of calling for any report from the Subordinate Court.

I dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 15 OF 1924.
September 8, 1924.
Present:—Mr. Dalal, A. J. C., and Mr. Neave, A. J. C.
Lala HARI KISHUN DASS—PLAINTIFF—APPELLANT—APPLICANT
versus
Choudhri MOHAMMAD SAFI JAN—DEFENDANT—RESPONDENT—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Substantial question of law, what is—U. P. Court of Wards Act (III of 1899), ss. 9, 15, 34—Contract Act (IX of 1872), s. 11—Ward of Court, contract entered into by, validity of—Portion only of property of ward under management, effect of.

In order that a question of law may be treated as substantial within the meaning of s. 110 of the C. P. C., it must be debateable or of general interest or without previous decisions of their Lordships of the Privy Council to guide the Indian Courts. [p. 409, col. 2.]

A person whose property is under the superintendence of the Court of Wards labours under the disability enunciated in s. 34 of the U. P. Court of Wards Act, and is, therefore, incompetent to contract under the provisions of s. 11 of the Contract Act, and a contract entered into by such a person is void from its inception. [p. 410, col. 1.]

The whole of the moveable and immoveable property of a person, in regard to whose property a declaration has been made under s. 9 of the U. P. Court of Wards Act, must be deemed, under s. 15 of the Act, to be under the superintendence of the Court of Wards from the date of such declaration, and the mere fact that the Court of Wards purports to take some of the property under its management and not the rest of it, makes no difference to the applicability of the provisions of s. 15. [p. 409, col. 2.]

Mohori Bibee v. *Dharmodas Ghose*, 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.), relied on.

Application against the judgment and decree of the Court of the Oudh Judicial Commissioner, dated the 2nd April 1924, in F. C. A. No. 33 of 1923, confirming that of the Subordinate Judge, Unao, dated the 11th April 1923.

Mr. *B. N. Srivastava*, for the Applicant.

Mr. *Niamatullah*, for the Opposite Party.

ORDER.—The plaintiff who has been unsuccessful in two Courts has applied for leave to appeal to His Majesty in Council. Though the valuation of the subject-matter of the suit is over Rs. 10,000, this Court affirmed the decision of the Trial Court, so leave would be justified only if we hold that a substantial question of law was involved in the appeal.

The grounds of appeal raise questions of law but, in our opinion, they are not substantial in the sense that they may be debateable, of general interest or without previous decisions of their Lordships to guide Indian Courts.

The defence accepted by both Courts was that the mortgage, which was the basis of the suit, was made by a person who was incompetent to contract under s. 34 of the Court of Wards Act III of 1899 (Local). Under s. 11 of the Contract Act a person who is disqualified from contracting by any law to which he is subject is not competent to contract. At the time of execution of the document the defendant was a ward and his property was under the superintendence of the Court of Wards. He, therefore, laboured under the disability enunciated in s. 34 of the Act. A declaration had been made regarding the defendant's property under s. 9 by the Local Government, so he was a ward as defined by s. 3(5) of the Court of Wards Act. The plaintiff's contention was that the property which was transferred to him was not under the superintendence of the Court of Wards. Such a plea, however, is barred by the provisions of s. 15 which are to the effect that the whole of the moveable and immoveable property of a ward shall be deemed to be under the superintendence of the Court of Wards from the date of the declaration of the Local Government in the case of proprietor in regard to whose property a declaration has been made under s. 9. Such a declaration was made prior to the date of the deed in suit. It is true that the Court of Wards in fact adopted a confused procedure and while taking some of the properties of the defendant under its management did not take the rest under

such management. We, however, cannot go behind the unrebuttable presumption enjoined by s. 15. The distinction between superintendence and management by the Act will be apparent when the provisions of ss. 26 and 40 of the Act are consulted where the Court of Wards is given power to appoint managers of property under its superintendence and to entertain an establishment for the management of the persons and properties under its superintendence. In our opinion there can be no debate as to the presumption of s. 15 and the difference between superintendence and management. This disposes of grounds of appeal Nos. 1 and 2. As regards ground No. 3 whether a ward under s. 9 may be a disqualified proprietor or not, he is certainly a ward as defined under s. 3. This answers ground No. 3. Grounds Nos. 4 and 5 were not pressed when it was pointed out by us that the Bench which decided the appeal held as a fact that the defendant made no representations to the plaintiff of his capacity to make the transfer. As to ground No. 6 the incompetency to contract under any law to which a party to a contract is subject is placed on the same footing as a minority in s. 11 of the Act and *Mohori Bibee* v. *Dharmodas Ghose* (1) is an authority of the Privy Council as to the contract by a minor being void from its inception. The last ground of appeal is based on the Privy Council ruling in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (2). The question here, however, is not one of limitation but of incapacity to contract. Even if the plaintiff's claim be brought within limitation there is no contract on which it can be based. In *Harnath Kuar's case* (2), the interest transferred was incapable of being transferred but the obligor was competent to contract. In the present case the incapacity is not of the property but of the person who contracted. In the present case there was no contract to which s. 65 of the Contract Act may apply.

Finally the points at issue are not of general interest. It will not generally happen that the procedure of the Board of Revenue would be faulty so that on facts the presumption drawn under s. 15 of the Court of Wards Act may be rebutted.

We dismiss the application with costs.

Z. K. *Application dismissed.*

(1) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).

(2) 71 Ind. Cas 629; 26 O. C. 223; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 33 M. L. T. 216; 5 P. L. T. 281; 2 P. L. R. 237 (P. C.).

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 93 OF 1922.

August 21, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Beasley.

G. SIRUR—DEFENDANT—APPELLANT

versus

A. M. BHAMIA—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 30—Suit to recover money as price of shares sold—Wagering contract—Burden of proof.

Where in a suit for money alleged to be due on account of shares sold by the plaintiff to the defendant upon the Stock Exchange, the defendant pleads that the transaction was a dealing in differences and partook of the nature of a wagering contract, the onus of proving that there was a mutual understanding that shares should not be delivered lies upon the defendant who asserts the same, and the onus is particularly heavy where both parties are themselves members of the Stock Exchange, for the reason that it is of the nature of dealings between stock-brokers that they should settle differences periodically between themselves on a settling day and pay the balances due and that shares should not be actually transferred between the two as they would be between a member of the Stock Exchange who sells shares and a member of the public who purchases them.

Appeal from the judgment of Mr. Justice Coutts-Trotter passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 436 of 1921.

Messrs. *T. C. A. Anandalvan* and *E. Sankaran Unnini*, for the Appellant.

Mr. *A. Doraiswamy Iyer*, for the Respondent.

JUDGMENT.

Spencer, Offg. C. J.—This is an appeal against the judgment of Coutts-Trotter, J., passing a decree in the plaintiff's favour for Rs. 3,144 and odd found to be due on account of shares sold by the plaintiff to the defendant upon the Madras Stock Exchange. The defendant raised two defences to the suit, first, that the transaction in question was a dealing in differences and thus partaking of the nature of a wagering contract and secondly, that part of the contract was entered into by the defendant's clerk outside the Stock Exchange and so not according

to the Rules and Regulations and, therefore, irregular and not enforceable.

The plaintiff and the defendant are both members of the Madras Stock Exchange. The onus in cases of this sort of proving that there was a mutual understanding that shares should not be delivered lies upon the defendant who asserts the same. When, as here, both parties are themselves stock-brokers, the onus is greatly increased, for the reason that is of the nature of dealings between stock-brokers that they should settle differences periodically between themselves on a settling day and pay the balances due and that shares should not be actually transferred between the two as they would be between a member of the Stock Exchange who sells shares and a member of the public who purchases them. The plaintiff asserted that in respect of 15 shares he actually delivered the shares to the defendant. On the other hand, the defendant swore that no shares were delivered or received. The defendant did not pursue the point or adduce any other evidence to show that the plaintiff's statement was false as he might have done by demanding the production of the receipt or voucher for the share certificates which were transferred. The plaintiff subsequently became insolvent and he filed an affidavit in the insolvency proceedings in which he admitted that certain other transactions were of the nature of wagering transactions. He attempted to distinguish those transactions from the suit transactions and the defendant made no further attempt to connect the two together. On the whole, we are satisfied that the defendant did not discharge the onus that lay on him of proving that the contracts in suit were of a gambling and wagering nature.

As regards the other defence, it is not denied by the plaintiff that the defendant's agent entered into certain transactions on the 11th and 15th December; but the letter Ex. D is ample proof that the defendant himself ratified the acts of his agent. There is, therefore, no reason to interfere with the judgment of the learned Judge, and the appeal is dismissed with costs.

Beasley, J.—I concur.

V. N. V. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 23 OF 1924.

July 21, 1924.

Present:—Mr. Wazir Hasan, A. J C., and Mr. Kendall, A. J. C.

Nawab Mirza MOHAMMAD SADIQ ALI KHAN—APPELLANT

versus

Nawab SHARF JAHAN BEGAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 39, sub-s. 1, cl. (d)—*Transfer of decree—Discretion of Court.*

The jurisdiction of a Court in transferring a decree from itself for execution to another Court is not limited by the fact that there is no property within the jurisdiction of that Court sufficient to satisfy such decree, as under cl. (*d*) of sub-s. (1) of s. 39, C. P. C., the Court can make an order of transfer if it considers for any other reason that the decree should be executed by the other Court.

Appeal against an order of the Subordinate Judge, Lucknow, dated the 30th April 1924.

Messrs. *Bisheshwar Nath* and *Mahesh Prasad*, for the Appellant

Mr. *Brij Narain Chakbast*, for the Respondent.

JUDGMENT.—The appellant is the eldest son of Nawab Baqar Ali Khan of Lucknow, Shish Mahal, and the respondent is his widow. On the death of Nawab Baqar Ali Khan, the respondent brought a suit for the recovery of her dower-debt due to her from the deceased. To this suit, she impleaded all the heirs of the deceased Nawab Baqar Ali Khan and obtained a decree therein for a sum of rupees three lacs recoverable from the estate of her deceased husband. With a view to realize the fruits of her decree, the respondent applied to the Court of the Subordinate Judge of Lucknow, from which she had obtained the decree mentioned above, for the transfer of the decree to the Court of the Subordinate Judge of Sitapur. This application was naturally made under the provisions of s. 39 of the C. P. C., 1908. The lower Court has made the order of transfer. This is an appeal against that order.

We think that the competency of the appeal is questionable. It is difficult to construe the order under appeal as one falling within the provisions of s. 47 (1) of the C.P. C. The question which that order has decided does not seem to relate "to the execution, discharge or the satisfaction of the decree." In the case of *Husain Bhai*

v. *Beltie Shah Gilani* (1) recently decided by a Bench of the High Court at Allahabad, it has been held with reference to a large number of cases that decision of all questions under s. 47 of the C. P. C. cannot be regarded as decrees but that only such decisions are decrees as satisfy the definition of decree given in s. 2, cl. (2), of the C. P. C. In the present case there is no conclusive determination of the rights of the parties with regard to all or any of the matters in controversy in the suit. Indeed the transfer of a decree from one Court to another for the purposes of execution proceedings being taken in the other Court is merely a preliminary step towards the execution of the decree. On the other hand, there is a direct authority in favour of the appellant in the case of *Bhabani Charan Dutt* v. *Pratap Chandra Ghosh* (2). But as we have heard the appeal on merits and our opinion is adverse to the appellant we give no decision on this point.

The argument presented on behalf of the appellant is, that there is property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and consequently the Court was not justified in making the order of transfer. The jurisdiction of the Court is, however, not limited by the fact that there is no such property within the jurisdiction of that Court. Under cl. (*d*) of sub-s. (1) of s. 39 of the C. P. C., the Court could make the order of transfer if it "considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court." The lower Court has, in our judgment, given eminently good reasons for making the order which it has made.

The appellant disclosed three classes of property situate within the jurisdiction of the Court which passed the decree and which, he said, was sufficient to satisfy it. These properties were entered in four lists A, B, C, and D. List A is of Government promissory-notes of the face value of Rs. 2,13,100. List B contains two decrees both against Sajjad Mirza for Rs. 56,000 and Rs. 1,165-5-4. List C shows two plots of land of the estimated value of Rs. 4,200, Shish Mahal property, residential buildings of the estimated value of Rs. 1,50,000 and a deed of mortgage for Rs. 6,000. List D consists of moveable property of the estimated value of Rs. 56,770. Now the decree-holder wishes to execute her decree against that portion of the estate of the deceased which is in the exclusive possession of the appellant. She has a legal right to do so and it is admitted on behalf of the appellant, though only for the purposes of this appeal, that in all the properties mentioned in these lists he owns only a fractional share. He does not disclose the exact extent of that fraction and consequently it is impossible to say that the properties which he disclosed in these lists are sufficient to satisfy the decree when the only property to be considered is the appellant's share. The learned Advocate for the appellant asks us to compel the decree-holder to accept in satisfaction of the decree not only the appellant's share in the properties mentioned in these lists but also the shares of all the other heirs of the deceased Nawab Baqar Ali Khan, who are parties to the decree under consideration. This, we realize, we cannot do. We have no power to take away the respondent's legal right to execute her decree against only such portion of the estate of her deceased husband as she chooses having regard to her own facilities and convenience.

The learned Subordinate Judge has examined the nature of the property entered in each of the lists and has satisfactorily shown that its substantial value is not at all what it is said to be by the appellant. It will serve no useful purpose to repeat the grounds on which he has come to that conclusion. We think that the grounds are sound.

We, therefore, dismiss this appeal with costs.

N. H. *Appeal dismissed.*

(1) 83 Ind. Cas. 1035; 22 A. L. J. 706; (1924) A. I. R. (A.) 808; 46 A. 733.
(2) 8 C. W. N. 575.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2393 OF 1921
July 17, 1924.

Present:—Mr. Justice Campbell and Mr. Justice Zafar Ali.

HARI SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RATTAN SINGH AND OTHERS—PLAINTIFFS AND LALU—DEFENDANT—RESPONDENTS.

Custom—Adoption—Hindu Jats of Chunni Khurd,

Tahsil Kharar, District Ambala—Daughter's son, whether can be adopted—Burden of proof.

When a sonless man in any land-holding group which recognises a power to adopt asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power. [p. 413, col. 2.]

Ralla v. *Budha*, 50 P. R. 1893 (F. B.), followed.

The burden of proving that the adoption of a daughter's son by a sonless Hindu *Jat* proprietor of Chunni Khurd, Tahsil Kharar, District Ambala is valid is on the party who sets up the custom. [p. 414, col. 1.]

Bhup Singh v. *Nihal Singh*, 129 P. R. 1882, *Sunder Singh* v. *Mano*, 68 P. R. 1888 and *Hari Singh* v. *Gulaba*, 50 P. R. 1874, dissented from.

Ralla v. *Budha*, 50 P. R. 1893 (F. B.), followed.

Lalu v. *Fatteh Singh*, 18 P. R. 1899, referred to.

Second appeal from a decree of the District Judge, Ambala, dated the 11th August 1921, affirming that of the Junior Subordinate Judge, Second Class, Ambala, dated the 13th June 1921.

Mr. *Devi Dayal*, for the Appellants.

Mr. *Man Singh*, for the Respondents.

JUDGMENT.—The only question argued before us in this second appeal is whether the adoption of a daughter's son by a sonless Hindu *Jat* proprietor of the village Chunni Khurd, Tahsil Kharar, District Ambala, is valid by custom in the presence of collaterals of the 5th degree. The Courts below have answered this question in the negative, holding that the defendants have failed to prove the alleged custom. There can be no manner of doubt that the adoption was not valid unless sanctioned by custom and that the onus of establishing the custom lay on the defendants. The evidence that the learned Counsel for the defendants-appellants relied on before us consists of—

(*a*) A statement in the *wajib-ul-arz* ;

(*b*) the *Riwaj-i-am* ; and

(*c*) the three judicial instances afforded by *Bhup Singh* v. *Nihal Singh* (1), *Sunder Singh* v. *Mano* (2) and *Gurbakhsh Singh* v. *Partapo* (3).

The statement (*a*) runs as below:—

"According to the custom of the village a gift to a daughter's son or sister's son cannot be made in the presence of (the donor's) male issue."

The learned Counsel draws from the above statement the inference that a gift to a daughter's son or sister's son is valid in the absence of male issue, but this inference does not necessarily follow. The *wajib-ul-arz* mentions a circumstance under which a gift to a daughter's son or sister's son would not be valid, but does not mention the circumstances under which it would be valid. Moreover, a gift to a daughter's son of a portion of the donor's property may be valid but not of the whole of it, and if a gift of a portion of the property only were valid, it would not necessarily follow that the adoption also would be valid. The *wajib-ul-arz* is slient on these points, and as the statement referred to is not directly in point, its evidential value is very slight indeed.

(*b*) The *Riwaj-i-am* also is not in favour of the defendants. In the *Riwaj-i-am* prepared in 1887 and again in 1918 it was stated that the people are generally opposed to adoption. It is nowhere stated that a sonless proprietor has the sanction of custom to adopt a daughter's son.

(*c*) Before 1893 the view of the Punjab Chief Court as expressed in *Hari Singh* v. *Gulaba* (4) was that by the general custom of the Punjab the adoption of a daughter's son was valid, and it was on the basis of that ruling that the adoption of a daughter's son by a *sikh jat* of a village in the Kharar Tahsil, Ambala District, was declared valid in *Bhup Snigh* v. *Nihal Singh* (1), though the Commissioner has disallowed the adoption, holding that the evidence was most distinctly against any such custom. But the theory that there was a general custom in favour of the adoption of a daughter's son was not accepted by a Full Bench of the Punjab Chief Court in *Ralla* v. *Budha* (5) which lays down that the burden of proof was on the defendants who alleged the adoption of a daughter's son to be valid against the plaintiffs, and that generally—creed, tribe and locality apart—when a sonless man in any land-holding group which recognises a power to adopt asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power. Since the question of burden of proof has been set at rest by the above ruling, *Bhup Singh* v. *Nihal Singh* (1) and *Sunder Singh* v. *Mano* (2) have lost their value as judicial instances because in those cases the existence

(1) 129 P. R. 1882.
(2) 68 P. R. 1888.
(3) 66 Ind. Cas. 133; 2 L. 346; (1922) A. I. R. (L.) 234.
(4) 50 P. R. 1874.
(5) 50 P. R. 1893 (F. B.).

of the custom was presumed and not proved. The third case of *Gurbakhsh Singh* v. *Partapo* (3) was from the village Hassanpur (Tahsil Kharar) which is at a consfderable distance from the village Chunni Khurd. If the custom is found to prevail in Hassanpur, it does not follow that it obtains in Chunni Khurd also, the two villages being many miles apart. The plaintiff himself stated that Chunni Khurd is 400 years old and that there has been no gift or adoption in favour of a daughter's son in the village until the one now in dispute. In *Lalu* v. *Fateh Singh* (6), it was found that among the *jats* of Rupar Tahsil, Ambala District, the adoption of a daughtsr's son is invalid by custom.

In view of what has been stated above, it is clear that the defendants failed to prove the alleged custom and, therefore, this appeal fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

(6) 18 P. R. 1899.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 490 AND 491 OF 1924.

September 3, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

M. MARUTHAVANASWAMI *alias* SADASIVA PANDARASANNATHI AVERGAL—COUNTER-PETITIONER—PETITIONER

versus

SUBRAMANIA THAMBIRAN CALLING HIMSELF SUBRAMANIA DESIKA PANDARA SANNATHI—PETITIONER—RESPONDENT.

Madras Administration of Estates Regulation (III of 1802), s. 16 (7), scope of—Claim by more than one person—Jurisdiction of Judge.

Clause (7) of s. 16 of the Madras Administration of Estates Regulation, 1802, contemplates the case only of a single claimant appearing to claim the personal properties left intestate by a deceased person. [p. 416, col. 1.]

The duty of a Judge, if more than one claimant appears before him, is to refer the parties to a regular suit and not to give any decision acting under the Regulation. [*ibid.*]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Subordinate Judge, Mayavaram, in O. P. No. 60 of 1923, dated the 29th March 1924 and in I. A. No. 197 of 1924, in O. P. No. 60 of 1923, dated the 2nd May 1924.

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

Messrs. *T. R. Ramachandra Iyer*, *S. Muthiah Mudaliar* and *K. Narasimha Iyengar*, for the Respondent.

JUDGMENT.—These revision petitions have been filed in respect of two orders of the Subordinate Judge of Mayavaram, dated 29th March 1924 and 2nd May 1924. The proceedings before him were under s. 16, cl. (7) of Madras Regulation III of 1802 and the learned Judge by his first order directed that affidavit evidence should be adduced and by his second order refused permission to the petitioner before us to cross-examine the deponents to the affidavits.

The facts are shortly these :—The Pandara Sannathi of Dharmapuram Mutt died on or about 28th of October 1923. The Sub-Magistrate having jurisdiction over the locality locked and sealed the rooms containing some moveables belonging to the Mutt and sent up a report to the Collector of Tanjore and he directed the Sub-Magistrate to handover the keys of the rooms to the Subordinate Judge of Mayavaram who was requested by the Collector to take proceedings under Regulation III of 1802. The present petitioner who is the Pandarasannathi of Sringapuri Mutt put in a petition on the 5th November 1923 stating that as the late Pandarasannathi died without appointing a successor he as the head of a dependent Mutt was entitled to succeed. The respondent was a rival claimant who also filed a petition claiming that he was the rightful successor on the ground that he was elected Pandarasannathi of the Dharmapuram Mutt by the Thambirans of that Mutt. The petition of the petitioner was O. P. No. 58 of 1923 and the petition of the respondent was O. P. No. 60 of 1923.

The learned Vakil for the petitioner has contended that his petition is in the nature of an original petition and that the procedure applicable is that applicable to suits and that, therefore, he is entitled to ask that evidence should be taken *viva voce*. The arguments turned on the question to some extent whether the proceeding was a regular petition or an interlocutory application, but on the view we take of

the scope of the Regulation, we are of the opinion that these questions do not arise.

The Regulation in question deals with rules of Civil Procedure and contains also various other provisions. In the early part of the 19th century, this measure was considered quite adequate but later on a more elaborate system was devised and practically the whole Regulation has been repealed, its place being taken by the C. P. C., and the Civil Courts Act. Curiously enough a few sections have been left unrepealed although we are unable to discover any ground for the retention at any rate of a large portion of what has not been repealed.

Now, turning to the Regulation, we find that it contained 29 sections and that all of them have been repealed excepting s. 16, cls. (2) to (7). Section 2 referred to the filing of a complaint, that word being the equivalent of a plaint, and procedure was laid down in the succeeding sections in regard to trial of suits. Section 16, cl. (2) enacts that when a Hindu or a Mussalman dies leaving a Will and appointing an executor, Courts of Justice are not to interfere except upon a regular complaint brought against his executors for a breach of trust or otherwise.

The 3rd clause refers to the case of a Hindu or a Mussalman dying intestate but leaving an heir and the Courts are restrained from interference in such cases except upon a regular complaint. The 4th clause enacts that if there are more heirs than one to a person dying intestate and there is no disagreement the Courts are not to interfere without a regular complaint. But, if there are disputes between the several claiments on a regular suit being filed by the party out of possession, the Judge is required to take security from the party in possession and if the latter is unable to give security, the Judge may give possession to the plaintiff himself on his giving security. But this act of the Judge is merely an act of administration for the benefit of the heir who may eventually succeed in the suit. Then follows the 5th clause, the 1st part of which is merely a continuation of the 4th clause. If neither party is able to give security, an administrator is to be appointed for the management of the estate until the disposal of the suit.

Pausing here for a moment, we fail to see of what use these provisions are at the present day. Nobody would think of resorting to them because under the C. P. C., parties can obtain *interim* orders in regard to protection of property which is the subject of a suit.

Now we come to part 2 of cl. (5). Where there is no person authorised and willing to take charge of the landed estate of a deceased person, the Judge is authorised to appoint an administrator for its management until the legal heir to the estate or other person entitled, shall attend and claim the same. If the Judge is satisfied that the claim is well-founded, the Administrator shall deliver over the property to him with an account of the administration. This is the effect of cl. (5) part 2, but we have seen that when there are several claimants, the Regulation specially enacts in cls. (2), (3), (4), (5) and (7) that their rights are to be adjudicated on in a regular suit. But cl. (5), part 2 does not contemplate a suit and is it intended that under that clause if there are several claimants the Court is to give a decision although there is no suit. It seems to us that this construction would be contrary to the scheme of the Regulation. What is meant by part 2, cl. (5) seems to be that if there is a single claimant the Judge on being *prima facie* satisfied as to his title, is to direct the *interim* Administrator to transfer possession to him. It is not intended that if more than one claimant appears, the rights of the several claimants are to be decided without a suit. Under cl. (4) and 1st part of cl. (5), if one of the rival claimants is in possession, the title to the estate can be decided only in a suit. But if neither party is in possession (2nd part of cl. (5) applies then) is there anything to suggest that the Court is to decide without there being a suit?

We are not concerned with cl. (5), but with cl. (7). We have, however, construed the previous clause, because there can be no doubt that the same interpretation in this respect must be placed both upon cls. (5) and (7).

Clause (7) enacts, that the Judge on receiving information that any person had died intestate leaving personal property and there is no claimant to such property, shall adopt measures for its care and issue an advertisement "requiring the heir of the deceased or any person entitled to receive charge of his effects to attend and should any person attend and satisfy the Judge as to his title to the property, the

same is to be delivered up to him." Should no claim be preferred within 12 months, a report is to be transmitted to the Governor-in-Council. Clause (5), part 2, refers to real property and cl. (7) refers to personal property. But the scope of both the clauses seems more or less identical. In our opinion, cl. (7) (as cl. (5), part 2 does), contemplates the case only of a single claimant and the words occurring in the clause such as "heir of the deceased" and "any person entitled" also to a certain extent confirm our view.

The duty of a Judge, if more than one claimant appears before him is to refer the parties to a regular suit. He has no jurisdiction, in our opinion, to give any decision acting under the Regulation when more than one claimant appears and claims property under cl. (7) of s. 16.

As we have held that the Judge cannot decide the dispute at all, it is obvious we cannot direct him to take evidence *viva voce* or to permit the petitioner to cross-examine the deponents to the affidavits.

The Civil Revision Petitions, therefore, fail and are dismissed, but in the circumstances without costs.

V. N. V. *Petitions dismissed.*
Z. K.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 993 OF 1921.
June 26, 1923.
Present:—Mr. Justice Crump.
VISHNU DIGAMBAR PALUSKAR—PLAINTIFF
versus
B. B. & C. I. RAILWAY—DEFENDANTS.

Negligence—Railway Company—Injury to passenger—Burden of proof—Duty of Company—Contributory negligence.

The duty of a Railway Company is to exercise due care and skill in carrying passengers. It is not bound to carry passengers safely and securely, but to take all reasonable care that in the management of its trains the passengers are not exposed to undue danger. [p. 418, cols. 1 & 2.]

East Indian Ry. Co. v. *Kalidas Mukerji*, 28 C. 401; 28 I. A. 144; 5 C. W. N. 449; 3 Bom. L. R. 293; 11 M. L. J. 156; 8 Sar. P. C. J. 3 (P. C.) and *Gee* v. *Metropolitan Ry. Co.*, (1873) 42 L. J. Q. B. 105; 8 Q. B. 161; 28 L. T. 282; 21 W. R. 584, followed.

In a suit to recover damages for an accident due to the defendant's negligence, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it, but when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale. [p. 417, col. 2.]

Plaintiff, a passenger by one of the defendant Company's trains, was lying on the centre berth. A ladder which should ordinarily have been placed under the berth was placed in the rack above, but it could not be ascertained whether this was done by a servant of the Company or by one of the passengers. During the course of the journey the ladder fell down from the rack and injured the plaintiff who sued the Company for damages:

Held, (1) that the plaintiff was not in any way guilty of contributory negligence; [p. 418, col. 2.]

(2) that, on the other hand, it had not been established that the Company was guilty of negligence and that, therefore, the plaintiff's suit must fail. [p. 418, col. 1.]

FACTS.—Plaintiff was a passenger by one of the defendant's trains and was travelling in a second class compartment. He commenced his journey in the afternoon and occupied the middle lower berth in the compartment. As soon as the train started the plaintiff lay down on the berth and fell asleep. A wooden ladder was kept in the compartment for the convenience of passengers who had to occupy the upper berths during the night. During the day this ladder was kept under the middle lower berth. On the day in question, however, this ladder was folded and placed, by some person unknown, in a rack above the berth occupied by the plaintiff without being fastened to the rack or so secured as to obviate the danger of its falling down. A short time after the train had started, the ladder fell down on to the plaintiff, and caused him severe injuries on the head, which disabled him from continuing his journey. Plaintiff sued to recover damages from the defendant Company for the injuries done to him owing to the negligence of the Company or its servants in placing the ladder on the rack. The defendant Company denied negligence on their part and pleaded contributory negligence on the part of the plaintiff on the ground that he should have been aware of the position of the ladder and should have removed the ladder from the rack before he fell asleep.

Mr. *Kemp* (with him Mr. *Coltman*), for the Plaintiff.

Mr. *Campbell* (with him Mr. *Kanga*, Advocate-General), for the Defendants.

JUDGMENT.

Crump, J.—[After mentioning the facts of the case His Lordship proceeded:—] For the purposes of this case there are two alternatives. Either the person who placed

the ladder in the rack was in defendants' employ, or he was not. Is it possible in the circumstances to say that one hypothesis is more likely than the other? I am satisfied on the evidence of the Carriage Inspector Cantervischer that these ladders are intended to be kept under the berths. That is consonant with common sense. No responsible person would place an article of that kind in a rack such as we have here. I am also satisfied that the Company's servants would ordinarily remove a ladder from the rack if they found it there. It is possible that they might place it there temporarily while sweeping or washing the carriage, and that it might escape notice. On the other hand the train stands at the passenger platform for an hour and a half before it starts and any passenger can enter a compartment. Luggage is brought in by all kinds of people, passengers, their servants or the coolies employed by them, and a ladder under a berth is no doubt frequently much in the way when luggage has to be disposed of. I do not think I am bound to affect "a cloistered seclusion" about these matters. Everyone who travels on Indian railways knows quite well that these ladders are frequently placed by passengers or their servants, in the lavatories or on unoccupied berths in order to make room for luggage. In the present case it is impossible to exclude the possibility that some passenger entered the carriage and placed the ladder in the rack, and then transferred himself to another compartment on finding that the lower berths were occupied, or because he decided to join a friend elsewhere. Such things often happen.

In my opinion no analysis of the evidence can carry the matter further and I am unable to say that of the two hypotheses which I have propounded one is more likely than the other. This being so can it be said that negligence on the part of the defendants is made out? Clearly not: and unless the burden lies on the defendants to disprove negligence plaintiff must fail. It is no doubt urged that defendants were in any case negligent in allowing the train to start with the ladder in the rack. I will deal with that point later.

A considerable number of cases have been cited and to these I have referred, and to other cases also where the question of negligence has been discussed. Reference has also been made to Beven's work on Negligence, 3rd Edition, and to the article on "Negligence" in Halsbury's Laws of England, Volume XXI, para. 751. The question resolves itself into this—is this a case where the doctrine *res ipsa loquitur* is applicable? In other words, "do the facts speak for themselves" that is to say, can negligence be inferred from the fact of the accident? Upon this point Blackburn, J. in *Scott* v. *London St. Ketherine Dock Co.* (1) remarked: "The question depends on the nature and character of the accident." Now it is impossible to find two cases which are identical in point of fact—none at least has been discovered in which the facts are identical with those before me. Many of them are complicated by a consideration whether a case ought or ought not to be left to a Jury, and it is mainly with reference to this question that the maxim *res ipsa loquitur* is important. The question "can negligence be inferred"? is for the Judge. The question "ought negligence to be inferred"? is for the Jury [see *Metropolitan Railway Co.* v. *Jackson* (2)] or as is said in Pollock on Torts (11th Edition, page 453, footnote): "Strictly the Jurors have to say not whether negligence ought to be inferred, but whether, as reasonable men, they do infer it." Here both questions are for the Judge. Can negligence be inferred from the nature and character of this accident and would a reasonable man infer it. Practically no advantage is gained by separating the two questions.

Generally speaking, therefore, the reported cases are not of much assistance but there is one principle which may be stated:

"In some cases of *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it. But when the balance is even, the *onus* is on the party who relies on the negligence of the other to turn the scale."

This statement of the law is cited by Beven as a correct exposition (see page 126, foot-note 2) and indeed it appears to be so. Here is an accident. There are two hypotheses on which it can be explained. On the one defendant is liable: on the other he is

(1) (1865) 3 H. & C. 596; 34 L. J. Ex. 220; 11 Jur. (N. S.) 204; 13 L. T. 148; 13 W. R. 410; 140 R. R. 627; 159 E. R. 665.

(2) (1877) 3 A. C. 193; 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175.

not. Is it not clear that if, as here, the balance is even plaintiff must fail in the absence of affirmative proof of negligence: see *Cotton* v. *Wood* (3). Lord Halsbury's maxim applies *ei qui affirmat, non ei qui negat, incumbit probatio.* An illustration of the application of this maxim to a case where the cause of an accident was unknown will be found in the judgment of the Judicial Committee of the Privy Council in *McKenzie* v. *Chilliwack Corporation* (4).

It must be pointed out here that this is not one of that class of cases where injury is caused by a thing which was exclusively in the defendants' or their servants' control. Here, as has been said, other persons can and constantly do move these ladders in railway compartments. Therefore, all those cases which turn on that peculiar state of facts are here inapplicable.

In *East Indian Railway Company* v. *Kalidas Mukerji* (5), the essential facts are not dissimilar to those which we have here. The accident was caused by an explosion of some fire-works which were introduced into the compartment without the knowledge of the defendant Company's servants. There was a duty to prevent dangerous goods being carried. Here there was a duty to prevent dangerous articles being placed where they might fall upon passengers. But in that case their Lordships of the Privy Council say that it was not incumbent on the Railway Company to prove that they did not know the nature of the goods. Is it incumbent on them to prove that they did not know that the ladder was in the rack when the train started? I think not.

This brings me to the second ground on which it is suggested that defendants are guilty of negligence—that is to say, that it was their duty to see that there was no dangerous article in the rack when the train started. The case last cited is instructive as to the duty of a Railway Company towards its passengers. The duty is to exercise due care and skill in carrying passengers, or as Blackburn, J., says: "Railway Company are not bound to carry passengers safely and securely, at all events, but to take all reasonable care that in the management of their trains the passenger is not exposed to undue danger:" *Gee* v. *Metropolitan Ry. Co.* (6). Now the precautions taken by the Company, as explained by Cantervischer whose evidence was given in a fair and straightforward manner, are as follows. The main line trains are inspected on arrival the day before. They are again inspected when they are made up shortly before the train is brought into the passenger platform, and any ladders which are found in the rack or elsewhere are removed, and restored to their proper place under the centre berth. This is, I think, reasonable care. It can hardly be expected that the defendant Company should employ a kind of patrol to see that no dangerous articles are placed in the rack before the train starts. Indeed in this case it would be difficult to exclude the hypothesis that the ladder was placed in the rack after the train started. It is not my experience that passengers observe minutely all that passes in a fairly full compartment. And it would be hardly in accordance with human nature to expect that any one would admit that he placed the ladder in the rack.

The result, if I am right, must be that plaintiff's claim must fail whatever sympathy may be felt for him. As, however, the evidence has been fully recorded I propose to record my findings on the remaining issues also.

I may be wrong, but I find it difficult to treat the plea of contributory negligence seriously. It really comes to this that a party who lies down in a berth in a railway carriage is bound to make a minute examination of that which is over his head, and if he detects any object above him to assure himself that it is securely fastened in the place where it happens to be. The evidence of the plaintiff, his appearence, his actions left no doubt on my mind that he is, as he says, almost blind. But apart from that where is the contributory negligence? Even defendants' witness Delany never saw that the ladder was in the rack. The plea requires no further examination.

There remains one point only and that is the question of damages. As in the case of *Sorabji Harmusji* v. *Jamshedji* (7),

(3) (1860) 8 C. B. (N. S.) 568; 29 L. J. C. P. 333; 7 Jur. (N. S.) 168; 141 E. R. 1288; 125 R. R. 786.

(4) (1912) A. C. 888; 107 L. T. 570; 29 T. L. R. 40.

(5) 28 C. 401; 28 I. A. 144; 5 C. W. N. 449; 3 Bom. L. R. 293; 11 M. L. J. 156; 8 Sar. P. C. J. 3 (P. C.).

(6) (1873) 42 L. J. Q. B. 105; 8 Q. B. 161; 28 L. T. 282; 21 W. R. 584.

(7) 21 Ind. Cas. 705; 15 Bom. L. R. 959; 38 B 552.

there are three items to be considered. (1) Expenses (2) Pain and suffering (3) Loss of income.

On the first head plaintiff claims Rs. 200 and though there is no satisfactory evidence of the exact amount the sum might be accepted as reasonable. On the second head the amount claimed is Rs. 25,000 which is beyond reason. Plaintiff's witness Dr. Sathe says there was a cut on plaintiff's forehead $1\frac{1}{4}$ inch (long) $\frac{1}{4}$ inch (deep) one-eighth inch (wide) and for a day and a half there were signs of concussion. I fear that plaintiff's own account of his sufferings is grossly exaggerated. In the case I have cited Rs. 10,000 was allowed and the most cursory perusal of the report shows how very desperate were the plaintiff's injuries in that case. Rs. 1,000 wonld be a very liberal allowance under this head. As to the third head, loss of income, the total claimed is Rs. 29.800 in two items. Judging from Dr. Sathe's evidence it might be fair to allow three months' income. There is no satisfactory proof of any permanent injury. It appears that there was a considerable falling off in the number of students in the institution which may be ascribed to plaintiff's illness. No accurate estimate is possible. As to the amount of plaintiff's income his evidence is not borne out by the accounts which he has produced. And his prospective estimate of what he might have made at Indore is pure guess work.

Plaintiff's net income for the first eleven months of 1920 is shown in the statement prepared by defendants' witness. It has not been criticized in any way. In round figures the total is Rs. 15,000, or say Rs. 16,500 for the year. There is no doubt something to be added from the sale of books. In view of the marked rise in plaintiff's earnings it would not be unreasonable to estimate that he would have made a profit of Rs. 20,000 in 1921. On that basis plaintiff's loss of income for three months may be estimated at Rs. 5,000. The total damages, were defendants held to be liable, I should estimate at Rs. 6,200.

Suit dismissed with costs, including costs reserved if any.

Z. K. *Suit dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NOS. 1352 TO 1357 OF 1921.

August 27, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Jackson.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF CHINGLEPUT —DEFENDANT—APPELLANT

versus

V. K. RAMANUJACHARIAR AND OTHERS —PLAINTIFFS—RESPONDENTS.

Madras Revenue Recovery Act (II of 1864), s. 58—Revenue Settlement—Assessment, validity of—Classification as dry or wet—Enhanced rate, legality of—Suit for declaration, maintainability of.

Once a Land Revenue Settlement has been duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment, since the annual payment is incapable of increase during the period for which the Settlement is made. [p. 420, col. 2; p. 421, col. 1.]

Kandukuri Balasurya Prasadha Row v. *The Secretary of State for India*, 41 Ind. Cas 98; 40 M. 886; 33 M. L. J 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290; 44 I. A. 166 (P. C.), relied on

When once certain lands have been assessed as dry at a Revenue Settlement, they cannot within the period of 30 years during which the Settlement remains in force be re-assessed as wet. Such assessment being illegal and *ultra vires*, the party aggrieved is not debarred by the provisions of s. 58 of the Madras Revenue Recovery Act, from bringing a suit for recovery of the amount so illegally levied and for a declaration that such assessment is illegal. [p. 421, col. 1.]

Second appeals against the decrees of the District Court, Chingleput, in Appeal Suits Nos. 396 to 401 of 1919, preferred against those of the Court of the District Munsif, Poonamallee, in O. S. Nos. 468 to 470 and 503 to 505 of 1918 respectively.

Mr. *T.R. Venkatarama Sastriar*, (Advocate-General) with him Messrs. *K. Gopalaratnam*, *P. Narasimhachariar* and *K. Jagannatha Iyer*, for the Appellant.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

S. A. No. 1352 OF 1921.

Jackson, J.—Appeal from the decree in A. S. 396 of 1919 on the file of the District Court of Chingleput in O. S. No. 468 of 1918 on the file of the Court of the District Munsif of Poonamallee.

The plaintiff is *raiyat* holding certain lands which at the last Revenue Settlement

in Chingleput District, were assessed as dry. Since then, the assessment has been enhanced under orders of the Board of Revenue and the plaintiff has brought this suit against the Secretary of State for India for a declaration that such enhancement is illegal, for the recovery of the amount so levied, and for a permanent injunction restraining the defendant from levying such enhanced rates in future. The Original Court and First Court of Appeal have decreed the suit as prayed for by the plaintiff and the defendant brings this second appeal.

The lands in question are of the sort described as "*Achukattu*." They are surrounded by high *bunds* which in the wet season retain sufficient water for raising a paddy crop. At the Settlement of 1909, the bulk of these lands was classified as '*Manavari*' or 'rain fed' and charged rather more than ordinary dry, and less than ordinary wet. But certain numbers lying within the catchment area of tanks were held to be objectionable as interfering with the supply of water, and they were still classed as ordinary dry. Had they too been transferred to '*Manavari*,' Government would practically have conceded the claim of these lands to enjoy additional water facilities, when that claim was held to be objectionable. The Government Order No. 2240, Revenue, dated the 14th August 1909 (page 36 of the printed documents) lays down that those which lie so close to the foreshore of a Government tank as materially to interfere with its supply should be entered in a special list and left to be dealt with by the Collector in accordance with the existing district practice as embodied in Government Order No. 573, Revenue, dated the 24th June 1905. In this Government Order (page 17 of the printed documents) the procedure enjoined is that water-rate should be charged if the *Achukattu* intercepts water which would otherwise flow into a Government irrigation work. Accordingly in the Settlement Notification dated 1st June 1910, Ex. A (at page 45 of the printed documents) it is declared that *Achukattus* which materially interfere with the supply of a Government irrigation work will be retained as ordinary dry, and will be dealt with by the Collector in accordance with the practice obtaining in the District.

The Collector proceeded to levy water-rate upon these lands and several appeals were preferred to the Board of Revenue. The Board acting under confidential instructions from Government ruled that such water-rate was not leviable under the Irrigation Cess Act, but the lands concerned were in accordance with the orders of Government liable to enhanced assessment. An appropriate enhancement would be the difference between the wet and dry rates. "The water-rates levied will be refunded but an enhanced assessment will be charged for the wet "*Achukattu*" cultivation and this should be the corresponding wet assessment minus the dry assessment already levied." Exhibit I (page 49 of the printed documents). In conformity with this resolution the Collector enhanced the rates on the plaintiff's lands as set forth in para. 7 of the plaint.

The point for determination is whether such enhancement is legal.

The defendant contends that the provision in the Notification Ex. A "will be dealt with by the Collector in accordance with the practice obtaining in the district" allows a large discretion. The practice, no doubt, was to charge water rate if a paddy crop was raised, but since such charges are not rightly leviable under the Irrigation Cess Act, an enhanced assessment practically amounts to the same thing, and can be described as "in accordance with the practice obtaining in the district". The short answer is that such practice never did obtain nor could obtain. Once a Settlement has been duly notified by Government, the Collector acting under the order of the Board of Revenue cannot vary the rates of assessment. The defendant relies upon para. 36 of the Notification Ex. A.

The thirty years limit does not apply to lands the irrigation of which may be improved by Government subsequent to the Settlement nor to lands which may be converted from dry to wet" or "*Manavari*." Conversion here of course refers to physical conversion. It does not mean that Government reserve to themselves the right at any time to convert the classification of a land as dry to one of wet. If that were so, there would have been no Settlement.

It is claimed, however, apart from the Notification that Government are at liberty to revise any assessment within the settlement period of 30 years (4th ground of appeal etc). But in the light of the Privy Council ruling in *Kandukuri Balasurya Prasadha Row* v. *The Secretary of State for*

India (1), this claim was not seriously pressed in argument. The Judicial Committee rules that "the annual payment is incapable of increase during the period for which the Settlement is made:" page 897.*

It is useless to say that for all practical purposes the enhanced assessment is the same as the water-rate or to urge that if the Settlement is allowed to stand unrevised, unobjectionable "*Achukattus*" classed as "*Manavari*" will actually pay a heavier assessment than objectionable *Achukattus* which are classed as dry. An executive act may be based on logic and common sense and yet be nonetheless illegal. The finding of the lower Courts must be upheld that when once these lands have been assessed as dry at the Revenue Settlement, they cannot within the period of 30 years during which the Settlement remains in force be re-assessed as wet. Such assessment being illegal, and *ultra vires* the plaintiff is not debarred from bringing this suit by the provisions of s. 58 of the Revenue Recovery Act.

The appellant further complains that no decree should have been issued in regard to the collections for *Fasli* 1326 for which no notice was given and no injunction should have been granted. In cases of this sort, Government does not resort to technicalities and may be trusted to see that justice is done in regard both to *Fasli* 1326 and to subsequent *faslies*. There is no necessity, therefore, to modify the decree of the lower Appellate Court as regards *Fasli* 1326, nor any need to grant an injunction. The decree, therefore, will contain no injunction and is otherwise confirmed. The appeal in the main fails. Appellant will pay costs of the respondent in this appeal.

The other Second Appeals Nos. 1353 to 1357 of 1921 follow with costs to respondents.

Devadoss, J.—I agree.

V. N. V. *Appeals dismissed.*

(1) 41 Ind. Cas. 98; 40 M. 886; 33 M. L. J. 144; 22 M. L T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290; 44 I. A. 166 (P. C.).

*Page of 40 M.—[*Ed.*]

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1804 OF 1921.
July 21, 1924.

Present:—Mr. Justice Campbell and Mr. Justice Zafar Ali.

MUHAMMAD ABDUL LATIF AHMAD KHAN—DEFENDANT—APPELLANT

versus

LADHA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 73—Contract for lease of immoveable property—Lessor, failure of, to give possession—Damages for breach of contract.

Where a lessor of immoveable property breaks the contract of lease through inability to give possession, he is legally bound to pay damages to the lessee which must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the lessor liable to damages.

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 21st April 1921.

Mr. *Niaz Mohammad* (with him Mr. *Umar Bakhsh*), for the Appellant.

Mr. *Abdul Rashid* (with him Mr. *Norman Edmund* for Mr. *Oertel*), for the Respondents.

JUDGMENT.—The admitted facts of this case are that on the 9th of August 1919 the defendant Abdul Latif by a written deed agreed to lease to the plaintiffs four squares of land, which he stated had been taken by him on lease from his brother Niaz Rasul Khan, and 33 *kanals* 7 *marlas* of other land. The lease was for three years, and the rent was Rs. 2,200 per annum for the squares and Rs. 100 for the other land. We are not concerned with the other land, but Abdul Latif failed to give possession of the four squares, and consequently the plaintiffs lodged the present suit for damages for breach of contract. They alleged that the two brothers Abdul Latif and Niaz Rasul Khan acted in collusion to cheat them and they joined them both as defendants and claimed Rs. 5,400 as damages.

It is admitted that the four squares in question were separately leased by Niaz Rasul Khan for three years at Rs. 3,500 to one Phiraya Ram on the 29th of January 1920.

Abdul Latif pleaded that there was no collusion between him and his brother, that the latter had withdrawn from his agreement to lease the squares to him (Abdul Latif, and that for that reason he was un-

able to give possession to the plaintiffs. He said that he never did anything to resile from his undertakings in the written agreement and that he was not liable for damages.

Niaz Rasul Khan denied that he had ever leased the squares to his brother and admitted that he had leased them to Phiraya Ram. In order to prove the alleged lease to him by Niaz Rasul Khan, Abdul Latif produced a letter, dated the 28th June 1919. It was held by the Trial Court that this letter, which purported to be a lease for three years, was inadmissible in evidence for want of registration and that the alleged lease could not be proved otherwise. This decision is not contested before us, and it disposes of the main issues in the case. For the rest the lower Court held that whether or not Abdul Latif acted in collusion with his brother and whether or not his plea was correct that he himself offered no obstruction to the plaintiffs taking possession he had clearly committed a breach of contract and was liable to pay damages for his failure to fulfil his absolute obligation to deliver possession to his lessee. Damages were assessed on the amount by which the same squares were leased to Phiraya Ram, and the Court held that the present value of the difference between Phiraya Ram's rent and that which the plaintiffs were to pay to Abdul Latif was a fair measure and gave the plaintiffs a decree for Rs. 3,316.

Against this decision Abdul Latif has appealed. In his memorandum of appeal he entered his brother Niaz Rasul Khan as co appellant, but it is admitted that this was a mistake. We have struck out Niaz Rasul Khan's name as appellant and since there has been no attempt at any stage to make him a respondent he is not a party to the appeal.

The argument of the learned Counsel for the appellant is based mainly on certain passages in English text books on the law of damages, derived from the rule laid down in *Flureau* v. *Thornhill* (1) which was later affirmed by the House of Lords in *Bain* v. *Fothergill* (2). That rule was to the effect that if a person enters into a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages, beyond the expenses he has incurred, by an action for the breach of the contract; he can only obtain other damages by an action for deceit. It is argued that in the present case, since Abdul Latif acted in perfect good faith and genuinely believed that his brother had leased the squares to him, *a fortiori* the plaintiffs could not recover damages against him but could only claim a refund of any money advanced on the transaction and interest thereon. No such advance having been made in the present instance, it was submitted that the suit should have been dismissed. It has been held, however, that the above rule is peculiar to English Law and is an anomaly due to the complexities of English titles and this has been made quite clear in a Full Bench decision of the Madras High Court reported as *Adikesavan Naidu* v. *Gurunatha Chetti* (3). The finding there was that a manager of a joint Hindu family, who has sold immoveable property belonging to himself and the minor members of the family, is personally liable under s. 73 of the Indian Contract Act for damages for failure to perform the contract when it is found that it is not binding on the minors. It was held that both parties had acted in perfectly good faith, but it was laid down that the law of India as set forth in the Indian Contract Act as to the right to damages for breach of contract to sell immoveable property is different from that in England. One of the learned Judges pointed out that s. 73 of the Indian Contract Act was very wide in its terms as regards the right to compensation for breach of any kind of contract, and that if *A* chooses to contract to sell to *B* full ownership rights in a property and breaks that contract through inability (not attributable to act of God, etc.) to convey the full title, he is legally bound to make compensation to *B* under s. 73. In *Ranchhod Bhavan* v. *Manmohandas Ramji* (4), Mr. Justice Macleod held that the rule in *Flureau* v. *Thornhill* (1) is not law in this country, and he pointed out that when the Contract Act was passed *Bain* v. *Fothergill* (2) had not been decided, and that the rule in *Flureau* v. *Thornhill* (1) which was subsequently restricted by *Bain* v. *Fothergill* (2) had already been limited by subsequent decisions, and he observed

(1) (1776) 2 W. Bl. 1078; 96 E. R. 635.
(2) (1874) 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 23 W. R. 261.
(3) 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425; 22 M. L. T. 300. (F. B.).
(4) 32 B. 165; 9 Bom. L. R. 1087.

that since s. 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages.

These pronouncements, in our judgment, are sound and apply to the present case. It is true that there is no mention of damages in the event of breach in the record of the contract with which we are dealing, but this does not mean that s. 73 of the Indian Contract Act is not to be applied, and we consider that the lower Court was perfectly right in applying it.

So far as the actual sum decreed is concerned, the learned Counsel for the appellant has attempted to reduce it by relying upon the statement of a certain witness named Chhajju Ram. We are not, however, impressed with Chhajju Ram, and in any case if the whole of his statement be read the difference in the loss to be assumed as suffered by the plaintiffs would merely amount to Rs. 45 per annum in comparison with the sum assessed. It is not quite clear exactly how the figure of Rs. 3,316 has been arrived at by the lower Court and there appears to be a slight miscalculation to the detriment of the plaintiffs ; but since there is no evidence on the printed record of the terms of Phiraya Ram's lease we are not disposed to increase the amount of the decree on the plaintiffs' cross-objections.

These cross-objections assert that the lower Court should have decreed the whole amount sued for, *viz.*, Rs. 5,400, a claim which is not seriously pressed. It is, however, contended that the lower Court should not have discounted the difference between the two annual rents for three years and decreed damages only at the present value. In our opinion the sum allowed is fair and reasonable and we decline to increase it.

The appeal is dismissed with costs and the cross-objections are also dismissed.

K. S. D. *Appeal and cross-objections dismissed*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 77 OF 1924.

September 10, 1924.

Present:—Mr. Dalal, J. C.

ZULFIQAR AHMAD—DEFENDANT—APPLICANT

versus

ROBERT ELLIET—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Finding of fact—Revision—High Court, power of—Negotiable Instruments Act (XXVI of 1881), s. 87—Pro-note, alteration in, after execution, effect of—Liability, whether discharged—Suit on pro-note—Admission of defendant, effect of.

Where a finding of fact is recorded by a Small Cause Court with hesitation, the High Court is entitled to satisfy itself, under s. 25 of the Provincial Small Cause Courts Act, whether the decree passed by the Small Cause Court is according to law.

Under s. 87 of the Negotiable Instruments Act where an alteration is made in a pro-note after its execution without the knowledge or the consent of the maker the pro-note becomes void, but the alteration has not the effect of discharging the liability of the maker. [p. 423, col. 2; p. 424, col. 1.]

Where in a suit on a pro-note which has been altered subsequently to its execution without the knowledge or consent of the defendant, the defendant admits the claim but alleges that the debt is re-payable in a certain manner the suit may be decreed in accordance with the admission, without any reference to the pro-note. [p. 424, col. 1.]

Gurchandra Das v. *Prasanno Kumar Chand*, 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783, distinguished.

Revision against the decree of the Additional Judge, Small Cause Court, Lucknow, dated the 11th April 1924.

Mr. *Ali Mohammad*, for the Applicant.

Mr. *B. N. Shargha*, for the Opposite Party.

JUDGMENT.—It was first objected on behalf of the plaintiff-respondent that no such application as the present lay under s. 25 of the Provincial Small Cause Courts Act as there were clear findings of fact by the Subordinate Court. This Court has to satisfy itself whether the decree of the lower Court is according to law. The finding of fact has been recorded with hesitation. There is a change made in the pro-note in suit at the place where the rate of interest is inserted. Something was written first and then erased and ½ entered there. The defence was that the word 20 was originally entered and the plaintiff had made the alteration. The defendant admitted having received Rs. 200 and his plea was that the money was repayable in two years at the rate of Rs. 20 per month. The pro-note was executed on 3rd December 1923 and the suit was instituted on 15th February 1924, so if the defence

was accepted only Rs. 40 would be due at the time of the institution of the suit. In one place the learned Judge states that the alteration was not made subsequent to the execution of the document but at another place he does not insist upon this finding and gives reasons why the suit should be dereed even if the alteration were made subsequent to execution. There is thus no clear finding of fact and this Court is entitled to interfere if it thinks that the full amount cannot be decreed in the case of alteration being made subsequent to execution. I think that this Court is entitled to interfere.

What the case of the defendant-applicant is, is already explained. He goes further and says that because of the change he is exempted from all liability. Such does not appear to be the law. Under s. 87 of the Negotiable Instruments Act No. XXVI of 1881 the instrument is rendered void but in the first para. nothing is said as to the alteration amounting to a discharge of liability. In the case of alteration being made by an indorsee the indorsor is discharged from liability. This provision clearly indicates that there will be no such discharge in any other case. The claim is admitted by the defendant and he alleges that the debt is re-payable at Rs. 20 per mensem. On that contract and on his admission, without any reference to the pronote, he is liable to re-pay the debt in the manner stated by him. The case quoted by the learned Counsel: *Gurchandra Das* v. *Prasanno Kumar Chand* (1) does not support the proposition of law advanced by him. In that case the plaintiff wanted to use the pro-note as an acknowledgment of a debt to save the suit from limitation. Obviously a void document cannot be accepted as an acknowledgment. Here there is no necessity for the plaintiff to make use of the pro-note in any manner, having regard to the defence. It is obvious that the alteration was made and this is admitted on behalf of the plaintiff also. There is no reason to believe that it was made prior to execution. There was no such allegation made by the plaintiff. No mention of the alteration was made in the plaint itself. It was concealed until detected in Court. I hold, therefore, that the alteration was made subsequently and that the instrument is void.

(1) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783.

In these circumstances I accept the defence. As pointed out Rs. 40 was due at the time of the institution of the suit and the claim for the balance was premature. Receipt of Rs. 15 is admitted in para. 2 of the plaint. The suit, therefore ought to have been decreed for Rs. 25 only.

In the result I reduce the amount of the decree to Rs. 25 and allow no costs to the plaintiff. The defendant shall receive no costs of the lower Court but shall receive costs on the amount of success here. The defendant has admitted his liability to pay at the rate of Rs. 20 per month and that liability will continue.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 5240 OF 1922.

March 1, 1923.

Present:—Mr. Justice Fawcett,

TYEBBHAI ESSUBHAI THANAWALLA —PLAINTIFF

versus

ABDUL HUSEIN TYEBALLY—DEFENDANT.

Arbitration—Proceedings, nature of—Failure to hear parties—Misconduct.

The enquiry before an arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts. In the ordinary course, at the appointed time and place the parties appear with their witnesses to support their respective cases. [p. 425, col. 1.]

Ganga Sahai v. *Lekhraj Singh*, 9 A. 253; 5 Ind. Dec. (N. S.) 604 and *Amir Begam* v. *Badr-ud-din Husain*, 23 Ind. Cas. 625; 36 A. 336 at p. 343; 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 17 O. C. 120; 16 Bom. L. R. 413; (1914) M. W. N. 472; 16 M. L. T. 35; 27 M. L. J. 181; 19 C. L. J. 494 (P. C.), followed.

If the parties are not given notice of any meeting, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators. [*ibid.*]

There must be clear justification appearing, before the Court can allow a contention that the arbitrator had power to decide without hearing the parties. [p. 425, col. 2.]

Johnston v. *Cheape*, (1817) 5 Dow. 247; 16 R. R. 114; 3 Scots. R. R. 374; 3 E. R. 1318 and *French Government* v. *Owners of SS. Tsurushima Maru*, (1921) 37 T. L. R. 961, discussed and distinguished.

FACTS.—The matters in dispute between the parties were referred to the arbitration of two Engineers who appointed an umpire. The plaintiff's Legal Adviser suggested to one of the arbitrators that before giving the award, they should call both the

parties and allow them to state their respective cases. The arbitrators, however, gave their award without hearing the parties. Thereupon the plaintiff applied to have the award set aside on the ground of misconduct.

Mr. *Setalvad*, for the Plaintiff.

Mr. *Munshi*, for the Defendant.

JUDGMENT.—[After stating the facts of the case his Lordship proceeded:—] The plaintiff alleges that he was anxious to be heard by the arbitrators and to lay before them his evidence on the question of damages to be awarded to him.

The ordinary rule is that the enquiry before the arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts. In the ordinary course, at the appointed time and place the parties appear with their witnesses to support their respective cases, as stated in Russell on Arbitration, 10th Edition, page 379. This rule has been applied in India. I need only refer to the leading case of *Ganga Sahai* v. *Lekhraj Singh* (1) and the Privy Council case of *Amir Begam* v. *Badr-ud-din Husain* (2), where it is said :—

"If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator."

Therefore, if the parties are not given notice of any meeting, in the ordinary case that would clearly amount to misconduct on the part or the arbitrators. The only question here is whether the case is an exceptional one to which this ordinary rule does not apply. Mr. Munshi for the defendant relies upon the case of *Johnston* v. *Cheape* (3). The submission in that case recited that the arbitrator had been appointed on account of his skill and knowledge of the subject, and it was held that the arbitrator was justified in refusing to receive certain evidence offered by one of the parties, if taking all the matters alleged to be facts into consideration, with his own local knowledge to guide him and all the circumstances in his view, he felt that such facts would have no effect upon his determination.

That case scarcely applies here. For, first of all, there is no recital either in the consent terms or in the order of reference, which was approved by the parties, that the arbitrators were appointed on account of their skill and knowledge of the subject. Secondly, this is not a case where the arbitrators merely refused to hear evidence, but a case where they refused to hear the parties at all. Therefore, this and similar rulings about arbitrators not examining witnesses do not, in my opinion, suffice to justify the departure from the general rule I have referred to. Then there is the further point that the order approved by the parties clearly contemplates the arbitrators examining witnesses, so that it cannot be said that the terms of the order show that the parties had agreed that the arbitrators should decide the matter without hearing the parties. No doubt there is the qualification "if they think fit," but I am inclined to agree with Mr. Setalvad's contention that this relates merely to the question of examining the witnesses upon oath, etc. As bearing on this matter, I may refer to *French Government* v. *Owners of SS. Tsurushima Maru* (4). In that case it was proved to be the present practice in commercial Arbitrations for the arbitrators to act as Advocates unless the parties gave notice of their desire to attend in person or by Solicitors or by Counsel; and as the arbitration clause there provided that the arbitrators should be "commercial men", it was held no evidence of misconduct that the umpire, without hearing the parties, had made his award on the case as presented by the arbitrators. But that is a very different case to this one, and it goes to show that there must be clear justification appearing, before the Court can allow a contention that the arbitrator had power to decide without hearing the parties.

Therefore, though I am reluctant to interfere with an award of this kind, I think that the omission did clearly amount to "misconduct," rendering the award liable to be set aside, under para. 15 of Sch. II of the C. P. C.

As the parties do not agree to the matter being remitted to the arbitrators for re-consideration, the award is set aside with costs.

K. S. D. *Order accordingly.*

(1) 9 A. 253; 5 Ind. Dec. (N. S.) 604.

(2) 23 Ind. Cas. 625; 36 A. 336 at p. 343; 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 17 O. C. 120; 16 Bom. L. R. 413; (1914) M. W. N. 472; 16 M. L. T. 35; 27 M. L. J. 181; 19 C. L. J. 494 (P. C.).

(3) (1817) 5 Dow. 247; 16 R. R. 114; 3 Scots. R. R. 374; 3 E. R. 1318.

(4) (1921) 37 T. L. R. 261.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 181 OF 1923.
October 14, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

MOHAN LAL—PLAINTIFF—APPELLANT

versus

Musammat DHAN KUAR AND OTHERS—DEFENDANTS--RESPONDENTS.

Hindu Law—Mortgage by widow—Onerous conditions—Declaration, suit for, by reversioner—Necessity for loan—Conditions not justified—Relief.

Where in a suit by the reversioner of a deceased Hindu for a declaration that a deed of mortgage executed by the widow of the deceased is invalid and void as against the plaintiff, the Court finds that there was necessity for the loan but that there was no necessity for the onerous conditions laid down in the deed, the plaintiff is entitled to a declaration that the conditions shall not be binding upon him.

Radha Kishun v. *Jag Sahu*, 80 Ind. Cas. 781; 51 I. A. 278; (1924) A. I. R. (P. C.) 134; 5 P. L. T. 434; 26 Bom. L. R. 732; 20 L. W. 285; 47 M. L. J. 329; 2 P. L. R. 259; 35 M. L. T. 177; 11 O. L. J. 652; 22 A. L. J. 959; L. R. 5. A. (P. C.) 129; 29 C. W. N. 293; 10 O. & A. L. R. 1384 (P. C.), followed.

Appeal against a decree of the Subordinate Judge, Kheri, dated the 19th February 1923, preferred against that of the Munsif, Kheri, dated the 3rd October 1922.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Mohan Lal Tiwari*, for Respondents Nos. 2 and 3.

JUDGMENT.—This is the plaintiff's appeal and it arises out of a suit for a declaration that the deed of mortgage dated the 17th June 1921 executed by *Musammat* Dhan Kuar defendant No. 1 in favour of Lalta Prasad defendant No. 3 for a sum of Rs. 1,000 is invalid and void as against the plaintiff. The mortgage in question relates to a two *biswas* 18 *biswansis zemindari* share of *mahal* Ram Sahai in *Mauza* Aliapur, Pargana Aurangabad, District Kheri. This share is a part of the larger share of 4 *biswas* 18 *biswansis* which belonged to one Kedar Nath, who died about three years before the institution of the present suit. The defendant No. 1, *Musammat* Dhan Kuar, is Kedar Nath's widow. She executed the mortgage in dispute. The plaintiff is the nearest reversioner entitled to succeed to the estate of Kedar Nath on the death of his widow. The plaintiff challenged the deed of mortgage on various grounds. The money borrowed under the deed in question was borrowed for the purpose of meeting the expenses of the marriage of the infant granddaughter of Kedar Nath. Both Courts are agreed that that was a legal necessity for which the mortgage could validly be made and that finding is not challenged in second appeal. The argument in this Court, however, is that so many and so much of the conditions of the deed of mortgage as are onerous in their nature are not proved by the creditor mortgagee to have been procured under the pressure of any legal necessity on the estate of the deceased Kedar Nath. The judgment of the Court of first instance deals with this argument but refuses to give effect to it for the reason that the present suit was not a suit for redemption.

The conditions of the deed of mortgage against which the attack has been made are as follows:—

(1) Term of the mortgage twenty years certain.

(2) Possession over the mortgaged property in lieu of Rs. 400 only.

(3) The balance of Rs. 600 to carry interest at 12 per cent. per annum compoundable six-monthly at the same rate.

(4) If no redemption on the expiry of twenty years a further security as against redemption for another ten years.

(5) Foreclosure on the expiration of the last mentioned period of ten years.

The Court of first instance is of opinion that these terms are onerous. I accept that opinion. The creditor has entirely failed to show any legal necessity for such terms. The same Court further points out that the income of the mortgaged property is about Rs. 180 a year while the interest at the rate of 12 per cent. per annum on the sum borrowed amounts to Rs. 120 only. Bearing this fact in mind it is perfectly clear to me that the conditions of the deed of mortgage are wholly oppressive. The view taken by the Court of first instance that no relief can be granted to the plaintiff in this suit is in my judgment justified. The conduct on the part of the plaintiff clearly asking for a declaration as to the invalidity of the mortgage as a whole. Surely if the whole cannot be declared to be invalid there is no reason why that part of it, which is invalid cannot be so declared. Indeed the relief if now refused will never be open again to the plaintiff.

The argument on behalf of the respondents is that there was no specific issue raised and no suggestion to the legal necessity in respect of the various terms of the mortgage transaction erroneous.

But the wider issue which the pleadings raised as to the legal necessity or otherwise of the mortgage as a whole embraces the point now being considered. This was pointed out repeatedly by their Lordships of the Privy Council in a series of decisions, the last of which is *Radha Kishun* v. *Jag Sahu* (1). But apart from this the judgment of the Court of first instance clearly shows that the parties were well aware of the legal situation and the point is indeed discussed at some length by the learned Munsif. I am, therefore, of opinion that the plaintiff's suit should not have been dismissed in its entirety.

The appeal is accordingly allowed, the decrees of the lower Courts are set aside and the plaintiff is granted a declaration to the effect that the terms of the deed of mortgage mentioned in the earlier part of this judgment are not binding on the plaintiff. The result of this declaration of course is that the mortgage stands as a usufructuary mortgage in lieu of the entire amount of Rs. 1,000 redeemable according to law.

In view of the fact that the point which has now succeeded was not prominently put before the lower Appellate Court I think in the interest of justice that the parties shall bear their own costs in this Court and in the Court below but that the plaintiff shall receive his two-thirds costs of the Court of first instance from the defendants.

Z. K. *Appeal allowed.*

(1) 80 Ind. Cas. 791; 51 I. A. 278; (1924) A. I. R. (P. C.) 184; 5 P. L. T. 434; 26 Bom. L. R. 732; 20 L. W. 285; 47 M. L. J. 329; 2 P. L. R. 259; 35 M. L. T. 177; 11 O. L. J. 652; 22 A. L. J. 959; L. R. 5 A. (P. C.) 129; 29 C. W. N. 293; 10 O. & A. L. R. 1438 (P. C.).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 125 OF 1917.

June 30, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

VALLABHDAS NARAYANJI AND ANOTHER —CLAIMANTS —APPELLANTS

versus

THE SPECIAL LAND ACQUISITION OFFICER FOR RAILWAYS AND ANOTHER— OPPONENT AND COUNTER-CLAIMANT— RESPONDENTS.

N. 16 B T. 3

Land Acquistition—Khoti *village*—Bhati *lands*—*Occupiers, whether can acquire title by prescription*—*Compensation*—*Apportionment between* khot *and occupiers.*

Certain *bhati* land in a *khoti* village was acquired under the Land Acquisition Act. It appeared that the villagers had been accustomed to cut grass on the waste lands if it was required for feeding their animals or for sale, and had enclosed such lands and sold them by registered deeds to the knowledge of the *khot* who never interfered with the exercise of these rights:

Held, (1) that the villagers acquired proprietary rights in the lands so enclosed and dealt with and were, therefore, entitled to compensation; [p. 429, col. 1]

(2) that the compensation money should be divided in the proportion of one to the *khot* and two to the occupier. [p. 428, col. 1; p. 429, col. 2.]

Vasudev Bhaskar Pendse v. *The Collector of Thana*, (1879) P. J. 274 and *Harischandra* v. *Sorabji*, (1897) P. J. 9, distinguished.

The acquisition of rights by prescription is open in law to villagers in *khoti* villages against the *khot*, whatever his rights under the lease from Government may be. [p. 429, col. 2.]

First appeal against the decision of the Assistant Judge, Thana, in Reference No. 5 of 1915.

Messrs. *R. W. Desai* and *J. G. Rele*, for the Appellants.

Mr. *W. B. Pradhan*, for the Respondent.

Mr. *Bahadurji*, Acting Advocate-General (with him Mr. *S. S. Patkar*), for the Crown.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of the Assistant Judge of Thana in Reference No. 5 of 1915. In 1910 a strip of land on the east side of the G. I. P. Railway between Kurla and Thana was notified for acquisition in order that the line might be widened. This Reference refers to a portion of that strip situated in the Vikhroli village, and the lands in other companion References are all similar lands either in this village or in the village of Kanjur through which the line passes.

* * * * * *

With regard to the apportionment of the compensation in those cases in which the claimants had proved that they were in occupation of *bhati* lands, in the proportion of one to the *khot* and two to the occupant, the *khot* claims to be entitled to the whole of the compensation, whether he was in occupation of the lands or not. This is a question which seems to have arisen, and must always necessarily be arising, in Salsette, in cases of compulsory acquisitions, because there have been a number of instances in Salsette where what may be called *khoti* grants have been made in old times by Government to

various individuals in order to encourage better cultivation in the villages granted, and it has come to be understood that with regard to *bhati* lands the compensation money should be awarded in the proportion of one to the *khot* and two to the occupants. It has been thought on principles of equity that the compensation money should be apportioned in this way, although the occupants may have proved that they had the right to occupy the grass lands and retain the whole of the produce without paying any assessment to the *khot*. That being the case, I see no reason why any alteration should be made in the apportionment of compensation in those References in which it has been proved that the lands in Reference were *bhati* lands in the occupation of particular individuals who claimed the rights of occupancy.

An enormous amount of learning seems to have been devoted to this case on the part of the legal advisers on both sides, as I see that this question how the compensation should be apportioned was argued for twenty days before the Assistant Judge, and I do not know which to admire most, the patience of the Judge or the ingenuity of the learned Counsel. But it seems to me that a great deal of the time taken up might have been saved if the parties had really considered what was the real issue. Most of the arguments on the issues which were raised by the Assistant Judge appear to me to have been purely academical. There was no necessity to construe Bombay Regulation I of 1808, nor was there any necessity to consider clause by clause the lease to the *khot* of the villages of Vikhroli and Kanjur. Whatever rights the *khots* acquired under the lease between themselves and Government in 1837 to the waste lands in these villages, even assuming for the purposes of this case that they became absolute proprietors of the soil, that would not prevent other persons acquiring rights against the *khot* either permanent or otherwise under the general law.

I may take the opportunity here of pointing out how a great deal of confusion has arisen in these cases and other similar cases which have come before the Courts by the use of the word "*warkas*." Evidently the word "*warkas*" was originally applied to that land in the neighbourhood of rice lands from which the villagers procured from times immemorial rough grass and branches for the purposes of *rab* burning on the rice fields, and it is admitted that although the villagers or *sutidars* in occupation of a particular area of rice land have a right to collect *rab* materials from the adjacent waste lands, they have no proprietary interest on account of that in the soil, so that in the case of those lands it might well be, if they were compulsorily acquired, the villagers or *sutidars* would have no right to any part of the compensation. The case of *Vasudev Bhaskar Pendse* v. *The Collector of Thana* (1) has been referred to as showing that the villagers have no rights whatever in any waste lands, for whatever purpose they are used. But what was decided in that case appears at page 286:—"The general conclusions at which we have arrived are these, *viz.*, that the holders of rice fields in the Konkan, whatever may be their tenure of such fields, are not proprietors of the soil in the '*warkas*' lands held by them: and that they are not entitled either by custom, or prescription, or, (so far as appears in the present case), by any grant or recognition on the part of the Government to cut down teak or other specially reserved trees growing on '*warkas*' lands of which they are the occupants. The plaintiff, therefore, cannot have a decree declaring him entitled to cut down such trees." So that the distinction between *warkas* land, which could be considered as appertaining to the cultivation of rice fields, and waste lands producing grass, which are better styled *bhati* lands, was not dealt with in the judgment. So it seems to me that, that is a very good reason why the decision in *Harischandra* v, *Sorabji* (2) is not an authority in the case now before us. The learned Judges considered that the question before them was concluded by the decision in *Vasudev Bhaskar Pendse's case* (1). They say: "*Warkas* lands are waste lands, and are, therefore, included in the grant made by the State of waste lands to the original grantee. The right to take *rab* from these lands for manuring rice lands confers no title to the soil or the trees growing in it, which remain the property of the grantee." Therefore, in that case the Court was not consider-

(1) (1879) P. J. 274.
(2) (1897) P. J. 9.

ing *bhati* lands but *warkas* lands proper.

This question arose in First Appeal No. 149 of 1903 and No. 11 of 1904 with regard to *bhati* lands in Malad, and although the *khoti* grant in that case may not have been worded in the same way as the *khoti* grant in this case, the decision that *bhati* lands are distinct from *warkas* lands which are appurtenant to rice holdings is directly in point.

It comes to this, therefore, that as these *bhati* lands were included in the village of Vikhroli, it may be said they were included in the lease which Government granted to the *khot* in 1837, and it might also safely be assumed that for centuries the villagers in Salsette have been accustomed to cut grass on the waste lands, if it was required for feeding their animals or for sale, and it nowhere appears, at any rate in this village, that the *khot* has ever interfered with those rights of cutting grass. That of course by itself would not be sufficient to create anything in the nature of occupancy rights. But we find in these cases the evidence shows that a great deal more was done than merely entering on the land when the grass was ready to cut and removing the grass. These grass lands have been enclosed. They have been sold by registered sale-deeds. They have passed from hand to hand under these sale-deeds, and the *khot* was perfectly aware that the villagers were enclosing these grass lands and were treating them as if they belonged to them. In that state of affairs it is impossible to say that the villagers could not acquire by such action proprietary rights in the lands so enclosed and dealt with. There is no suggestion in this case that these lands had not been so dealt with for a period of twelve years and upwards. It would follow, therefore, unless the *khot* chooses to contest the question in a regular suit by endeavouring to regain possession of grass lands of this nature, that the villager-claimants in these References have acquired an interest in the land in Reference

It is not necessary for the purposes of these References to define exactly what that right is. But it is certainly clear that they have been in possession of these lands, and have taken the profits of these lands, and have paid no assessment for them, and so they might certainly have made a perfectly good case for receiving the whole of the compensation. But it seems to have been recognised in other similar cases not only on the east side of the island but also on the west side, that some residuary interest remained in the *khot* which entitled him to share in the compensation, and as this question was not fought out before the Assistant Judge, and considering all the circumstances and the previous recognition of this method of apportionment, I do not think there is any reason why it should be disturbed. It evidently was in the past recognized as a compromise between the conflicting interest of the *khot* and the villager-occupants who had been accustomed to take grass for their own purposes from the grass lands without paying anything by way of assessment to the *khot*. Therefore, I think, that is the ground on which all these References ought to be decided, and we make it clear that there was no necessity for the findings on various issues which were raised in the lower Court, in particular issues Nos. 1, 2, 3, 4 and 5.

* * * * *

Shah, J.—.....The main question in these appeals round which the arguments have ranged is the question of apportionment. The *khot* claims the whole of the compensation in respect of these *bhati* lands. On the other hand the villagers claim to have a substantial interest in these *bhati* lands on account of the long and continued user thereof adversely to the *khot*, and claim to be entitled to the compensation in respect of those lands. It is not necessary for the purpose of deciding this question of apportionment to consider the points relating to the construction of Regulation I of 1808, nor is it necessary to deal with the general question as to whether under the lease the *khot* did or did not acquire any right to the *bhati* lands or other waste lands. Whatever his rights under the lease may be, it is quite clear that, if the occupants of the particular plots acquired can show that they have been in enjoyment of the respective plots for over twelve years, and have enjoyed those lands in their own right, there is no reason why they should not acquire the interest which they claim to have in those lands. The acquisition of rights by prescription is open in law to these villagers against the *khot*, whatever his rights under the lease may be. The Government do not claim any interest in the land such

as might go to reduce the market-value of the land acquired under the Land Acquisition Act. The lower Court has considered the question of the enjoyment of each particular plot by a particular individual very carefully, and has dealt with that part of the case fully in the judgment. In the course of the argument, no attempt has been made on behalf of the *khot* except in relation to a few plots to show that the conclusion of the lower Court on evidence with regard to the possession and enjoyment of each particular plot by each particular holder is open to any objection. These conclusions, therefore, must be accepted to be right with regard to the enjoyment and possession by particular villagers of the particular plots in question. If we accept those findings, it is clear that the villagers, who are shown to have enjoyed and held these lands for a number of years to the knowledge of the *khot*, and without any assertion on the part of the *khot*, against their enjoyment, are entitled to a substantial share in the compensation. On that ground it is clear that the claim of the *khot* to the whole of the compensation cannot be allowed. If once the conclusion is reached that the *khot* is not entitled to the whole of the compensation in respect of each plot acquired, then as regards the apportionment between the *khot* and the villager there is not any serious difference between the parties. In previous cases the occupant and the *khot* have been held entitled to share the compensation in the proportion of 2 to 1. It is in the same proportion that the lower Court has directed the apportionment of compensation in these cases; and in spite of the desire of the occupants expressed through their Pleader in the course of argument, for the first time, that they should get the whole amount, there is no reason whatever to think that that is not a fair and equitable apportionment under the circumstances. The fact that they have filed no cross-objections, and have raised no objection in the lower Court to allow the compensation to be divided in that proportion goes a great way to show that they have all along understood their rights to be as determined by the lower Court. That proportion has been accepted in some of the earlier decisions of this Court with regard to the *bhati* lands, and that proportion, I think, may properly be accepted in these cases.

I desire to add a word with reference to the decision in *Harischandra* v. *Sorabji* (2) which has been relied upon by Mr. Desai as showing that all these *bhati* lands are on the same footing as the *warkas* land, and that no length of enjoyment of such lands would give any right of ownership over the same to the holder. I do not think that that decision has any such effect. That case was decided really on the evidence in that case; and it is pointed out that in the absence of any evidence the learned Judges declined to assume that the *sutidars* as such had become the owners of the soil in the *warkas* land. They referred to the case of *Vasudev Bhaskar Pendse* v. *The Collector of Thana* (1), in the judgment. It is clear to my mind that neither that case nor *Vasudev Bhaskar Pendse's case* (1) helps the *khot* in the present case, because the lands with which we are concerned are not exactly of the class of *warkas* lands with which the Judges were concerned in that particular case; nor can I accept those cases as laying down the general proposition, which it is contended they do, that in no case can *warkas* land be acquired by the holder by adverse possession against the *khot*. But in the present case we are not concerned with the effect of these decisions on what may be described as proper *warkas* land. These *bhati* lands stand on the same footing for the purpose of acquisition of rights by prescription as ordinary lands; and I see no reason why these villagers who have been enjoying the produce of these grass-growing lands, should not have the benefit, which the law gives to such occupation and enjoyment, as against the *khot*. As regards the few lands, as to which Mr. Desai contended that the acquisition of rights by adverse possession was not established, I am of opinion that he has failed to show that the conclusion reached by the lower Court is wrong.

K. S. D. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 333. OF 1921.

July 2, 1924.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

ANANT RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM RATTAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom or personal law—High caste Hindus—Presumption—Joshi Brahmans of Saila Kalan, Tahsil Garhshankar, District Hoshiarpur—Succession—Daughters versus *collaterals.*

The initial presumption in the case of high caste Hindus is that they are governed by their personal law. [p. 431, col. 1.]

Joshi Brahmans of *Mauza* Saila Kalan, Tahsil Garhshankar, District Hoshiarpur, are not governed by custom and among them daughters are not excluded by collaterals in the matter of succession to ancestral property. [p. 431, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 14th December 1920, affirming that of the Subordinate Judge 1st Class, Hoshiarpur, dated the 26th July 1920.

Dr. *Nand Lal*, for the Appellants.

Bakhshi *Tek Chand* and Mr. *Jagan Nath Bhandari*, for the Respondents.

JUDGMENT.

Broadway, J.—The parties to the suit giving rise to this appeal are Joshi Brahmans of *Mauza* Saila Kalan in the Garhshankar Tahsil of the District of Hoshiarpur. The property in suit has been held to be ancestral, and the only point for determination in this appeal is whether succession to this property is governed by Hindu Law or by custom. Admittedly if the Hindu Law is applicable, Jhalla's daughters are entitled to succeed, but the plaintiffs-appellants claim that they are governed by custom under which they as collaterals, exclude Jhalla's daughters. Now, the initial presumption in the case of high caste Hindus has been held to be that they are governed by their personal law. The initial presumption, therefore, in this case is that the parties are governed by Hindu Law. It is claimed that this presumption is rebutted by the answer to question 45 in the *Riwaj-i-am* of Hoshiarpur District according to which Brahmans are said to be governed by custom in matters of succession and daughters are excluded by collaterals, however, remote. Stress has been laid on the pronouncement of their Lordships of the Judicial Committee in the case of *Beg* v. *Allah Ditta* (1), and it has been urged that full effect should be given to the *Riwaj-i-am* of this district. It is quite obvious that this Court is bound by the pronouncement referred to above, but the presumption is a rebuttable one and in my judgment the weight to be given to this entry in the *Riwaj-i-am* is considerably reduced by the fact that the compiler has noted that custom has veered round in favour of the daugthers and a very large number of instances are cited in support of this, the instances relating to practically every class and sect, including Brahmans. In these circumstances I am of opinion that the Courts below have rightly placed the onus on the plaintiffs-appellants and called upon them to prove the existence of a custom by which daughters are excluded by collaterals. Dr. Nand Lal for the appellants has cited a large number of authorities relating to Brahmans in Rohtak, Gurgaon, Kangra, Gurdaspur, Jhang and other Districts. I do not consider it necessary to discuss these authorities as I am unable to see that the mere fact that a certain custom prevails among Brahmans in Rohtak would establish that a similar custom was in force in Hoshiarpur. The evidence on the record admittedly does not give a single instance of daughter being excluded by collaterals so far as *Mauza* Saila Kalan is concerned.

Dr. Nand Lal, however, contended that the oral evidence produced established that the parties were governed by the custom alleged. He has taken us through such portions of the depositions of the witnesses as he considered most favourable to himself. The witnesses have deposed to what their opinion is on the subject. Doubtless, the opinion of respectable persons belonging to the same tribe and village would carry a certain amount of weight, but in the present case there are only two witnesses from the village in question, one a Rajput and the other a Jat. Their opinion on questions relating to custom so far as Brahmans are concerned cannot, in my judgment, carry any weight. The other witnesses, some of whom are Brahmans, belong to other villages, and I cannot regard their testimony as proving the

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

custom set up. In my view the plaintiffs-appellants, on whom the onus lay, have failed to prove that the parties to the suit are governed by custom, or that any custom exists by which daughters are excluded by collaterals.

In this view of the case it is not necessary to discuss a preliminary point raised by Mr. Tek Chand to the effect that one of the appellants, Gokal, having died in October 1921, the appeal as against him and his interests had abated. In my opinion Mr. Tek Chand's contention is correct and that as far as Gokal was concerned, the appeal had abated.

I would, therefore, dismiss this appeal with costs.

Moti Sagar, J.—I agree.

K. S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 2676 OF 1921.

October 12, 1922.

Present :—Mr. Justice Pratt.

NAZARALLY T. SINGAPOREVALLA—DEFENDANT—APPLICANT

versus

V. V. KANEMAR VENKAPIYA—PLAINTIFF—OPPONENT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 10 (a)—*Decree evicting tenant—Application for restoration of possession—Notice of motion lodged with Prothonotary—Limitation*—Terminus a quo.

On the 9th September 1921, a decree was passed against the applicant directing him to give over possession of the premises in suit to the landlord on or before the 31st December 1921. Possession was as a matter of fact given up on that date. On the 4th October 1922, the applicant moved the Court for an order restoring him to the occupation of the premises on the original terms and conditions of his lease on the ground that the premises were not reasonably and *bona fide* required by the landlord for his own occupation. It appeared that notice of the motion was given on August 25, 1922, and a copy was lodged with the Prothonotary on the same day:

Held, that the application was barred by time. [p. 433, col. 1.]

Hinga Bibee v. *Munna Bibee*, 31 C. 150; 8 C. W. N. 97, followed.

It is only when the motion is brought on that an application can be said to be made to the Court. The notice of motion is not a proceeding in Court, it is merely an expression of an intention to apply to the Court given to the other party for his information. Similarly the copy of the notice of motion lodged with the Prothonotary does not amount to an application, it is only an intimation to the Court that an application is intended to be made [*ibid.*]

FACTS.—The applicant was the tenant of the opposite party who obtained a decree for eviction of the former from the premises occupied by him on the allegation that the premises were reasonably and *bona fide* required for his own use and occupation. The applicant was evicted from the premises in execution of the decree. More than six months after the date of such eviction the applicant made an applicantion under s. 10 (*a*) of the Bombay Rent (War Restrictions) Act, for an order restoring him to the occupation of the premises on the original terms and conditions of his lease and for recovery of compensation for wrongful eviction on the allegation that the opposite party had not occupied the premises within the period of six months from the date of his eviction, and that the premises were not reasonably and *bona fide* required by the opposite party for his own use and occupation on the date when he filed his suit for ejectment of the applicant.

Mr. *F. S. Taleyarkhan*, for the Applicant.

Mr. *N. P. Engineer*, for the Opponent.

JUDGMENT......On this application, the first point that arises is one of limitation. Under s. 10 (*a*) the application must be made within nine months of the date when the plaintiff obtains possession. The application ought, therefore, to have been made on or before September 30, 1922. The motion, however, was not made till four days later, *i. e.*, October 4, 1922. Mr. Taleyarkhan contends that the application is in time, because notice of motion was given on August 25, 1922, returnable on August 31, 1922, and that a copy of that notice of motion was lodged with the Prothonotary as required by r. 322 on the day on which it was given, that is, on August 25, 1922. He contends that that is the day from which limitation should run, and that the mere fact that the notice of motion was not brought on was due to the Solicitor's impression that as the Rent Suit Judge was not sitting on Original Side, the bringing on of the motion might be deferred. That is of course a mistake, for the motion could have been brought

on before any Judge. But the real point is whether the date on which the copy of the notice of motion was lodged with the Prothonotary should be taken as the date of the application or the date on which the motion was brought on in Court. On this point, I feel no hesitation in deciding that the date of the application is the date on which the motion was brought on. It is only when the motion is brought on that an application can be said to be made to the Court. The notice of motion is not a proceeding in Court ; it is merely an expression of an intention to apply to the Court given to the other party for his information. Similarly the copy of the notice of motion lodged with the Prothonotary does not amount to an application; it is only an intimation to the Court that an application is intended to be made. I am fortified in this construction of the rule by the case of *Hinga Bibee* v. *Munna Bibee* (1).

Mr. Taleyarkhan draws my attention to the case of *Kuttayan Chetty* v *Ellappa Chetty* (2). There the plaintiff's Vakil applied to the Registrar for an issue of the notice of motion according to the rules of that Court and a notice of motion was accordingly issued by the Registrar. The Madras High Court held that the date of the application to the Registrar for the issue of the notice of motion was the *terminus a quo* for the purpose of limitation. But the distinction is obvious, for under the Madras High Court's Rules, it is the Court that issues notice of motion. Therefore, an application to the Court to issue notice presupposes that an application has been made to the Court. Under the Rules of this Court, no application is made to the Court for issuing notice of motion and the Court is not moved until the day in which the motion is brought on. The motion, therefore, is time-barred and I must dismiss it with costs.

K. S. D. *Motion dismissed.*

(1) 31 C. 150; 8 C. W. N. 97.
(2) 17 M. L. J. 215.

MADRAS HIGH COURT.

CIVIL APPEAL No. 350 OF 1921.
October 10, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Srinivasa Iyengar.

V. S. GOPALASWAMY IYER—PLAINTIFF—APPELLANT

versus

KACHI KALYANA RANGAPPA KALAKKA THOLA UDAYAR AND OTHERS—DEFENDANTS Nos. 1, 3, 4, 6 AND 7—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (b), (2) (xi)—*Mortgage-deed, endorsement on, acknowledging receipt, whether requires registration—Receipt of mortgage-money, whether requires registration.*

An endorsement on a mortgage-deed acknowledging payment of the whole or part of the mortgage money, does not require registration, irrespective of the fact whether the endorsement purports to extinguish the mortgage or not. The limitation imposed by sub-cl. (*xi*) of cl. (2) of s. 17 (*b*) of the Registration Act, on an independent receipt that it should not purport to extinguish the mortgage in order to exempt it from registration, does not apply to an endorsement on a mortgage-deed. [p. 434, col. 1.]

A receipt granted by a mortgagee for money paid "for the discharge of the hypothecation deed" does not purport to extinguish the mortgage, within the meaning of sub-cl. (*xi*) of cl. (2) of s. 17 (*b*) of the Registration Act and is, therefore, exempt from registration. [p. 435, col. 2.]

Chundooru Lakshmana Setty v. *Duggisetty Chenchuramayya*, 44 Ind. Cas. 132; 34 M. L. J. 79; 7 L. W. 229; (1918) M. W. N. 262, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in O. S. No. 48 of 1918.

Mr. *K. V. Krishnaswamy Iyer* for the Advocate-General, for the Appellant.

Messrs. *S. Varadachariar*, *R. Gopalaswami Iyengar* and *K. Ramachandra Iyer*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—The plaintiff has filed this suit to enforce a mortgage, refusing to recognise the discharge given to the mortgagors by his paternal uncle, the 5th defendant. The question to be decided is very simple. If the plaintiff and the 5th defendant were members of a joint undivided Hindu family, the act of the 5th defendant who was the senior male member, would be binding on the plaintiff, as the Judge has found that in waiving a portion of the amount due and giving a discharge the 5th defendant acted prudently and for the benefit of the family and this finding has not been attacked before us. If, however, on the date the 5th defendant entered into the transaction, he and the plaintiff were divided, the act

of the 5th defendant would still be binding on the plaintiff as it was subsequently ratified by the plaintiff's next friend in the agreement of compromise which was ultimately made a decree of the Court in Suit No. 9 of 1909 and in this connection I must observe that it was conceded before us that the ratification by the plaintiff's next friend would stand upon the same footing as it were a ratification made by the plaintiff himself on his attaining majority.

On either hypothesis, therefore, the appeal must fail. A point, however, was taken for the first time before us by the learned Vakil for the appellant that the discharge of the mortgage cannot be proved as the writing evidencing the discharge has not been registered. This argument is untenable. Exhibit X is an endorsement on the deed of mortgage itself which is to the effect that the sum of Rs. 6,480 was received in full satisfaction of the amount due under the mortgage. Exhibit XVI is an independent receipt granted to the mortgagor. It recites also the acknowledgment of the sum mentioned above and there are the following words:—"You shall take this as the receipt for the discharge of the hypothecation deed." Sub-cl. (*xi*) of cl. 2 of s. 17 of the Registration Act runs thus:—

"Nothing in cls. (*b*) and (*c*) of the sub-section applies to any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for the payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage." This clause contemplates (1) an endorsement on a mortgage-deed and (2) any other independent receipt for payment of money. In the case of an independent receipt it is necessary that it must not purport to extinguish the mortgage. But so far as an endorsement on the mortgage-deed is concerned no such limitation is placed.

In the present case, I do not think that Ex. XVI the receipt mentioned above, contains any words purporting to extinguish the mortgage and it is not sufficient that the effect of the words is to produce that result. But even granting that there are such words in the receipt, the defendant can fall back on the endorsement and prove by it that the mortgage-debt has been discharged. It is, however, noticeable that in the endorsement there are not even words purporting to extinguish the mortgage. The appellant's contention, therefore, is utterly unfounded and must be overruled *Chundooru Lakshmana Setty* v. *Duggisetty Chenchuramayya* (1) referred to by the appellant's learned Vakil has no bearing on the question to be decided and it is unnecessary to consider it. The appeal, therefore, fails and is dismissed with the costs of respondents Nos. 1 and 2.

Srinivasa Iyengar, J.—The only question argued in this appeal, indeed the only point on which we required to be satisfied in the first instance, was whether the learned Subordinate Judge was wrong in holding that the plaintiff, the appellant before us, is precluded from questioning the discharge of the suit mortgage granted by the original 5th defendant in the suit. The learned Vakil who has appeared for the appellant has entirely failed to satisfy us that the decision on that matter of the learned Subordinate Judge was wrong. The original mortgagee was one Sundarappa Iyer, father of the plaintiff, who died leaving the plaintiff, his son, Venkatarama Iyer, his step-brother, as the surviving members of the joint family. Both these were minors at his death. Pursuant to an agreement made by the mother of the 5th defendant perporting to act for the family, the 5th defendant after he came of age agreed to receive a sum of Rs. 6,480 in full satisfaction and discharge of the amount due from the mortgagors. This would seem to have been done by him *bona fide* in the interests of the family. In evidence of this discharge he passed to the mortgagors Ex. 16. When both the plaintiff and the 5th defendant were still minors, there was a partition sought to be brought about between them by their respective mothers and this arrangement of partition was embodied in Ex. A. Subsequent to Ex. 16, that is to say, subsequent to the discharge granted by the 5th defendant, O. S. No. 9 of 1909 on the file of the Subordinate Judge's Court at Mayavaram was instituted in the name of the plaintiff by his maternal uncle as his next friend. This suit was no doubt based on the footing of Ex. A being a partition binding on the parties. But the defendant, the 5th defendant, in this case denied the validity of the partition and set up that the family was still joint. One of

(1) 44 Ind. Cas. 132; 34 M. L. J. 79; 7 L. W. 229; (1918) M. W. N. 262.

the items in the suit in respect of which the plaintiff's half share was demanded was the amount of the said mortgage. But the suit was compromised and Ex. 3 is the *razinama* decree passed therein. That decree was on the basis that there had been no valid partition between the parties, and that the action of the 5th defendant in claiming to represent the family and granting a discharge to the mortgagors under Ex. 16, and receiving the sum of Rs. 6,480 was binding on the plaintiff, and the *razinama* decree further proceeded to determine the shares of the parties on that basis. This *razinama* decree has not been set aside but on the other hand it has been not only acquiesced in by the plaintiff after he came of age but has been made the basis of other claims made by him. In Ex. 16 the 5th defendant acted not only for himself but purported to act also for the plaintiff as his guardian. If the 5th defendant was the manager of the joint family at the time of his granting the discharge and if the discharge granted by the 5th defendant was *bona fide* and in the interests of the family as found by the learned Subordinate Judge, then it follows that the plaintiff could not re-open it or ask for his share of the mortgage-monies on the footing that there has been no valid discharge. Assuming that the 5th defendant was not the manager of the joint family and had no power to grant a discharge in that capacity, then the position is this. The 5th defendant purported to act as the guardian of the plaintiff in the transaction. The transaction was, therefore, liable to be avoided by or on behalf of the minor plaintiff. But by the said *razinama* decree in O. S. No. 9 of 1909 the plaintiff was decreed to be bound by the discharge granted by the 5th defendant. Even on the assumption, therefore, that the discharge originally granted by the 5th defendant was voidable by or at the instance of the minor plaintiff, by reason of the said decree in O. S. No. 9 of 1909 the right to avoid the discharge was finally put to an end to. The *razinama* decree was passed with the sanction of the Court granted on behalf of the minor plaintiff. We asked the learned Vakil who appeared for the appellant whether he was going to argue that such a decree passed in respect of a minor with the sanction of the Court would in law be in a different position to a decree passed in respect of an adult, and he properly intimated to us that he did not propose to argue for any such position. We, therefore, fail to see how the plaintiff whose right, if any, to avoid the discharge has been either found against or put an end to by the compromise decree, can be entitled to any relief on the footing that there has been no valid discharge binding on him. We have, therefore, come to the conclusion that the learned Subordinate Judge was right in his decision on the point.

The learned Vakil who appeared for the appellant, however, wished to argue a question of law not raised before the lower Court and not even raised in the grounds of appeal here, on which he contended he was entitled to succeed on the question whether or not there had been a valid discharge. As the question raised was a pure question of law and as the other side did not strenuously oppose, we allowed him to argue the point. His contention was that Ex. 16 the receipt granted by the 5th defendant was not receivable in evidence as it is a document required to be compulsorily registered and was not so registered. For this position, reliance was placed on cl. (*b*) in s. 17 which prescribes compulsory registration for all non-testamentary instruments which purport or operate to limit or extinguish whether in the present or future, any right, title or interest of the value of Rs. 100 or upwards to or in immoveable property in the same section. Exception XI to cl. (*b*) provides that any endorsement on a mortgage-deed acknowledging the payment of the whole or in part of the mortgage-money and any other receipt for the payment of the money due under a mortgage when the receipt does not purport to extinguish the mortgage need not be registered. The learned Vakil who appeared for the appellant argued that Ex. 16 would not fall under the 11th exception because while no doubt the mere endorsement on a mortgage-deed acknowledging the payment of the whole or any part, of the mortgage-money need not be registered, the receipt of a part of the amount due in full satisfaction of the whole amount due was not contemplated or covered by the exception. But exception 11 also excepts from the operation of cl. (*b*) of s. 17 any other receipt for the payment of the money due under a mortgage when the receipt does not purport to extinguish the mortgage. There are no words in Ex. 16 which purport to extinguish the mortgage. In the body of cl. (*b*) all instruments which purport or operate to limit or extinguish certain rights are in

cluded but in the exception the words 'or operate' are not repeated. This is significant, and the obvious conclusion to be drawn from this deliberate difference in the wording is that receipts granted for money may extinguish the debt and may, therefore, operate to extinguish the security; but if they do not purport in terms to extinguish the security they need not be registered. The learned Vakil who appeared for the appellant drew our attention to the decision of this Court in the case of *Chundooree Lahshmana Chetty* v. *Duggisetty Chenchuramayya* (1) as an authority for the position contended for by him, with regard to the admissibility of Ex. 16 under the Registration Act. At the outset we may observe that that decision has no bearing on the present case. That was clearly a case of a contract, the performance of which was being sought to be enforced. Further it was not the case of a payment made or accepted in respect of which either an endorsement was made or a receipt was granted and, therefore, obviously the terms of exception 11 to cl. (*b*) of s. 17 of the Registration Act had no application. If the document should be merely an agreement to reduce the amount payable under the mortgage, it is conceivable that it might fall within the terms of cl. (*b*) of s. 17 because it may, though not purporting of do so, operate to limit or extinguish rights in immoveable property. All the decisions referred to by the learned Judges as authorities for the position were all cases only to agreements which would operate to create or limit such interests in immoveable property. None of those cases were cases of receipts or discharges for payment of the mortgage amount accepting a smaller amount in lieu of the whole. The contention, therefore, that Ex. 16 is not admissible in evidence also fails.

In view of our finding that the plaintiff-appellant is precluded from questioning the discharge it has become unnecessary to consider the other questions raised in the appeal. The appeal, therefore, fails and must be dismissed with costs of 1st and 2nd respondents.

V. N. V. *Appeal dismissed.*
Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2297 OF 1921.
July 22, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

ALLAH WASAYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat ZOHRAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Succession—Kalasra Jats of Dogar Kalasra, Muzaffargarh District—Daughter, whether loses her right by marriage outside family—Burden of proof

The burden of proving that the daughter of a sonless proprietor loses her right of succession to her father's estate by marrying outside the family is on the collaterals. [p. 437, col. 1.]

Beg v. *Allah Ditta;* 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), relied on.

Among Kalasra Jats of Dogra Kalasra, Muzaffargarh District, the daughter of a sonless proprietor loses her right of succession by marrying outside the family. [p. 439, col. 1.]

Fatima v. *Khanda*, 25 P. R. 1895, followed.

Ranjha v. *Jindwaddi*, 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914 and *Sawan* v. *Sahib Khatun*, 2 Ind. Cas. 71; 44 P. R. 1909; 69 P. W. R. 1909; 67 P. L. R. 1909, distinguished.

Second appeal from a decree of the District Judge, Multan, dated the 8th August 1921, confirming that of the Senior Subordinate Judge, Muzaffargarh, dated the 6th December 1920.

Bakhshi *Tek Chand* and Mr. *Jagan Nath Bhandari*, for the Appellants.

Mr. *Hargopal*, for the Respondents.

JUDGMENT.—The land in suit belonged to Gaman a Kalasra Jat of Dogar Kalasra in the Sinawan Tahsil of the Muzaffargarh District, and on his death it passed to his widow Bakhtawar defendant No. 1. She has transferred it by gifts to her daughter Zohran, defendant 2, and the present suit has been brought by Gaman's brother's grandsons for a declaration that the gifts shall not affect their reversionary rights.

It has been found by the lower Appellate Court that the land in suit is all ancestral except the Dal Lakhmiwali land in Dogar Kalasra. The question in dispute is whether or not Zohran, who has married a man in another family is entitled to succeed to her father's estate on her mother's death. In the third paragraph of the plaint the plaintiffs mentioned the fact of her having married in another family apparently as the reason for her having no right of succession and the Subordinate Judge has said on page 27 of the paper-book that the plaintiffs

admit the right of succession of a daughter marrying in her father's family. That point was also not seriously contested in the lower Appellate Court, and the only question in dispute is whether a daughter loses her right of succession by marrying outside the family. The Courts below have found that she does not, so that the suit has been dismissed, and the plaintiffs have preferred a second appeal to this Court after obtaining the necessary certificate from the District Judge under s. 41 (3) of the Punjab Courts Act.

The first question is on which party the burden of proof lies. In the current *Riwaj-i-am* compiled in 1903 the matter of the succession of daughters is left uncertain, as it is there stated that in some cases daughters have excluded collaterals and in others have been excluded by them, but in the *Riwaj-i-am* of 1880 the answer of the Jats was that daughters succeeded to the exclusion of collaterals, and six instances of the succession of daughters were given. It is not stated in either of the *Riwaj-i-ams* that an exception is made in the case of daughters who marry outside the family, and we think that in accordance with the ruling of the Privy Council in *Beg* v. *Allah Ditta* (1) there is a presumption in favour of the correctness of the entry in the *Riwaj-i-am* of 1880 and that the onus should lie on the plaintiffs. It is argued on their behalf that the statement as to the daughter succeeding in preference to collaterals is opposed to the general custom of the Province but we see no force in the argument when the right of a daughter who marries within the family is not denied, the dispute being only whether the daughter forfeits her right of succession if she marries outside the family. We agree with the Courts below that the onus lies on the plaintiffs.

The next question is whether they have discharged the onus. There are several judicial decisions in their favour, the first being *Fatima* v. *Khanda* (2) in which it was held that a daughter who has married outside her own family loses whatever right she might have had to succeed to her father's estate. That was a case relating to Ganga Jats of the Muzaffargarh Tahsil and we may note here that it is not stated in either of the *Riwaj-i-ams* that different *Gots* of Jats follow different customs or that the customs of Jats of one Tahsil differ from those of the Jats of another.

The decision given in *Fatima* v. *Khanda* (2) was followed in Civil Appeal No. 971 of 1910 (Ex. P-16), a case of Bhutta Jats of the Muzaffargarh Tahsil in which it was held by Chevis, J., that a married daughter excludes collaterals only if she has married within the family. The Courts below have wrongly regarded that case as an instance of the succession of a sister, as the judgment clearly shows that the claim of Mubarak Khatun, which was in question was dealt with as a claim to succeed to the estate of her father.

The same view on the point of custom was taken by Scott-Smith, J., in Civil Appeal No. 810 of 1911 (Ex. P-15) a case which is of particular importance as it relates to the village to which the parties in the present case belong. The parties in that case were goldsmiths, but it was admitted that they followed the customs of Jats.

Next there is a judgment of Mr. Spencer, Divisional Judge (Ex. P-11) in a case relating to Thaim Jats of the Muzaffargarh Tahsil in which collaterals of the third degree were held to be entitled to succeed in preference to daughters who had married in another family.

Another decision in favour of the collaterals was given by Lala Joti Parshad, District Judge in 1904 in a case of Dedar Jats of the Sinawan Tahsil (Ex. P-18).

There are also two mutations, Ex. P-12 and P-13, which were effected in 1909 and 1914, respectively, in favour of nephews to the exclusion of daughters. The learned District Judge thinks that Ex. P-13 is of no value because the daughter who was excluded had married without the consent of her parents, but it is obvious that that fact would not affect the right of inheritance.

Exhibit P-14, Ex. P-17 and Ex. P-21, which are also relied upon, may be left out of consideration, as they relate to the exclusion of sisters who had married outside the family and they afford no indication as to the custom applicable to daughters, whose rights stand on a higher level.

We come now to the instances relied on by the defendants, which are enumerated on page 33 of the paper-book.

Kadir Bakhsh (D. W. No. 2) deposes to the first instance, the succession of one

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89.

(2) 25 P. R. 1895.

Zainab, but he is not related to her, and she herself and the collaterals whom he says she excluded are not produced, nor has a copy of the mutation entry been put in to corroborate him. He has, moreover, contradicted himself, first saying that Zainab and her husband belong to the same family and then that they are of different *Gots*. His statement cannot be regarded as satisfactory proof of the instance.

Instance No. 2 is the same as instance No. 7. The property which was in question had been left by a *Tarkhan* whose daughter had married a Jat, and the daughter's son brought a suit for the property against his maternal grandfather's collaterals. The Munsif gave judgment in the plaintiff's favour (Ex. D-16), but his decision was based, not on any instances, but on an erroneous construction of the answer to question No. 18 of the *Riwaj-i-am* of 1903. It is stated in answer to that question that the fact of a daughter being married or unmarried makes no difference in her right to inherit, and the Munsif wrongly took this to mean that marriage outside the family did not affect the daughter's right to inherit. A copy of the judgment of the District Judge passed on appeal from the Munsif's decree in that case has not been filed, and the judgment of the Chief Court in second appeal (Ex. D-15) dealt only with the question of the plaintiff's legitimacy and not with the question of custom. This instance, therefore, is of no help to the defendants.

Gauhar (D. W. No. 4) who deposes to instance No. 3, the succession of his niece to her father's property, is an insolvent, and he admits that his niece got the property by instituting a suit. The best evidence would have been a copy of the judgment in the suit, but none has been produced. Gauhar's uncorroborated statement is of no value.

The fourth instance is deposed to by Ghulam Muhammad (D. W. No. 7), who says that his sister-in-law succeeded her father to the exclusion of collaterals, though married in another family. He says the dispute was referred to the Tahsildar, but a copy of the mutation, which would have shown why the collaterals were excluded, has not been produced. Ghulam Muhammad's statement is of little value.

The 5th instance, that of the succession of Allah Wasai to her father, does not help the defendants, as the copy of the mutation (Ex. D-8) shows that the land was mutated in favour of the daughter, not on the ground of her being entitled to succeed by custom, but on the ground of her being in possession and in accordance with a Will.

The 6th instance, relating to the succession of Bakho in 1905 to her brother to the exclusion of her uncle, although she had been married in another family, is proved by the copy of the mutation entry (Ex. D-13). This is a good instance in the defendant's favour.

Instance No. 8 which is taken from the statement made by the proprietors of Bet Mahesar at the time of the Settlement of 1880, shows no doubt that the estate of one Muhammad was inherited by his daughters, three of whom had married outside the family, but as there is nothing to show that Muhammad had any collaterals, the fact that his daughters succeeded proves nothing.

There is one other instance, not mentioned by the lower Appellate Court, on which the defendants rely, namely, Ex. D-6, a mutation in favour of one Fateh Muhammad's daughter who had married outside the family. But in the first place the mutation is comparatively recent, having taken place in December 1918, and in the second place it was effected with the consent of the collaterals. So this instance also is of no value.

Ranjha v. *Jindwaddi* (3) has also been cited, in which it was held that the plaintiffs, who were collaterals in the 5th and 6th degrees, had failed to prove that by custom among Gurmani Biloches of the Muzaffargarh District they had a preferential right of succession to a sister. That ruling, however, is not in point because the *Riwaj-i-am* provides for the succession of sisters in preference to collaterals so remotely related, though not in preference to brothers or their descendants. *Sawan* v. *Sahib Khatun* (4) is similarly inapplicable, in which it was held that among Panwar Jats of the Muzaffargarh Tahsil a sister excluded collaterals of the 5th degree.

The result is that only one instance supporting the defendants' case has been established, namely, the mutation mentioned

(3) 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914.

(4) 2 Ind. Cas. 71; 44 P. R. 1909; 69 P. W. R. 1909; 67 P. L. R. 1909.

as instance No. 6 in the list given on page 33 of the paper-book, whereas on the plaintiffs' side there are, as we have shown above, as many as five judicial decisions, of which three are decisions by the Chief Court, and two mutations. We are of opinion that although the onus rested on the plaintiffs to prove that a daughter loses her right of succession by marrying outside the family they have succeeded in discharging it.

The plaintiffs admitted in the Trial Court (see page 28 of the paper-book) that their right of succession extended only to the ancestral property, so that their claim to the land which has been found to have been acquired by Gaman will fail.

We accept the appeal, reverse the decrees of the Courts below, and pass a decree declaring that the gifts of the land in suit, except the land of Dal Lakhmiwali in Dogar Kalasra, made by Bakhtawar in favour of her daughter Zohran shall not affect the plaintiffs' reversionary rights after the donor's death. The defendants will pay the plaintiffs' costs in all the Courts.

K. S. D. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 100 AND 101 OF 1923.

September 8, 1924.

Present:—Mr. Justice Devadoss.

GARAPATI NARASIMUDU AND OTHERS —DEFENDANTS NOS. 3 TO 5—APPELLANTS

versus

PINNAMANENI BASAVA SANKARAM, MINOR, REPRESENTED BY MOTHER AND NEXT FRIEND RATTAMMA AND OTHERS —PLAINTIFF AND DEFENDANTS NOS. 1 AND 2 —RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 27, 56—Hindu Law—Father, adjudication of, effect of—Son's share, whether vests in Receiver—Suit by son for partition, maintainability of—Sale by Receiver prior to vesting order, validity of—Ratification—Estoppel—Transfer of Property Act (IV of 1882), s. 43—Contract Act (IX of 1872), s. 200.

On the adjudication of a Hindu father as insolvent, what vests in the Official Receiver is not only the share of the father but also the shares of his undivided sons in the family property which he could alienate to satisfy his own debts. This, however, does not prevent the sons from bringing a suit for partition of their shares on the ground that the father's debts are illegal or immoral and that the father could not convey their shares validly for such debts. Such a suit by the sons who are not in the position of creditors but claim independently of the insolvent, is not barred by the provisions of s. 23 of the Provincial Insolvency Act. In these respects, there is no difference between the Provincial and Presidency Towns Insolvency Acts. [p. 441, col. 1.]

Official Assignee of Madras v. *Ramchandra Aiyar*, 68 Ind. Cas. 898; 46 M. 51; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55, not followed.

Kuppusami Goundan v. *Marimuthu Goundan*, 82 Ind. Cas. 438; 47 M. L. J. 487; (1924) M. W. N. 807; 20 L. W. 783; (1925) A. I. R. (M.) 52, followed.

In the absence of an order by the Court in Insolvency vesting the property of an insolvent in the Official Receiver, the property does not become vested in the latter and he cannot give a valid title to a vendee from him. [p. 442, col. 1.]

Where, however, subsequent to the alienation, the Court on being appraised of the fact does pass a vesting order, such an order is sufficient ratification of the Receiver's act so as to pass a good title to the alienee. [*ibid.*]

Subba Aiyar v. *Ramaswami Aiyangar*, 62 Ind. Cas. 346; 40 M. L. J. 209; 13 L. W. 227; (1921) M. W. N. 135; 29 M. L. T. 233; 44 M. 547 and *Sankaranarayanam Pillai* v. *Rajamani*, 83 Ind. Cas 196; 46 M L. J. 314; 34 M. L. T. 152; 47 M. 462; (1924) A. I. R. (M.) 550; 20 L. W. 357, relied on.

Kavati Sankara Rao Garu v. *Turlapati Ramakrishnayya*, 78 Ind. Cas. 294; 46 M. L. J. 184; (1924) M. W. N. 198; 34 M. L. T. 2; 19 L. W. 450; (1924) A. I. R. (M.) 461, *Vythialinga Padyachi* v. *Ponnuswami Padyachi*, 62 Ind. Cas. 396; 41 M. L. J. 78; (1921) M. W. N. 243, distinguished.

The alienee can also claim in such a case to have obtained a good title by reason of s. 43 of the Transfer of Property Act. [*ibid.*]

Where a person who acts ordinarily as an agent, *bona fide* thinking that he has a right to act for the principal, conveys the property of the principal, it is open to the principal to ratify such act and thereby give a good title to the vendee. If an agent acts without authority and thereby prejudices the rights of third persons, the ratification by the principal would not validate the act. But where the principal's property is alienated, and the only person that could be prejudiced is the principal himself, s. 200 of the Contract Act does not stand in the way of such an act being ratified by the principal. [p. 441, col. 2.]

Second appeals and Memorandum of Objections preferred against the decrees of the Court of the Subordinate Judge, Masulipatam, in A. S. Nos. 13 and 44 of 1922 respectively, preferred against the preliminary and final decrees of the Court of the Additional District Munsif, Gudivada, in O. S. No. 159 of 1920.

Messrs. *S. Varadachariar* and *N. Rama Row*, for the Appellants.

Messrs. *V. Ramadoss* and *V. Krishna Mohan*, for the Respondents.

JUDGMENT.—Plaintiff is the son of the 2nd defendant. The 1st defendant is the Official Receiver of Masulipatam. Defend-

ants Nos. 3 to 5 are vendees of the plaint property from the 1st defendant. The plaintiff has brought this suit for a declaration that the sale by the 1st defendant of the plaintiff's share of the property to defendants Nos. 3 to 5 is invalid and for a division by metes and bounds of his share of the property. The plaintiff's case is that the 2nd defendant, his father, was leading an immoral life and that he contracted debts for purposes which could not bind the plaintiff, his undivided son, and that the Official Receiver had no right to sell his share of the property to the defendants Nos. 3 to 5. The 2nd defendant applied to be adjudicated an insolvent on 24th January 1918. His petition was referred for disposal to the Official Receiver on 31st January 1918. The 2nd defendant was adjudicated insolvent on 15th July 1918. The Official Receiver held an auction sale of the property of the insolvent on 25th August 1918 and executed a sale-deed in favour of the defendants Nos. 3 to 5 on 12th September 1919. The plaint was filed on 27th June 1919. The District Munsif gave a preliminary decree in favour of the plaintiff and passed a final decree. On appeal the Subordinate Judge of Masulipatam held that the Official Receiver had no right to sell the property inasmuch as on the date of the sale, the property did not vest in him and dismissed the appeal of the defendants Nos. 3 to 5. The District Munsif found that the debts of the 2nd defendant were not tainted with illegality or immorality. The Subordinate Judge held that the Official Receiver purported to sell the whole of the property including the son's share.

Mr. Varadachariar who appears for the appellants contends that the whole property vested in the Official Receiver and under the law the Official Receiver is entitled to dispose of the whole property including the sons' share and that by the vesting order of 1st February 1921 any defect in the title of the Official Receiver was cured. An objection was taken that as the property did not vest in the Official Receiver the sale by him was bad. There are decisions of this Court which hold that there must be an order by the District Court vesting the property in the Official Receiver; otherwise the Official Receiver has no right to deal with the property. Under s. 27 of the Provincial Insolvency Act (V of 1920) on the making of an order of adjudication, the whole property of the insolvent vests in the Court and till the Court appoints a Receiver of the property under s. 56 of the Provincial Insolvency Act, the property does not vest in him. In this case no such order was passed by the District Court till 1st February 1921. The judgment of the District Munsif was delivered on 9th February 1921. The question in this case is whether the Official Receiver could give a good title to the vendee. It is admitted that on the date of the sale the property did not vest in him, no order to that effect having been passed by the District Court. It is urged by Mr. Varadachariar that the property of the insolvent vested in the District Court and, therefore, the plaintiff could not sue for a declaration of his right. It was held by the learned Chief Justice and Coutts-Trotter, J., in *Official Assignee of Madras* v. *Ramachandra Aiyar*, (1), that "where the managing member of a joint Hindu family consisting of himself and his sons is adjudicated an insolvent, the interests of the sons do not vest in the Official Assignee by reason of the adjudication, although it would be competent to the latter to deal with their shares if the debts of the insolvent were of such a nature as to be binding on their interests". Mr. Varadachariar's contention is that there is a difference between the law as contained in the Provincial Insolvency Act (V of 1920) and that contained in the Presidency Towns Insolvency Act III of 1909 so far as this point is concerned and that s. 52 of the Presidency Towns Insolvency Act gives power specifically to the Official Assignee to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit; and that such a provision as that contained in s. 52 not being enacted in the Provincial Insolvency Act, it must be assumed that what vests in the Official Receiver is not only the property of the insolvent but the property of the undivided Hindu son as well. I was at first inclined to uphold this contention as the definition of the word 'property' clearly includes not only the property of the insolvent, but all the property over which he could exercise a right for his own benefit and a

(1) 68 Ind. Cas. 898; 46 M. 54; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55.

Hindu father can sell for his own debt his undivided son's share. Though a literal interpretation of the definition of the word 'property' in s. 2 of the Provincial Insolvency Act V of 1920 may be favourable to the appellants' contention, yet sitting as a Single Judge, I felt bound to follow the decision in *Official Assignee of Madras* v. *Ramachandra Aiyar* (1). But before I delivered the judgment in the case, I came across in 20 Law Weekly 21 (Short Notes) a short note of the recent decision of the learned Officiating Chief Justice and Srinivasa Iyengar, J., in A. S. No. 139 of 1921 [*Kuppusami Goundan* v. *Marimuthu Goundan* (2)]. I sent for the decision and as I found that the learned Chief Justice dissented from the ruling in *Official Assignee of Madras* v. *Ramachandra Aiyar* (1), I had the case posted for further argument and heard it with reference to that ruling. The learned Officiating Chief Justice and Srinivasa Iyengar, J., held that what vests in the Official Receiver is not only the share of a Hindu father but also the share of his undivided son which he could alienate for his own debt. Following that decision I hold that the share of the plaintiff did vest in the District Court. This does not prevent a son from bringing a suit for partition of his share on the ground that the father's debt was illegal or immoral and that the father could not convey his share validly for such a debt. Section 28 of the Provincial Insolvency Act V of 1920 applies only to suits by creditors of the insolvent. A suit by a person who is not a creditor and who claims independently of the insolvent is not barred by the provisions of the Indian Insolvency Act.

In this case the Official Receiver purported to sell the son's share also. That is the finding of the Subordinate Judge and that is also the plaintiff's case as set out in para. 7 of the plaint. The contention for the respondent is that the Official Receiver could not convey the property which did not vest in him and that the vendees did not get a good title. On the date of the sale the property of the insolvent including that of the son's share was vested in the District Court. On 1st February 1921 the District Court passed an order vesting the property in the Official Receiver. Two points are urged for the appellant (1) that the sale being by the agent of a principal who afterwards ratified it, is good, (2) though the property did not vest in the Official Receiver before the date of sale yet it vested in him after the sale and under s. 43 of the Transfer of Property Act the vendees get a good title. As regards the first contention, it is urged on behalf of the respondent that under s. 200 of the Contract Act, a principal could not ratify an act to the prejudice of third persons. The Official Receiver is an officer of the Court and acts on behalf of the District Court. As a rule the District Court by an order vests the property of the insolvent in the Official Receiver. In this case such an order was not passed, although the District Court transferred the petition of the insolvent for disposal. When the District Court was appraised of the fact that it was necessary that it should pass an order vesting the property in the Official Receiver it passed such an order on 1st February 1921. Before the order was passed, the Official Receiver sold the property to the appellants. Where a person who acts ordinarily as an agent *bona fide* thinking that he has a right to act for the principal conveys the property of the principal, it is open to the principal to ratify such act and thereby give a good title to the vendee. If an agent acts without authority and thereby prejudices the rights of third persons, the ratification by the principal would not validate the act. But where the principal's property is alienated, and the only person that could be prejudiced is the principal himself, s. 200 does not stand in the way of such an act being ratified by the principal. In *Subba Aiyar* v. *Ramaswami Aiyangar* (3) it was held that a sale by the Official Receiver before the vesting order was valid. The learned Judges observed that the Official Receiver is an agent of the District Court and that his act is valid. No doubt in that case they relied upon the general terms of the order as giving power to the Official Receiver to deal with the property though there was no subsequent order vesting the property. In this case, there is an order subsequent to the sale, vesting the property in the Official Receiver. This decision is quoted with approval in *Sankaranarayanam Pillai* v. *Rajamani* (4).

(2) 82 Ind. Cas. 438; 47 M. L. J. 487; (1924) M. W. N. 807; 20 L. W. 783; (1925) A. I. R. (M.) 52.

(3) 62 Ind. Cas. 346; 40 M. L. J. 209; 13 L. W. 227; (1921) M. W. N. 135; 29 M. L. T. 233; 44 M. 547.

(4) 83 Ind Cas. 196; 46 M. L. J. 314; 34 M. L. T. 152; 47 M. 462; (1924) A. I. R. (M.) 550; 20 L. W. 357.

Phillips, J., observes with reference to the case in *Subba Aiyar* v. *Ramaswami Aiyangar* (3): "Accepting this case as an authority for the proposition that the Official Receiver can act as agent, it is clear that the subsequent ratification by the Court would make the proceedings valid." The respondent relies upon two cases, one in *Kavali Sankara Rao Garu* v. *Turlapati Ramakrishnayya* (5) and another in *Vythialinga Padyachi* v. *Ponnuswami Padyachi* (6) as supporting his contention that in the absence of vesting order before the date of sale the Official Receiver could not give a valid title to the vendee from him. But in those two cases, there was no vesting order. It is well-settled that there should be an order by the District Court vesting the property of the insolvent in the Official Receiver otherwise the property of the insolvent would not vest in him. The two cases relied upon by the respondent do not conflict with the decision in *Subba Aiyar* v. *Ramaswami Aiyangar* (4) and *Sankaranrayanam Pillai* v. *Rajamani* (5). In this case the order of the District Judge vesting the property in the Official Receiver is sufficient ratification of his act so as to give a good title to the appellants.

The second contention of the appellants is entitled to considerable weight. By the vesting order, the property of the insolvent actually vested in the Official Receiver. In other words what vests by reason of s. 27 of the Provincial Insolvency Act in the District Court is made to vest in the Official Receiver and the vendee from the Official Receiver at a time when the property did not vest in him can claim the benefit of s. 43 of the Transfer of Property Act when the property vests in him. Supposing an agent sells the property of his principal when he had no right to convey the property and if subsequently the principal conveys that property to the agent, the vendee will get good title by reason of s. 43 of the Transfer of Property Act. In this case the property of the insolvent vested in the Official Receiver on 1st February 1921 and the appellants are entitled to rely upon that fact and set up their right against the plaintiff. It is contended on behalf of the respondent that on the date of the filing of the plaint, the appellants had no title to the property. But the order of the District Court was passed before the judgment was delivered by the District Munsif in favour of the respondent. I hold that the appellants have derived a good title from the Official Receiver and in the light of the findings of the lower Courts, the plaintiff is not entitled to a decree for partition inasmuch as his share has been validly conveyed by the Official Receiver to the appellants. In the result the appeals are allowed and the plaintiff's suit is dismissed but considering the fact that the Official Receiver sold the property before it vested in him, I think this is a fit case where both the parties should be made to bear their own costs throughout. The memorandum of objections is dismissed.

V. N. V. *Appeal allowed.*

Z. K.

(5) 78 Ind. Cas. 294; 46 M. L. J. 184; (1924) M. W. N. 198; 34 M. L. T. 2; 19 L. W. 450; (1924) A. I. R. (M.) 461.

(6) 62 Ind. Cas. 396; 41 M. L. J. 78; (1921) M. W. N. 243.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1233 OF 1923.

July 27, 1923.

Present:—Mr. Justice Mulla.

ARDESHIR FRAMJI GHASVALLA—PLAINTIFF

versus

TRICAMDAS GORDHANDAS—DEFENDANT.

Cantonments (House Accommodation) Act (II of 1902), s. 6, scope of—Vendor and purchaser—House in Cantonment—Agreement to comply with requisition of Cantonment Authorities for transfer—Undertaking to waive protection of s. 6 (c), validity of—Purchaser, whether bound to give undertaking.

Section 6 of the Cantonments (House Accommodation) Act does not contain any prohibition against a transfer by an owner of a house of his right to continue in occupation of the house. All that the section says is that no notice requiring the vacation of a house shall be issued under the section if the house is occupied by the owner. But the owner may agree that if the house is required by the Military Authorities, he would deliver possession thereof to them. [p. 444, col. 2.]

A Cantonment Magistrate is not, therefore, prohibited from entering into such an agreement with an intending purchaser of a house, and such an agreement would not defeat the provisions of the Cantonments (House Accommodation) Act. [*ibid.*]

Defendant agreed to buy a house from the plaintiff. One of the terms of the contract was as follows:—"Tenure Cantonment land. You will have to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to your name."

Plaintiff applied to the Cantonment Magistrate for leave to transfer the house to the defendant. The Cantonment Magistrate replied that leave would be given provided the purchaser gave an undertaking that the house would always be available for occupation by a Military Officer on duty at the station and that he will not claim to live in it as owner. Defendant refused to give this undertaking:

Held, that the obligation to vacate and rent the house to a Military Officer was an incident of land held on Cantonment tenure, and that as the defendant knew that the tenure was that of Cantonment land he must be held to have bought the land subject to the incidents of that tenure, and having undertaken to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name he was bound to sign the undertaking in the form required by the Cantonment Magistrate. [p. 445, col. 1.]

Mr. *Kanga*, Advocate-General, for the Plaintiff.

Mr. *Kemp*, for the Defendant.

JUDGMENT.—This is an originating summons taken out by the plaintiff for the determination of the questions (1) whether the defendant is not bound to comply with the requistions of the Cantonment Authorities set forth in the plaint, (2) whether the said requisitions are arbitrary and illegal, and (3) whether the defendant should not specifically perform the contract of sale and complete the purchase.

By an agreement constituted by three letters the defendant agreed to buy from the plaintiff his land and bungalow situated at Wanowrie Lines, Poona, for Rs. 40,000. The defendant paid Rs. 5,000 as earnest.

One of the terms contained in the letter dated October 17, 1921, addressed by the plaintiff to the defendant, was as follows:—

"Tenure Cantonment land. You will have to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to your name."

Subsequent to the date of the agreement the plaintiff applied to the Cantonment Magistrate, Poona, for leave to sell and transfer the said property to the defendant. On November 26, 1921, the Cantonment Magistrate wrote to the plaintiff stating that the General Officer Commanding would be moved to allow the plaintiff to sell the property if the purchaser gave beforehand an undertaking in writing in these terms: "That the bungalow will always be available for occupation by a Military Officer on duty at this station and that he will not claim to live in it as owner." The plaintiff sent a copy of this letter to the defendant's attorneys. On December 1, 1921, the defendant's attorneys wrote to say that the undertaking asked for was an attempt to get round s. 11 of the Cantonments (House Accommodation) Act, 1902. To that letter the plaintiff replied on December 7, stating that the plaintiff had expressly informed the defendant that he would have to execute an undertaking in the form required by the Cantonment Authorities. The plaintiff's attorneys communicated the contents of the defendant's letter of December 1, to the Cantonment Magistrate. On December 10, the Cantonment Magistrate wrote to the plaintiff's attorneys asking them to inform the defendant's attorneys that under the conditions of the grant of building sites in Cantonments the Military Authorities had the power to veto the contemplated sale of any property and that the General Officer Commanding Poona District would not exercise this right in the case of the proposed sale if the purchaser gave the required undertaking. On December 22, the defendant's attorneys wrote to the plaintiff stating that the plaintiff knew that the defendant was purchasing the property for his own use and occupation, and that unless the proposed condition was waived, the defendant would not complete the purchase.

Further correspondence ensued, and, on June 24, 1922, the defendant wrote to the plaintiff to the effect that the question whether the Cantonment Authorities had power to require an undertaking in the above form would come up for consideration in the Bombay Legislative Council in the autumn session, and suggested that the matter might stand over until then. The plaintiff agreed to this, but as no such question came up before the Council, he took out the present summons on April 3, 1923.

* * * * * * * * * * * * * *

The only other question is whether the undertaking required by the Cantonment Magistrate was legal. It was contended for the defendant that though he agreed to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name, he did not agree to comply with any unlawful requisition, and that the undertaking asked for was unlawful. This contention was based on ss. 6 and 11 of the Cantonments Act. On the other hand, it was urged for the plaintiff that the Act did not apply, and that the case was, therefore, governed by Cantonment Rules 1938, 1939 and 1999. It was also argued that even if the Act applied, the undertaking asked for was not unlawful.

It appears from Ex. A that the site of the property in question was occupied by a bungalow shown in the map of 1828. The site was granted on certain conditions of tenure which are set out in Ex. B. Condition No. 1 provides that Government retain the power of resuming the land at any time on giving one month's notice. Condition No. 2 is as follows:—

"The ground being the property of Government, cannot be sold by the grantee. The right of occupancy alone can be sold by the grantee, but not without the sanction of His Excellency the Commander-in-Chief obtained through the Officer Commanding the station. The fact of registering such deed of sale does not legalize it, if it is otherwise contrary to regulations."

The sections of the Cantonments Act material to the present inquiry are ss. 4, 6 and 11. Section 4 is as follows:—

"Nothing in this Act shall affect the provisions of any written instrument executed by or on behalf of the East India Company or the Government, unless the other party entitled and the Secretary of State for India in Council consent in writing to be bound by the terms of this Act."

Section 6 runs thus:—

"Where the Cantonment Authority, on application made to it as hereinafter provided by s. 8 and subject to the requirements of that section, considers that the liability imposed by s. 5 should be enforced on behalf of a Military Officer, it may, if the house is not already occupied by a Military Officer, by notice—

(*a*) require the owner to let the house to the Military Officer named in the notice, and

(*b*) require the existing occupier (if any) to vacate the same."

Section 11 provides that "no notice shall be issued under s. 6 if the house...(*c*) is occupied by the owner."

On the strength of these sections it was argued for the defendant that if an intending purchaser gave an undertaking as required by the Cantonment Magistrate, it would be to contravene the provisions of s. 11, and that the contract implied in the undertaking would, therefore, be void under s. 23 of the Indian Contract Act, 1872; as defeating the provisions of the law, and that the transfer would be void for the same reasons under s. 25 of the Transfer of Property Act. It was also argued that s. 11 conferred upon the owner of a house in a Cantonment the right of not being evicted by a notice under s. 6, and that he cannot contract himself out of that right, and reliance was placed on *Kashi Prasad* v. *Kedar Nath Sahu* (1). I am unable to accede to these contentions. The Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued under s. 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the Military Authorities, he would deliver possession threof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even an owner in possession. Such an agreement would not, in my opinion, defeat the provisions of the Cantonments Act. The decision in *Kashi Prasad's case* (1) rested on the provisions of s. 9 of the N.-W.P. Rent Act XII of 1881. That section is in these terms:

"The right of tenants at fixed rates may devolve by succession or be transferred. *No other right of occupancy shall be transferable* in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein."

There is no prohibition, express or implied, in s. 11 of the Cantonments Act. I hold, therefore, that the undertaking required by the Cantonment Magistrate is not illegal or arbitrary.

But the matter does not rest there. The land in this case is held subject to the terms contained in the written instrument Ex. B executed on behalf of Government. That it is executed on behalf of Government is clear from condition No. 1 which reserves to Government the right of resuming the land. By virtue, therefore, of s. 4, the provisions of the Cantonments Act do not apply to this land. If the Act does not apply, Cantonment Rules, 1938, 1939 and 1999 apply. Rule 1938 provides that "in the event of a house in Cantonments occupied by a non-Military resident being required for an officer, a formal notice should be served on the occupant requiring him to vacate by a certain date." Rule 1939 provides that "the owner of any house, in a Military Cantonment, not occupied by a person belonging to the army, may be required to rent the same

(1) 20 A. 219; A. W. N. (1898) 47; 9 Ind. Dec. (N. S.) 47.

to any Military Officer belonging to the station who may require it to reside in, if the Officer Commanding the station is satisfied that there is no other suitable house available." Rule 1999 provides that "no ground will be granted except on the following conditions, which are to be subscribed to by every grantee, *as well as by those to whom his grant may subsequently be transferred.*" Then follow the conditions. The first condition is in almost the same terms as condition No. 1 in Ex. B. The second condition is that "the ground being the property of Government cannot be sold by the grantee." This corresponds with the first part of condition No. 2 in Ex. B. By the latter part of condition (*b*) provided that "the sale or transfer of any house in Cantonments *must first receive the sanction* of the Local Military Authorities." This corresponds with the second part of condition No. 2 in Ex. B.

According to Rule 1939 an owner may be required to rent his house to a Military Officer even if it is occupied by the owner. The undertaking required by the Cantonment Magistrate does not go beyond this rule. The obligation to vacate and to rent the house to a Military Officer is an incident of land held on Cantonment tenure. The letter of October 17, 1921, expressly stated "tenure-Cantonment land". The defendant knew what the tenure was. He must, therefore, be held to have bought the land subject to the incidents of that tenure, and having undertaken to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name, he is bound to sign the undertaking in the form required by the Cantonment Magistrate.

My answers to the questions will, therefore, be: No. 1 The defendant is bound. No. 2 No. No. 3 He is bound. No. 4 The defendant should pay the costs of the summons and the hearing. Counsel certified.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 337 OF 1923.

December 1, 1924.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

SHEORAJ SINGH—PLAINTIFF—APPELLANT

versus

Musammat PHULBASA KUER AND ANOTHER—DEFENDANTS AND SARDAR SINGH—PLAINTIFF—RESPONDENTS.

Suits Valuation Act (VII of 1887), s. 11—Over-valuation or under-valuation of suit, effect of—Change of forum—*Jurisdiction, want of, whether cured—Prejudicial disposal of suit, meaning of.*

For the purposes of sub-s. (*b*) of s. 11 of the Suits Valuation Act, it must be decided on the circumstances of each case whether the change of *forum* owing to over-valuation or under-valuation has affected the disposal of the suit on its merits prejudicially or not. The disposal of a suit on its merits is prejudicially affected within the meaning of the sub-section when such disposal is made by a District Judge, instead of being made, as it ought to have been if the valuation were correct, by a Bench of two Judges of the Court of highest jurisdiction in a province. In such a case the lack of jurisdiction in the Court which has disposed of the suit is not cured by the provisions of s. 11 of the Suits Valuation Act. [p. 447, col. 2.]

Kalu Achan v. *Meenakshi Nethiar Amma*, 73 Ind. Cas. 87; 46 M. 631; 18 L. W. 1; 45 M. L. J. 135; (1923) M. W. N 489; (1924) A. I. R. (M.) 6; 33 M. L. T. 5, dissented from.

Mohini Mohan Misser v. *Gour Chandr Rai*, 56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123; (1921) Pat. 105, *Shidappa Venkatrao Jadhav* v. *Rachappa Subrao Jadhao*, 16 Ind. Cas. 1005; 36 B. 628; 14 Bom. L. R. 757, *Rachappasubrao* v. *Shidappa Venkatrao*, 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.), *Hamidunnissa Bibi* v. *Gopal Chandra Malakar*, 24 C. 661; 1 C. W. N. 556; 12 Ind. Dec. (N s.) 1110 and *Sakina Bibi* v. *Abdul Hafiz Khan*, 2 O. C. 103, referred to.

Second appeal against the judgment and decree of the Second Additional District Judge, Lucknow, at Unao, dated the 3rd July 1923, reversing that of the Sub-Judge, Unao, dated the 28th November 1921.

Mr. *H. K. Ghosh* holding brief of Mr. *A. P. Sen* and Mr. *L. S. Misra*, for the Appellant.

Messrs. *H. Husain* and *A. Rauf*, for the Respondents.

JUDGMENT.—In this second appeal, which was referred for decision to a Bench of two Judges by one of us, argument was addressed to us on ground of Appeal No. 4 only. It is as follows :—

That the lower Court has acted illegally and without jurisdiction in proceeding with the matter and deciding it without any inquiry into the facts of appellant s appli-

cation that the entry of Rs. 4,000 as to valuation in the suit was a mistake for Rs. 40,000.

It may be conceded at the outset that the contention is worded in a confused manner by a Counsel unacquainted with the facts of the case. The suit was tried by a Subordinate Judge with unlimited jurisdiction and the appeal was heard by the Second Additional District Judge of Lucknow. Before the District Judge there was no application relating to the valuation of the suit and the Reference made in the ground of appeal to the need of inquiry is unwarranted by facts.

The points at issue really are :—

(1) Whether the valuation of the suit was such as to put the appeal beyond the pecuniary jurisdiction of a District Judge?

(2) Whether in that case the decision of the District Judge was without jurisdiction and so void?

It is unfortunate that care is not taken in framing grounds of appeal, such an important work being left to Junior Counsel unsupervised by the seniors better versed in drafting. We shall, however, not take the course which may reasonably be taken by other Courts of disallowing argument which does not arise from the ground of Appeal No. 4, only permitting ourselves to draw the attention of Counsel to the serious danger to litigants in the loose drafting of grounds of appeal consequent on a misunderstanding or want of understanding of the facts of the case. We shall make our disapproval felt when awarding costs.

The facts are these. The suit in the Trial Court was for a declaration that a Will executed by a last male Hindu owner was a forgery and that in consequence the defendant lady *Musammat* Phulbasa and the other defendant her transferee had an interest in the property in suit only for the lifetime of the widow and not absolute. The Trial Court decreed the suit, but on appeal by the defendants the suit was dismissed and the Will was held to be genuine.

In the plaint the valuation given for the purposes of jurisdiction is written in *raqam* (writing) and not in figures and the *raqam* represents Rs. 4,000 and not Rs. 40,000. The case of the plaintiff-appellant here is that this was a slip for Rs. 40,000 and we know that such a mistake could easily be made. Judgment was delivered on 28th November 1921 and when the plaintiffs, on obtaining a copy of the decree on 12th December, 1921, discovered that the suit was valued at Rs. 4,000 they applied through their Pleader on 16th December to the Trial Court for a correction of the plaint and the decree at Unao. The Trial Court was unable to enter into the question because an appeal has already been filed by the defendants in Lucknow on 13th December. For this reason the Trial Court dismissed the application on 4th February 1922. No written objection to the jurisdiction of the District Judge was taken in the lower Appellate Court and there is no affidavit on the record to prove that any oral objection was taken, or that the Judge's attention was drawn to the application of the plaintiffs of the 16th of December 1921. The District Judge's judgment was delivered on 3rd July 1923. There appears to have been a division in the camp of the plaintiffs, only one plaintiff Sardar Singh has gone over to the defendants and accepts the genuineness of the Will. Possibly this may have led to Sheoraj Singh submitting to the jurisdiction of the District Judge.

As regards actual valuation it is certain that the property in suit is of a larger value than Rs 5,000. It is sufficient to mention that the revenue payable is Rs. 875, so its value must be at least Rs. 18,000 to take the lowest computation of 20 times the revenue. We hold it to be correct, therefore, that by a slip the plaintiffs' scribe entered Rs. 4,000 in place of Rs. 40,000 through his stupidity in using *raqam* notation and not figures.

The next question is of considerable difficulty. Under ordinary law parties cannot invest a Court with jurisdiction even by their agreement, and the decree of the Appellate Court would be void when the valuation of the suit was beyond the jurisdiction of that Court. The question, therefore, resolves itself into one, whether the doctrine that trial without jurisdiction is void from the commencement is modified by s. 11 of the Suits Valuation Act. That section lays down : "An objection that by reason of the overvaluation or undervaluation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless

(*a*) The objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the memorandum of appeal to that Court, or

(*b*) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was overvalued or undervalued and that the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

In the present case cl. (*a*) will not apply because no occasion arose for an objection to be taken by the plaintiff in the Trial Court, nor could he include such an objection in a memorandum of appeal because he was not the appellant in the lower Appellate Court. Coming to cl. (*b*) we have given in writing our reasons for holding that the appeal was undervalued by the defendants.

It was argued before us on behalf of the respondents that mere change of *forum* does not prejudicially affect the disposal of an appeal on its merits. According to the respondents' learned Counsel an applicant objecting under s. 11 of the Suits Valuation Act must show that the Appellate Court had been guilty of some failure of procedure or proper understanding in deciding the appeal on its merits. This contention receives support from the Full Bench ruling of the Madras High Court in *Kelu Achan* v. *Meenakshi Nethiar Anna* (1). That was a case where the suit was tried by the Court of a Munsif though the real valuation was over Rs. 5,000 and the District Judge heard the appeal though it properly lay to the High Court.

The provisions of s. 11 of the Suits Valuation Act came to be discussed, as in this case, on a second appeal to the High Court. The learned Chief Justice observed at page 648* of the report: "In my judgment, the clause of the Suits Valuation Act when referring to prejudicially affecting the disposal of a suit or appeal on its merits, is not considering at all the different rules of procedure that there may be on appeal from one Court to another Court. If, as has been contended before us, the mere fact of there being some different rules in the procedure on appeal must prejudicially affect the disposal of a suit on its merits, the section has really no meaning at all, because in every case from a District Munsif to lower Appellate Court, where there has been undervaluation the appeal would have to be allowed and a new trial ordered, because the trial on its merits was prejudiced and that, in my judgment, is absurd." With all respect to the learned Judge we find no absurdity in the argument put forward by the appellant. Every case must be governed by its facts. It is not necessary to hold that a change of *forum* by itself would affect the disposal of an appeal on its merits prejudicially. In some cases there may be prejudice and in others there may not be; for instance, if the valuation of a suit were under Rs. 5,000 but over Rs. 1,000 and the suit was tried without jurisdiction by a Munsif and not by a Subordinate Judge and an appeal was tried and decided by a District Judge, it could not be said that the change of *forum* created any prejudice. The trial was held by a Court without jurisdiction, but in either case the appeal lay to the District Judge and there will be little ground to urge prejudice whether one subordinate Judicial Officer tried the case or another so long as it was properly tried and its merits fully discussed. In our opinion the matter would be different when a litigant, who is entitled to have the merits of his case considered on the facts by a Bench of two Judges of a High Court, had his appeal decided by a District Judge sitting single. In our opinion in every case it should be decided on the circumstances of that case whether the change of *forum* has affected the disposal of the suit on its merits prejudicially or not. We may point out that the word used is 'disposal' and not decision and we feel that disposal of a suit on its merits is prejudicially affected when that disposal is made by a District Judge instead of being made, as it ought to be, by a Bench of two Judges of the Court of highest jurisdiction in a province. We agree partly with the observation of the other learned Judge at page 649* that the object of s. 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances. He adds that if it does not do that it does nothing else. Where we differ is in the consideration of the circumstances under which the lack of jurisdiction is cured. His opinion appears to be that such

(1) 73 Ind. Cas. 87; 46 M. 631; 18 L. W. 1; 45 M. L. J. 135; (1923) M. W. N. 489; (1924) A. I. R. (M.) 6; 33 M. L. T. 5.

*Pages of 46 M.—[*Ed.*]

lack can always be cured where the difference is only of the Court which has assumed jurisdiction. We think that such lack cannot always be cured, but may be cured only where, in the opinion of the Appellate Court, there has been no prejudice in the lower Appellate Court wrongly assuming jurisdiction.

We are supported in our opinion by a Bench judgment of the Patna High Court in *Mohini Mohan Misser* v. *Gour Chandra Rai* (2). The case there was similar in all respects to the one before us and one of the learned Judges observed: "Nor can it be said that the appellant is not prejudiced inasmuch as if the suit had been properly valued there would have been appeal to the High Court in the first instance. The High Court would have gone into the facts of the case and the appellant would not have been confined to urging points of law. The case, therefore, does not come under s. 11 of the Suits Valuation Act and the decision of the learned District Judge being without jurisdiction, the decree passed by him is void."

A case of the Bombay High Court is very instructive, though the point in dispute here was not specifically raised there nor referred to in the judgment. In that case *Shiddapa Venkatrao Jadhav* v. *Rachappa Subrao Jadhav* (3) the plaintiff sued for an injunction and declaration of his rights as the adopted son of a certain person. The Trial Court of the Subordinate Judge granted him the two reliefs holding that he was such an adopted son. The defendant appealed to the District Judge though the valuation of the suit was nearly Rs. 70,000. The District Judge wrongly entertained it on the ground that the valuation was determined by the amount fixed for the payment of Court-fee, decreed the appeal and dismissed the plaintiff's suit. The plaintiff thereupon went to the High Court which reversed the decree of the District Judge on the ground that it was void for want of jurisdiction of the Court. That case was similar to the one here. On behalf of the respondent distinction was drawn on the ground that the defendant-respondent in the District Judge's Court had objected to that Court's jurisdiction at the hearing of the appeal there. In our opinion that is not a point of distinction because it is not provided in para. (*a*) of the first clause of s. 11 of the Suits Valuation Act. That para. provides only for objection taken in the First Court and in the memorandum of appeal to the lower Appellate Court. In the Bombay case the defendant was not the appellant, so there was no occasion for him to take objection in a memorandum of appeal. Paragraph (*a*) does not provide for an objection made by a respondent in the lower Appellate Court. Such was the interpretation of facts when the appeal went to their Lordships of the Privy Council from the final decision in the High Court [*Rachappasubrao* v. *Shidappa Venkatrao* (4)]. At page 517* of the report their Lordships observed that no objection to the Court's jurisdiction was taken in the First Court, nor in the memorandum of appeal. Upon the facts of the case the defect of jurisdiction of the District Court would be cured under s. 11 of the Suits Valuation Act except on the ground of prejudice. Though no reference was made to that Statute Law, both the High Court of Bombay and the Privy Council held that the lack of jurisdiction of the District Judge was in no way cured and that his decree was void.

Reference was made by the respondent's learned Counsel to a Calcutta ruling of a Bench of two Judges [*Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (5)] which was followed by a Single Judge of this Court in *Sakina Bibi* v. *Abdul Hafiz Khan* (6). In that case under the particular circumstances that a Court of Munsif tried a suit which was properly triable by a Judge of Small Causes, the High Court held on second appeal that there was no prejudice by the change of *forum*. Under similar circumstances we ourselves would have arrived at a similar conclusion. The report, however, in no way justifies the contention of the respondent that a change of *forum* could under no circumstances cause prejudice such as is contemplated by s. 11 of the Suits Valuation Act. The facts of the case reported in *Mohammad Sharafat Ullah* v.

(2) 56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123; (1921) Pat. 105.

(3) 16 Ind. Cas. 1005; 36 B. 628; 14 Bom. L. R. 757.

(4) 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24; (P. C.).

(5) 24 C. 661; 1 C. W. N. 556; 12 Ind. Dec. (N. S.) 1110.

(6) 2 O. C. 103.

*Page of 43 B.—[*Ed.*]

Hira Lal (7) were similar and the learned Judge of this Court who decided it did not lay down any such proposition as is contended for by the respondent's learned Counsel. Upon similar facts a Bench of the Allahabad High Court decided that there was no prejudice under s. 11 under the circumstances of that particular case [*Dalip Singh* v. *Kundan Singh* (8)].

We do not consider it necessary to discuss cases and opinions of Judges reported in several unauthorized reports. We are satisfied that except in the Full Bench case of the Madras High Court no other High Court has definitely held that the change of *forum* could under no circumstances cause such prejudice as is contemplated in s. 11 of the Suits Valuation Act.

Under the circumstances of the present case we hold that prejudice has been caused and that the lack of jurisdiction of the lower Appellate Court is not cured by the provisions of s. 11 of the Suits Valuation Act.

Our attention was drawn to the alleged dishonesty of the plaintiff in not raising a plea of want of jurisdiction in the lower Appellate Court. It was pointed out and probably justly, that if the decision of the lower Appellate Court had gone in favour of the plaintiff-appellant he would not have agitated the matter further. In our opinion both parties are tarred with the same brush. The defendant knew full well that Rs. 4,000 was a slip for Rs. 40,000 in the plaint of the plaintiffs in the Trial Court. We are satisfied as to this because of the large fee paid by them to the Pleaders up to a valuation of Rs. 36,500. When this was pointed out to the respondents' learned Counsel by the Court he explained that Pleader's are paid in Subordinate Courts far in excess of the valuation of the suit. This does not appear to be correct, because in the lower Appellate Court, where the valuation was fixed by the defendant at Rs. 4,000 he paid only Rs. 200 to his Pleader. In our opinion there is nothing to choose between the lack of straightforwardness of the two parties.

One of the plaintiffs Sardar Singh, who is a respondent here, has applied to be discharged from the appeal as he now accepts the position taken up by the defendants of the genuineness of the Will propounded by them. We shall pass no order at this stage in view of the order we propose to pass in this appeal.

In the result we decree this appeal of the plaintiff Sheoraj Singh, set aside the decree of the lower Appellate Court and direct that Court to return the petition of appeal to the defendants *Musammat* Phulbasa and Chandrapal Singh for presentation to the proper Court. For reasons already given by us we direct that the plaintiff shall pay the costs of the defendants-respondents of this Court and bear his own costs. This is the punishment we have inflicted on him for unsatisfactory preparation of the last ground of appeal in this Court and for his want of candour in the lower Appellate Court.

Z. K. *Appeal decreed.*

(7) 21 Ind. Cas. 52; 16 O. C. 257.
(8) 22 Ind. Cas. 614; 36 A. 58; 12 A. L. J. 21.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 131 OF 1923.
July 25, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Mukerji.

BINDRABAN—DEFENDANT—APPELLANT
versus
RAM NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Hindu brothers owning land jointly—Death of one—Widow's possession, nature of.

Out of two Hindu brothers *J.* and *M.* who were joint and owned an 8-pies share in a village, *J.* died first, leaving a widow *B.* whose name was recorded with respect to a 4-pies share with the consent of *M.* On the death of *M.* *B.'s* name was also recorded in respect of his share and *B.* continued to be in possession of the whole till her death in 1917. On the 6th November 1906, she made a transfer by way of sale of 4-pies share in favour of the defendant and on the 13th September 1918 her reversioners sued for recovery thereof:

Held, (1) that there was nothing to show that the widow ever claimed title in herself and a title adverse to her husband's estate; [p. 450, col. 2.]

(2) that the first assertion of adverse title took place on the 6th November 1906 and the suit was amply within time from that date. [*ibid.*]

Lajwanti v. *Safa Chand*, 80 Ind. Cas. 788; 22 A. L. J. 304; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; 51 I. A. 171; L. R. 5 A. (P. C.) 94 (P. C.), referred to.

Letters Patent Appeal against the judgment of Mr. Justice Gokul Prasad, dated the 1st May 1923.

Dr. *N. C. Vaish*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The facts relating to this Letters Patent Appeal are these :—

There were two brothers, Jawahir and Mazbut. It has been found that they were joint. Jawahir died shortly before Muzbut and left a widow, Bari Bahu, surviving him. The two brothers together owned an 8-pies share. On the death of Jawahir, with the consent of Mazbut, the name of Bari Bahu was recorded with respact to a 4-pies share. On the death of Mazbut the name Bari Bahu was recorded in respect of the 4-pies share which stood in his name. Bari Bahu continued to be in possession of the entire 8-pies share till her death which happened in 1917. Before her death, however, she, on 6th November 1906, made a transfer by way of sale of a 4-pies share in favour of the defendant-appellant. On 13th September 1918, that is to say within 12 years of the execution of the sale-deed, the respondents brought the suit out of which this appeal has arisen claiming, as the reversioners of Bari Bahu, for the recovery of the 4-pies share sold to the defendant-appellant. One of the pleas of the appellant was that Bari Bahu was in adverse possession of the property, and therefore, the plaintiffs' suit was barred by time. This plea found favour with the Court of first instance. On appeal the learned District Judge came to the conclusion that Bari Bahu's possession was not adverse but was permissive. On this finding the suit was decreed. A second appeal was filed to this Court, and the learned Judge of this Court remitted an issue specifically directed to the character of possession of Bari Bahu. The finding recorded by the learned District Judge on 16th May 1922 was that the possession of Bari Bahu was permissive and not adverse. On this finding the learned Judge who heard the second appeal dismissed the appeal brought by the defendant.

In this appeal it is contended that the possession of Bari Bahu was really adverse and not permissive. The learned District Judge has made the following remark in his judgment:

"It is not shown that her (Bari Bahu's) possession ever became adverse or was even alleged to be adverse before the sale-deed of November 6, 1906."

Assuming that Bari Bahu did not obtain possession until the death of Mazbut, it does not necessarily follow that she claimed title adversely to her husband's estate. Ordinarily a Hindu widow would claim to be in possession in the right of her husband. As the learned District Judge has remarked, there was absolutely nothing before him to show that she ever claimed a title in herself and a title adverse to her husband's estate, and, therefore, to the estate which would go on her death, to the reversioners to her husband's property.

Two cases of the Privy Council have been cited to us to show that, in the circumtances of these cases, their Lordships held that the possession of the widows, in those cases was adverse. But each case must be treated on its own facts. In the latest Privy Council case of *Lajwanti* v. *Safa Chand* (1), their Lordships found, in the circumstances of the case that, the two widows who were not entitled to the property (they being stepmothers to the male owner of the property) were in possession as Hindu widows and they prescribed for the benefit of their husband's estate. This case, therefore, is entirely concluded by the finding of the learned District Judge, that there was no assertion of an adverse title by the widow in herself, namely, title, adverse to her husband's estate and to the estate that would go to the reversioners. The first such assertion that did take place was on 6th November 1906, and this suit is amply within time from that date.

The appeal fails and is hereby dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) 80 Ind. Cas. 788; 22 A. L. J. 304; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 P. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; 51 I. A. 171; L. R. 5 A. (P. C.) 94 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 22 OF 1924.

November 13, 1924.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

Pandit IQBAL NARAIN—DECREE-HOLDER—APPELLANT

versus

Musammat JAGRANI—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Civil Procedure Code (Act V of 1908), O. IX, rr. 2, 3, 4—Execution of decree—Application for execution

—*Continuation of proceedings—Application to continue proceedings, nature of—Dismissal of application for default of decree-holder—Limitation.*

An application contemplated by Art. 181 of Sch. I to the Limitation Act must be an application required by law to be made. [p. 453, col. 1.]

There is no provision of law which requires a decree-holder to make an application where the sole object is the continuation of proeeedings in a pending case. Where the Court intends to and does, as a matter of fact, maintain an application for execution on its pending file, and stays proceedings for the time being and does not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file so that it may proceed with it, is not governed by any Article of the Limitation Act. [*ibid.*]

(Case-law discussed.)

An application for execution of a decree for sale on foot of a mortgage was returned to the decree-holder for certain amendments to be made and for the filing of certain papers. The application was again filed by the decree-holder without the amendments having been made and without the papers which had been directed to be filed. The Court directed notice to issue to the judgment-debtors and fixed a date for hearing. On the date fixed the decree-holder did not appear and the notice issued to the judgment-debtor was found not to have been served as the decree-holder had failed to pay costs for further proceedings. Thereupon the Court passed the following order:—"The case be consigned to record on account of the decree-holder's default in prosecution. The decree-holder will bear his costs." More than three years after this order the decree-holder made an application for continuing proceedings under his previous application:

Held, that the order passed by the Court on the previous application could not be interpreted as meaning that the Court merely postponed the hearing of the application, the application was finally intended to be dismissed and was, as a matter of fact, dismissed by that order and that, therefore, the subsequent application was barred by time. [p. 453, col. 2.]

When an application for execution has been dismissed for default, in circumstances mentioned in rr. 2 and 3 of O. IX of the C. P. C. relating to suits, proceedings under r. 4 of the Order cannot be taken in respect of such an application. [p. 454, col. 1.]

Thakar Prasad v. *Fakir Ullah*, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.), relied on.

Appeal against an order of the Sub-Judge, Mohanlalganj, Lucknow, dated the 18th February 1924.

Mr. *Sailendra Roy*, for the Appellant.

Mr. *Gaya Prasad* and Mr. *Wasim* holding brief of Mr. *Hyder Husein*, for the Respondent.

JUDGMENT.—One of us referred this appeal to a Bench of two Judges for decision. It was accordingly heard by us and we now proceed to decide it.

The appeal is by the decree-holder. The facts are as follows:—

On the 23rd June 1914, the appellant obtained a final decree for sale of certain property belonging to the judgment-debtor in terms of O. XXXIV, r. 5, sub-r. (2), of the C. P. C. On the 20th June 1917, the decree-holder made his first application for execution as directed by the provision of r. 10 of O. XXI of the Code. The application was in the form prescribed by r. 11, sub-r. (2) of the same Order. The mode in which the assistance of the Court was required was by the sale of the property described in the final decree. This prayer was in accordance with cl. (*g*) of sub-r. (2) mentioned above. The application was accompanied with a copy of the decree. On the same date the office placed the application before the Presiding Judge with the report that the entry in respect of incumbrances was defective and that a copy of the *khewat* was not filed. On the following day, that is 21st June 1917 the Court passed an order in the absence of the decree-holder. The order was as follows:—"Return for the necessary amendments. The *khewat* should be filed with the amended application and statement, to be re-filed within ten days hence." On the 3rd July 1917 the application for execution was accordingly returned to the *mukhtar* of the decree-holder. On the 9th July 1917 the *mukhtar* again presented the same application without making any amendments. Along with the application he filed a written protest against the objections taken by the office. The substance of the protest was that the decree sought to be executed was a decree for sale passed under O. XXXIV, r. 5, of the C. P. C. and that the judgment in which the decree in question was passed had determined that the property required to be sold was the ancestral property of the judgment-debtor. A copy of the judgment was also filed and the prayer was that the application for execution be registered and proceeded with according to law. On this second occasion the office reported that the application for execution was re-filed after the time fixed for amendment in the previous order had expired. On the 11th July 1917 the Court extended the time and ordered notice to issue to the judgment-debtor and fixed the 23rd July 1917 as the date for the hearing of the case. The notice which the Court directed to be issued was obviously in compliance with the provision of O. XXI, r. 22, sub-r. (1) (*a*) of the Code. The entry in the Court proceedings shows beyond doubt that the order of the 11th

July 1917 was passed in the presence of the decree-holder's agent. When the case was taken up on the 23rd July 1917 the decree-holder was absent and the notice issued to the judgment-debtor was found not to have been served, and it was further found that the decree-holder had not supplied costs for further proceedings. On those grounds the Court passed the following order:—"The case be consigned to record on account of the decree-holder's default in prosecution. The decree-holder will bear his costs. The amount due under the decree was Rs. 1,145-11-0." Since then the decree-holder did nothing till the 28th January 1924 when the application now under consideration was made. The prayer in this application is that the application for execution dated the 20th June 1917 be summoned from the record room and necessary steps taken for the sale of the properties referred to in it. The lower Court has held that the order of the 23rd July 1917 was an order of dismissal of the execution case then pending and that consequently the present application was barred by time.

The argument in support of the appeal is that the present application is not an application for execution but is made merely for the object of proceeding with the pending application. That the present application is such an application in form cannot be doubted but whether it can be treated as bearing the same character in substance as well is the question for decision before us. If the answer to this question is in the affirmative even then the learned Counsel for the respondent argues that the present application falls within Art. 181 of the First Schedule of the Indian Limitation Act, 1908, and as it was made beyond three years from the date of the last order of the Court it was barred by time.

We are unable to uphold this argument. If the execution proceedings initiated by the original application of the 20th June 1917 can be construed in the circumstances of this case as still pending we are quite clear in our judgment that there is no question of limitation. This opinion of ours is supported in its entirety by the decision of their Lordships of the Privy Council in the case of *Qamar-ud-din Ahmed* v. *Jawahir Lal* (1) and is in accordance with *Yakub Ali* v. *Durga Prasad* (2). Similar view has been taken in the case of *Bhagwanta Kuer* v. *Zamir Ahmad Khan* (3). The decision of a learned Judge of this Court in the case of *Girdhari Lal* v. *Damodar Das* (4) seems to be in conflict with the opinion which we have held and which we have just now expressed. Article 181 is not expressly referred to in the judgment but the learned Judge, however, made the following observation:—

"An application, which is in substance an application made with the object of moving the Court in the matter of a former application which has been postponed, suspended or otherwise stayed by reason of some order, is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, that is, when the order for postponment, suspension or stay was withdrawn or became inoperative, even though the execution proceeding may have been struck off by that order. No question of limitation can arise where an execution case is pending or has been merely postponed." We are in entire agreement with this view except in so far as it holds that an application to continue suspended proceeding must be made within three years from the last order of postponement. Indeed the last portion of the quotation given above would seem to be in conflict with the part immediately preceding it. In the case of *Kalka Singh* v. *Gur Saran Lal* (5), the same learned Judge expressed his opinion as follows:—

"These considerations do not, however, apply where no such obstacle has been imposed either by the Court executing the decree or by a Court before which an appeal from an order passed in the execution proceeding is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution is awaiting trial. Where there is no such obstacle, actual or resulting, there is nothing to stop the running of limitation, which will be gov-

(1) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

(2) 30 Ind. Cas. 877; 37 A. 518; 13 A. L. J. 760.

(3) 78 Ind. Cas. 766; 5 P. L. T. 451; (1924) Pat. 221; 2 P. L. R. 249; 3 Pat. 596; (1924) A. I. R. (P) 576.

(4) 25 Ind. Cas. 160; 17 O. C. 169.

(5) 54 Ind. Cas. 426; 6 O. J. L. 656.

erned by Art. 181 or 182 of the Indian Limitation Act (IX of 1908), whichever may be applicable. As pointed out in *Chalavadi Kotiah* v. *Poloori Alimelammah* (6), the dismissal of an application for execution without notice to the parties and for no fault of the decree-holder is a mere direction to the officers of the Court to remove the application from the pending list; but the decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off." Without deciding we may assume that where a bar to the further progress of execution proceedings has been created by an order of a Court of competent jurisdiction such proceedings may only be revived by an application under Art. 181 after the removal of the bar but we are unable to take the view that even in a case where the Court intended to and did, as a matter of fact, maintain an application for execution on its pending file and stopped proceedings for the time being and did not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file so that it may proceed with it is governed by any Article of the Indian Limitation Act. The learned Judge has referred to the decision in the case of *Chalavadi Kotiah* v. *Poloori Alimelammah* (6). We have carefully considered that decision and are of opinion that it does not support the view taken by the learned Judge. On the other hand, it distinctly lays down that when an application for execution is, as a matter of fact, pending the decree-holder has a right every moment to ask for further progress in the matter of the application. We think that an application contemplated by Art. 181 must be an application required by law to be made and we are not aware of any provision of law which requires a decree-holder to make an application where the sole object is the continuation of proceedings in a pending case. The learned Counsel for the respondent also relied upon a decision of a Bench of the Allahabad High Court in the case of *Balwant Singh* v. *Budh Singh* (7). But that was a case in which an order staying execution was passed by a competent Court. We have no such case before us.

We have now to construe the order of the 23rd July 1917. The learned Pleader for the appellant contends that the said order did not put an end to the execution proceedings then pending but simply postponed them to a time when the decree-holder complied with the directions relating to the amendment or showed that the application could be proceeded with without any further act on the part of the decree-holder. In support of this contention it is pointed out that it having been determined in the adjudication which resulted in the decree in question that the property required to be sold was the ancestral property of the judgment-debtor, the clear duty of the Court was to transfer the execution of the decree to the Collector as required by the notification of the Local Government made under s. 68 of the C. P. C. and embodied in para. 181 of the Oudh Civil Digest and that the decree-holder had nothing to do before such transfer was made. This may be true but there is no doubt that Court had jurisdiction over the case of which it was seized and before transferring it to the Collector might order the decree-holder to do certain acts in default of which the application for execution might be dismissed. Now the order may be right or wrong. If wrong it could be set right on appeal but if no appeal is preferred from it the order is final. We, cannot, therefore, hold that the order of the 23rd July 1917 must be held as not amounting to the disposal of the application on the sole ground that it was an order which was wrong and should not have been passed. We are of opinion that rightly or wrongly the Court insisted on the amendment and on perfect compliance with its order of the 20th June 1917. That the order was not complied with is admitted; and the fault of the decree-holder in that behalf was the basis of the order of the 23rd July 1917. In these circumstances, therefore, we do not think that that order can be interpreted to mean that the Court merely postponed the hearing of the application. On the contrary, we are of opinion that the application was finally intended to be dismissed and was, as a matter of fact, dismissed. The direction as to the costs in the said order tends in the same direction. It is settled law both under

(6) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329.
(7) 56 Ind. Cas. 1006; 42 A. 564; 18 A. L. J. 642.

the old and the new C. P. C. that when an application for execution has been dismissed for default in circumstances mentioned in rr. 2 and 3 of O. IX of the Code relating to suits, proceedings under r. 4 of the same Order cannot be taken in respect of such an application: *Thakur Prasad* v. *Fakir ullah* (8).

The result is that the present application must be treated to be an application for execution in substance and it is admitted that as such it is barred by limitation.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(8) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 587 OF 1921.
February 13, 1924.
Present:—Mr. Justice Krishnan.

ATMAKUR CHINNA CHENCHAYYA AND OTHERS—PLAINTIFFS Nos. 2 TO 5—APPELLANTS

versus

KHANDA KONDIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Finding in proceeding between decree-holder and judgment-debtor, whether binding on subsequent decree-holder.*

A decree-holder is not bound by the result of previous proceedings, to which he was not a party, between the judgment-debtor and another decree-holder regarding the title of the judgment-debtor to certain properties, nor can he take advantage of findings arrived at in those proceedings which are favourable to him. [p. 455, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Kurnool, in A. S. No. 75 of 1920, preferred against that of the Court of the District Munsif, Nandayal, in O. S. No. 6 of 1918.

Mr. *Ch. Raghava Rao*, for the Appellants.

Mr. *S. Duraisami Iyer*, for the Respondents.

JUDGMENT.—In this case the plaintiff who had obtained a decree against the 3rd defendant, attached the plaint property as belonging to the 3rd defendant, but he was met by a claim petition put in by defendants Nos. 1 and 2 claiming that the property belonged to them and that the 3rd defendant had no interest in it. The claim was allowed and this suit is brought by the plaintiff to have that order set aside and to have it declared that the property really belongs to the 3rd defendant and is liable to be attached and sold for his decree debt. The lower Courts have dismissed the plaintiff's suit.

Originally the property belonged to the 3rd defendant, but he made a gift of it in 1912 to one Veera Reddi *alias* Musali Reddi. The donee then mortgaged the property by way of simple mortgage to defendants Nos. 1 and 2. It would seem that, on a former occasion, this property was attached as the property of the 3rd defendant by another decree-holder, one Subbarayudu. At that time both Veera Reddi and the present defendants Nos. 1 and 2 put in separate claim petitions urging their different interests in the properey. As regards the 1st and 2nd defendants, their claim was allowed on the ground that whatever defect there might be as regards Veera Reddi's title, such defect did not affect the mortgage right of defendants Nos. 1 and 2 as they were *bona fide* purchasers for value; their claim was allowed under the last clause of s. 53 of the Transfer of Property Act. Against the order on the claim petition no suit was filed by any one; but, as regards the adverse order against Veera Reddi, he filed a suit against the decree-holder Subbarayudu. Defendants Nos. 1 and 2 had nothing to do with that suit and they were not made parties to it. Even before the claim petitions were brought, defendants Nos. 1 and 2 had obtained a preliminary mortgage-decree on their mortgage against Veera Reddi only. Subsequent to the claim petition they seem to have got a final decree in the matter and they executed that decree against Veera Reddi, and the property was brought to sale and purchased by one of the defendants. Veera Reddi's suit finally failed. There was subsequently again an attachment by the same decree-holder of the property as 3rd defendant's property. By that time the Court-auction had taken place and the sale to one of the defendants had been complete. The defendants put in a claim petition again and urged their right by purchase against that attachment. That claim was allowed and no further steps were taken to contest that order on the claim petition. Now the plaintiff, who is another decree-holder, attaches the property again as the 3rd defendant's. He contends that as he was not a party to any of the previous proceedings, he is not bound

by those proceedings and, therefore, it is open to him to show now that the 3rd defendant is still the owner of the property and he is entitled to attach the property as the 3rd defendant's; I am prepared to concede that this decree-holder as a new creditor is not bound by the previous proceedings as he was not a party to any of them; but the difficulty in his way will then be that he must show in this case now afresh that the gift to Veera Reddi by the 3rd defendant is not a valid gift and that the mortgage by Veera Reddi to defendants Nos. 1 and 2 is not valid and, therefore, the property is 3rd defendant's. It has not been pressed before me that there is anything invalid as regards the mortgage; the very same reason that was given for upholding it in the first claim petition is applicable. The defendants Nos. 1 and 2 are *bona fide* purchasers for value and under the last clause of s. 53 of the Transfer of Property Act they are not affected by any defect in Veera Reddi's title even assuming that there is any such defect. Both the lower Courts have found it and I think they are right in their finding; that finding is scarcely attacked before me. It is, however, contended that, so far as the equity of redemption is concerned, it is still in the 3rd defendant on the footing that the gift to Veera Reddi is not a good gift. Of course, if the gift to Veera Reddi could be shown to be a bad gift, it will not be binding as against this decree-holder. The 3rd defendant was not a party to the mortgage-suit; and though the mortgage itself might be binding on him, his equity of redemption could not be treated as having been properly sold so as to bind him. But the difficulty in the way of the plaintiff is that he has made no attempt in this case to show that the gift to Veera Reddi is a bad one. He says it was so found in the previous litigation as between Veera Reddi and the 3rd defendant and the then decree-holder; but, as he himself argues, he is not bound by the findings in that suit either by way of *res judicata* or *lis pendens;* nor is the finding in that suit binding upon defendants Nos. 1 and 2, the mortgagees, as they were no parties either. The doctrine of *lis pendens* cannot be extended to give any advantage to the plaintiff in this case. Just as the plaintiff is not bound by the previous proceedings, he cannot take advantage of them. There must be mutuality in this matter. The learned Vakil for the plaintiff relies upon the case reported as *Gnanambal* v. *Parvathi* (1) for saying that he is not estopped from showing afresh that the property is still third defendant's. That ruling, no doubt, supports him and I am prepared to follow it; but as already pointed out he is met by the difficulty that he has not attempted in this case to show that there is anything wrong in Veera Reddi's gift, and the fact that Veera Reddi's gift was not supported by the Court in a suit by another creditor cannot be taken advantage of in this Court.

The second appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 15 M. 477; 2 M. L. J. 212; 5 Ind. Dec. (N. S.) 684.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 53 OF 1924.
October 14, 1924.

Present:—Mr. Dalal, J. C.

Syed MOHAMMAD SHAKIR—JUDGMENT-DEBTOR—APPELLANT

versus

JUGUL KISHORE AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 41, O. XXI, r. 2—Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Oudh Civil Digest, r. 172 (a)*—Execution of decree—Transfer of decree for execution—Jurisdiction of Court to which decree transferred—Certificate, absence of, effect of—Certification of part payment, application for, to Court not having jurisdiction, effect of—Limitation, extension of.*

The Court to which a decree is transferred for execution is not divested of its jurisdiction until it sends the certificate under s. 41 of the C. P. C. to the Court which passed the decree. Before such certificate is sent, any application for certification of a part payment must be made to the Court to whom the decree was transferred for execution and not to the Court which passed the decree. Such an application made to the Court which passed the decree will not operate to extend the period of limitation for execution of the decree under Art. 182 (5) of Sch. I to the Limitation Act. [p. 456, cols. 1 & 2.]

Maharajah of Bobbili v. *Narasarajupedasinhula*, 36 Ind. Cas. 682; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 909; 39 M. 640; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.), followed.

The part satisfaction referred to in r. 172 (*a*) of the Oudh Civil Digest must be such that no further satisfaction of the decree in that Court would be possible. The rule does not apply to a case where the parties have entered into an agreement by which full satisfaction can be obtained by the decree-holder on a future date. [p. 456, col. 2.]

A rule made by the High Court if it is in conflict with the provisions of a section of the C. P. C. is *ultra vires*. [p. 456, col. 2.]

Appeal against an order of the District Judge, Sitapur, dated the 18th August 1924, in Miscellaneous Appeal No. 9 of 1924, preferred against that of the Subordinate Judge, Sitapur, dated the 16th April 1924, in Case No. 181 of 1923.

Mr. *M. Wasim*, for the Appellant.

Messrs. *Ram Bharose Lal* and *Raj Narayan Shukla*, for Respondent No. 2.

JUDGMENT.—The point arising in this appeal appears to me to be concluded by the authority of their Lordships of the Privy Council in *Maharajah of Bobbili* v. *Narasarajupedasinhula* (1). The question at issue is whether the Court of the First Additional Subordinate Judge was a proper Court on 23rd December 1920 to which payment of a part of the decree was to be certified so as to save limitation under Art. 182 (5) of the Limitation Act. On 12th January 1919 the execution was transferred by the Court of the First Additional Subordinate Judge which passed the decree to the Court of the Subordinate Judge. On 16th June 1919 the parties came to an arrangement in the Court of the Subordinate Judge by which Rs. 200 was paid in cash and the balance was agreed to be paid by instalments commencing from the end of July 1919 and ending in *Rabi* 1922. The balance of the decree was made recoverable on default of payment of any instalment. Prior to 23rd December 1920, the Court of the Subordinate Judge had not sent a certificate under s. 41, C. P. C. to the Court which passed the decree relating to the fact of part execution. It is certain, therefore, on the authority of the Privy Council already quoted that on 23rd December 1920 the Court which had jurisdiction was the Court of the Subordinate Judge and not of the Additional Subordinate Judge. In the Privy Council case, the District Court had transferred a decree for execution to the Court of the Munsif of Parvatipur. The Munsif had actually passed an order dismissing the petition of execution and no further steps were taken to get the decree executed by the Court of the Munsif. This Court, when applied to, gave wrong information to the decree-holder that the copy of the decree had been returned to the District Court with a non-satisfaction certificate. In fact no such report had been made. Under these circumstances an application made to the District Court, before the Court of the Munsif sent a certificate under s. 41 to that Court, was held by their Lordships to be an application made to a Court without jurisdiction. It is obvious that according to their Lordships the Court to which a decree had been transferred for execution was not divested of its jurisdiction until it sent the certificate under s. 41, C. P. C. to the Court which passed the decree.

It was argued, and the argument was accepted by the learned Judge of the lower Appellate Court, that the Court of the Subordinate Judge was bound to send, a certificate under r. 172 (*a*) of the Oudh Civil Digest and that this Court lost its jurisdiction even though it omitted to send any such certificate. A rule made by this Court, if it is in conflict with the provisions of a section of the C. P. C., would be *ultra vires*. In my opinion however, the rule can be reconciled with the provisions of the Code. What is really meant by the direction that the record shall be returned to the Court by which the decree was sent for execution when the decree has been executed wholly or in part by the Court to which it has been sent is that part satisfaction should be such that no further satisfaction of the decree in that Court would be possible. In the present case the Court of the Subordinate Judge had still scope for realization of an amount much larger than Rs. 200 received on 16th June 1919. I do not think that the rule would apply to a case like the present where parties had entered into an agreement by which full satisfaction could be obtained by the decree-holder on a future date.

When a Court disobeys a rule framed by this Court there is no provision either of law or of a rule of this Court that the Court loses jurisdiction immediately. It will be a most inconvenient procedure if the Court to which a decree is transferred for execution loses jurisdiction whenever it passes any order relating to partial execution. Both according to law and sound practice, jurisdiction of the Court to which execution is sent should cease

(1) 36 Ind. Cas. 682; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 809; 39 M. 640; 14 A. L. J. 1129; 20 M. L. T. 472; 21 C. L. J. 478; 5 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.).

only when that Court sends a certificate to the Court which passed the decree under s. 41 of the C. P. C. The present application of 17th April 1923 is not saved by the application of 23rd December 1920 and is, therefore, beyond time.

I set aside the decree of the lower Appellate Court, restore the decree of the Trial Court and dismiss the application for execution with costs of all the Courts.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 998 TO 1000 OF 1921.

February 22, 1924.

Present:—Mr. Justice Krishnan.

KODURI SUBBARAYADU AND OTHERS —PLAINTIFFS—APPELLANTS

versus

KOYYALAMUDI SUBBANNA AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 29—Promissory note executed by executor—Personal liability—Pro-note executed by guardian of minor—Hindu Law—Joint family—Will—Testamentary guardian, appointment of, validity of.

When a promissory-note is executed by any person, he is personally liable on it unless it is clear that such a liability is excluded. [p. 458, col. 1.]

Executors are personally liable on notes executed by them as such, even though they may be acting for the benefit of the testator's estate in doing so, unless their liability is excluded, in the manner provided in s. 29 of the Negotiable Instruments Act. [*ibid.*]

A person who executes a pro-note does not exclude his personal liability merely by saying that he executes the note as the guardian of a minor. [p. 459, col. 1.]

A Hindu father cannot validly appoint by Will a guardian of the property for his minor son to take effect after his death, where such property is joint family property. [*ibid.*]

Case-law discussed.

Second appeals against the decrees of the Court of the Additional Subordinate Judge, Rajahmundry, in Appeal Suits Nos. 3, 4 and 5 of 1920, preferred against those of the Court of the Temporary District Munsif, Razole at Amalapuram, in Original Suits Nos. 805, 781 and 780 of 1917 respectively.

Mr. *P. Somasundaram*, for the Appellants.

Messrs. *S. Varadachariar* and *B. Satyanarayanan*, for the Respondents.

JUDGMENT.—These are three second appeals arising from three suits brought by three plaintiffs on promissory notes executed to them respectively by defendants Nos. 2 and 3. The cases being similar in their facts, they have been dealt with in one judgment by the lower Courts and it will be convenient to do so in second appeal as well.

One Viranna died leaving debts due to these plaintiffs among others. The 1st defendant is his minor son and was his undivided co-parcener. The property belonging to Viranna is found to have been all joint family property. He nevertheless executed a Will before his death and named defendants Nos. 2 and 3 as the executors of it; he authorised them to take possession of the properties on behalf of his minor son and manage them and collect outstandings and pay the necessary education and maintenance expenses with his mother's consent and hand over the properties and accounts to the minor on his attaining majority. Defendants Nos. 2 and 3 entered upon the management under this Will, though it is clear that the document is invalid in law as a Will in so far as, it purported to deal with the joint family property. Plaintiffs as creditors of Viranna pressed defendants Nos. 2 and 3 for the payment of their dues. Defendants Nos. 2 and 3 asked them for time and executed the suit promissory notes themselves in renewal of promissory notes of the testator. In these suits plaintiffs claimed decrees against defendants Nos. 2 and 3 personally as the makers of the notes and against the estate of the 1st defendant. The District Munsif gave them a decree against defendants Nos. 2 and 3 personally and dismissed the suits against the minor's estate. Thereupon both the plaintiffs and defendants Nos. 2 and 3 appealed to the Subordinate Judge who gave decrees against the estate of the minor but dismissed the suit against defendants Nos. 2 and 3. The minor has not appealed; but plaintiffs have brought these second appeals claiming personal decrees against defendants Nos. 2 and 3.

The question for decision is whether defendants Nos. 2 and 3 are personally liable under the notes. It will be convenient now to refer to the promissory notes in the three cases, separately as there is some difference in their language.

Taking S. A. No. 998 first the note Ex. A thoughs it sets out in the preamble that it is executed by Subbanna and Satyanarayana (who are defendants Nos. 2 and 3) as executors of the Will of Viranna, it says in the body of the note. "On demand we promise to pay to you or to your order, etc." and it is signed by defendants Nos. 2 and 3 without any qualification being added to their signatures. It seems to me clear on the language of the note that defendants have made themselves personally liable for the amount due. When a note is executed by any person he is personally liable on it unless it is clear that such a liablity is excluded. The document no doubt speaks of the defendants as executors of Viranna's Will. But the Will being invalid they had really no such capacity but even if it is to be assumed that the defendants executed Ex. A only as the executors of Viranna's Will, plaintiffs are still entitled to a personal decree as executors are personally liable on notes executed by them as such even though they may be acting for the benefit of the testator's estate in doing so, unless their liabiliy is excluded in the manner provided in s. 29 of the Negotiable Instruments Act. It is clear law that an executor is personally liable. See *Chidambaram Pillai* v. *Veerappa Chettiar* (1), *Sudhir Chandra Das* v. *Kamala Chandra Dutta* (2) and *Farhall* v. *Farhall* (3). It was argued that as Ex. A was executed not for money borrowed by the executors themselves but for money already due by the testator, the liability fell only on the estate. Whether recourse can be had to the estate or not in those circumstances, a point I need not consider, the liability of the executant of the note, it seems to me, remains. The suit note was executed by the defendants in consideration of the plaintiffs forbearing to sue. In fact the correspondence shows that the defendants expressly asked for time and executed the note to get such time and they got it thereby. Most of the cases cited before me refer to the question how far recourse can be had to the estate on a note executed by an executor, or a guardian of a minor or a trustee of property. Such are the cases in *Padma Krishna Chettiar* v. *Nagamani Ammal* (4), *Ammalu Ammal* v. *Namagiri Ammal* (5), *Venkatasami Naicker* v. *Muthusami Pillai* (6) and *Batchu Ramajogayya* v. *Vajjula Jagannadham* (7). When an executor executes a promissory note, to exclude his personal liability he must bring himself under the exclusion provided for in s. 29 of the Negotiable Instruments Act. Exhibit A clearly does not comply with that provision. I must hold, therefore, that defendants Nos. 2 and 3 are personally liable. I need not consider whether in this view the decree against the estate is correct or not for no appeal has been filed for the minor against it. Second Appeal No. 998 must, therefore, be allowed and the decree of the Subbordinate Judge modified by making defendants Nos. 2 and 3 also liable for the amount decreed and costs of the First Court. Defendants Nos. 2 and 3 will pay the costs of their appeal to the lower Appellate Court and of this second appeal to the plaintiffs with the usual 6 per cent. interest on them.

Taking S. A. Nos. 999 and 1000 next, the language of the notes in these cases is different from the language of the note in S. A. No. 998. The notes in these cases begin by saying in the preamble that they are executed for the minor by the guardians appointed under Viranna's Will but they are in fact both executed by defendants Nos. 2 and 3. The note in S. A. No. 999 is signed by them as guardians of the minor, whereas the note in S. A. No. 1000 is merely signed by them without any description added. Under both notes, however, the executants, defendants Nos. 2 and 3 themselves, promise to pay the amount on demand. In Ex. E, the note in S. A. No. 1000, the language is "any one of us shall be liable for and pay this sum of Rs. 2,240 to you or your order on demand." The other note says, "on demand we shall pay this sum of Rs. 2,240 to you or your order on demand." The other note says, "on demand we shall pay you or order, etc." It seems to me clear on the language of the notes that the executants were undertaking a personal liability to pay, though they were acting as guardians of the minor in executing them. They were

(1) 43 Ind. Cas. 865; 22 M. L. T. 380; (1917) M. W. N. 744; 6 L. W. 640.
(2) 41 Ind. Cas. 503; 45 C. 538; 21 C. W. N. 1043.
(3) (1872) 7 Ch. App. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W.R. 157.
(4) 30 Ind. Cas 574; 39 M. 915; 18 M. L. T. 216.
(5) 43 Ind. Cas. 760; 33 M. L. J. 631; 22 M. L. T. 391; 6 L. W. 722; (1918) M. W. N. 110.
(6) 45 Ind. Cas. 949; 34 M. L. J. 177; 23 M. L. T. 280.
(7) 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

not validly appointed as guardians, for it has been held in this Court that a Hindu father cannot validly appoint by Will a guardian of the property for his minor son to take effect after his death where such property is joint family property as in this case. But it must be conceded that the parties were under the impression that the Will was valid and defendants Nos. 2 and 3 did act as the *de facto* guardians of the minor. However that may be, as they undertook to pay themselves they cannot now disclaim their personal liability. A person does not exclude his own personal liability merely by saying that he executes the pro-note as a guardian. In the case in *Padma Krishna Chettiar* v. *Nagamani Ammal* (4), the question of the liability of the mother was not dealt with as pointed out by Wallis, C. J., in *Palaniappa Chettiar* v. *Shanmugam Chettiar* (8). The reason why the defendants undertook to pay is plain from Ex. F in S. A. No. 999 which shows that they wanted to avoid suits being filed and asked for time and "agreed to settle the affair according to the plaintiff's will and pleasure." They do not say or indicate in the notes that they will pay only from the estate of the minor, but, on the other hand, they say they will pay the note amounts. I need not consider in these cases either whether the decrees given against the estate are proper decrees, for the same reasons as given above in S. A. No. 998. These second appeals must also be allowed and the decrees of the Subordinate Judge modified in the same manner as in S. A. No. 998 with the same order as to costs.

Z. K. *Appeals allowed.*

(8) 49 Ind. Cas. 23; 41 M. 815 at p. 816; 8 L. W. 317; 35 M. L. J. 90; 24 M. L. T. 51.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1431 OF 1921.

August 5, 1924.

Present:—Mr. Justice Das and Mr. Justice Foster.

JITAN DUSADH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAWAHIR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence, admission of—Discretion of Court.

Both under the general law and under O. XLI, r. 27 of the C. P. C., an Appellate Court may for a substantial cause, admit additional evidence in appeal, but the question is one of discretion.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 10th May 1921, confirming that of the Munsif, Gaya, dated the 8th April 1920.

Mr. *G. N. Mukherjee* for Mr. *B. N. Mitter*, for the Appellants.

Mr. *Lachmi Narain Singh*, for the Respondents.

JUDGMENT.

Das, J.—The only question is whether the learned Judge in the Court below should have considered the village note which was filed by the appellant. Admittedly it was not filed in the Court below and the learned Judge considered the question whether he should admit additional evidence in this case. It may be conceded that both under the general law and under O. XLI, r. 27, the Court may for a substantial cause admit additional evidence in appeal, but the question is one of discretion. No sufficient cause was shown by the appellant why additional evidence should be taken in appeal.

In my opinion it is impossible to interfere with the judgment of the Court below and this appeal must be dismissed with costs.

Foster, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 44 OF 1923.

November 14, 1924.

Present:—Mr. Justice Sulaiman.

Musammat MAHTAB-UN-NISSA—APPELLANT

versus

RIFAQAT-ULLAH AND OTHERS—OPPOSITE PARTY.

Muhammadan Law—Marriage—Conversion to Islam, effect of, on prior marriage—Prior marriage, whether dissolved—Transfer of Property Act (IV of 1882), ss. 6 (h), 53—Contract Act (IX of 1872), s. 23—Transfer of property in lieu of past illicit cohabitation, legality of—Void and unlawful consideration, distinction between—Fraudulent transfer.

The mere fact of a Hindu woman changing her religion even though *bona fide* does not *ipso facto* dissolve her previous marriage. Even under pure Muhammadan Law a convert's first marriage is not

dissolved automatically on conversion. It is only where the conversion takes place in a country where the Muhammadan Law is not administered that the marriage is so dissolved on the lapse of a woman's term of probation. But when she remains in a country where the Muhammadan Law regarding questions of marriage is in force, she has only the right to obtain a divorce *if* her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court. [p. 460, col. 2; p. 461, col. 1.]

No question of the doctrine of *factum valet* arises in a case of a second marriage by a woman where her first husband is still alive. The second marriage, in such a case, is not only irregular but illegal and such an illegality cannot be cured either by acquiesence or long continued cohabitation. [p. 461, col. 1.]

If, in order to compensate a woman for past illicit connection, the offending party gives her some property, the consideration for the transfer is not necessarily illegal. [p. 462, col. 1.]

Where a part of the consideration for a transfer is void but not unlawful, the transfer is not a nullity unless the balance of the consideration is also a void consideration. [p. 462, col. 2.]

Where, however, after excluding the void consideration the reduced consideration is grossly inadequate, the transfer may be presumed to have been made with intent to defraud, defeat or delay creditors within the meaning of s. 53 of the Transfer of Property Act. [*ibid.*]

Case-law discussed.

Execution first appeal from a decree of the Subordinate Judge, Budaun, dated the 19th December 1922.

Mr. *S. A. Haidar*, for the Appellant.
Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—(*June 6, 1924*).—This is an execution first appeal arising from an objection raised to the attachment of certain property.

The respondent is a purchaser of a decree for dower which had been passed in favour of Saiyid-un-nissa deceased against Ali Hasan her husband. Ali Hasan died during the execution proceedings and Saiyid-un-nissa brought on the record the present appellant *Musammat* Mahtab-un-nissa and her daughters treating them as the 'heirs of the deceased Ali Aasan.' The first application for execution which was made against these persons was ultimately struck off. A subsequent application was put in and these persons were again treated as the heirs of Ali Hasan deceased. *Musammat* Mahtab-un-nissa put in an objection that part of the property sought to be attached belonged to her exclusively as it had been transferred to her under a registered sale deed executed on the 9th of April 1913 by Ali Hasan in her favour for a sum of Rs. 7,000. The decree-holder by way of reply put in the plea *inter alia* that the marriage of *Musammat* Mahtab-un-nissa with Ali Hasan was illegal inasmuch as she was a Thakur woman and the wife of a living husband, that she had been kidnapped by Ali Hasan unlawfully and without the consent of her husband and could, therefore, not have been lawfully married to the deceased. It was also pleaded that the sale deed in question was a fictitious and collusive transaction executed in order to defeat and delay the execution of the decree.

Evidence was recorded on both the points in question, but the learned Subordinate Judge has unfortunately not gone into the question of the collusive and fictitious nature of the sale transaction but has disallowed the objections on the facts admitted or said to have been proved that the marriage of *Musammat* Mahtab-un-nissa could not have been a legal and valid one.

This finding is challenged in appeal. On the question of fact there cannot be much doubt. The evidence on both sides establishes the fact that some 20 or 25 years ago *Musammat* Mahtab-un-nissa whilst she was a married Hindu woman and her Hindu husband was living eloped and became a Muhammadan. Within a few days of her leaving her husband's house she went through a form of marriage with Ali Hasan and lived with him as his wife and gave birth to a number of children.

The learned Subordinate Judge seems to have been of opinion that in view of the provisions contained in Act No. XXI of 1866 the first marriage of *Musammat* Mahtab-un-nissa could not have been dissolved without a reference to the Civil Court. It is apparent, however, that the said Act has no application whatsoever to the facts of the present case. That Act was enacted to legalize under certain circumstances the dissolution of marriages of native converts to Christianity deserted or repudiated on religious grounds by their wives or husbands.

Nor is it correct to say that *Musammat* Mahtab-un-nissa's first marriage was indissoluble. I am prepared to admit that the mere fact of her changing her religion even though *bona fide* did not *ipso facto* dissolve her previous marriage. Though she must be deemed to be governed by the Muhammadan Law after conversion yet even under that law a convert's first marriage is not dissolved automatically. It is only where the conversion takes place in a country where the Muhammadan Law is not adminis-

tered that the marriage is so dissolved on the lapse of the woman's term of probation. But when she remains in a country where the Muhammadan Law regarding questions of marriage is in force, she has only the right to obtain a divorce if her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court. This was the view expressed by the learned Judges of the Calcutta High Court in *In the matter of Ram Kumari* (1). Even though that was a case arising under the Indian Penal Code the rule of law was correctly indicated, and is fully supported by Hedaya, Vol. I, Book II, Chap. V.

Assuming, therefore, that it was possible to get the previous marriage dissolved in a proper way, the question still remains whether that was really done in the present case.

The finding is that the marriage with Ali Hasan took place within a few days of her running away from her husband, that is to say, before the expiry of her period of probation. The haste, however, would have been a mere irregularity which would be perfectly cured by long continued co-habitation and treatment as a wife. But it is also clear that the former marriage had not been dissolved by a decree of the Court. In the absence of any such authorised and legal dissolution I am bound to hold that the marriage-tie had not been severed. Her going through a form of marriage a second time, therefore, could not make this second performance a valid marriage. No question of the doctrine of *factum valet* would arise in a case where a woman's husband is still alive. The second marriage is not only irregular but illegal and such an illegality cannot be cured either by acquiescence or long continued co-habitation. I cannot, therefore, hold that any dower debt in its strict sense was due to her from Ali Hasan.

But this finding does not dispose of the appeal. The sale-deed purported to have been executed in lieu of Rs. 7,000, out of which Rs. 5,000 represented part of the dower debt and the balance of Rs. 2,000 was left in the hands of the vendee in order to pay off certain mortgage and simple debts of Ali Hasan.

As to the sum of Rs. 5,000, it is urged on behalf of the decree-holder that it was a void and illegal consideration inasmuch as no legal marriage had taken place. It is then contended that the transfer in lieu of such an unlawful consideration is a nullity under s. 6, sub-cl. (*h*) of the Transfer of Property Act. I am, however, of opinion that it is impossible to dispose of the case on any such abstract proposition of law. It is true that every person is presumed to know the law. On the other hand as the question of law raised was by no means a simple one there is always a possibility of the objector having been deceived and made to believe by the deceased Ali Hasan that a valid marriage was being contracted and that she was entitled to a dower debt of Rs. 5,000. If acting on the representation so made she had submitted to live with him as his wife and had borne children to him there might well have been circumstances under which Ali Hasan himself would have been estopped from challenging the validity of the marriage in question.

It was held in the case of *Man Kuar* v. *Jasodha Kuar* (2) as well as in the case of *Dhiraj Kuar* v. *Bikramajit Singh* (3) that past co-habitation was not such an immoral consideration as to make a promise in lieu of it altogether void. It was, however, pointed out by Aikman, J., in the case of *Alice Marry Hill* v. *William Clarke* (4) that in the two cases previously mentioned the co-habitation had not been shown to have been adulterous. In the opinion of the learned Judge adultery being an offence against the criminal law in India co-habitation past or future if adulterous was not merely an immoral but an unlawful consideration. In that case, however, the plaintiff was trying to enforce a contract the validity of which the defendant was impugning. I would further like to point out that adultery though an offence on the part of the man is not an offence on the part of the married woman. It cannot, therefore, be urged that the consideration passing from her is necessarily illegal though, of course, it is indisputably immoral. Bigamy, however, is an offence committed both by the married woman and the man. But in the present case the question is not whether such a contract can be specifically enforced in a Court of Law, but the question

(1) 18 C. 264; 9 Ind. Dec. (N. S.) 176.

(2) 1 A. 478; 2 Ind. Jur. 356; 1 Ind. Dec. (N. S.) 377.

(3) 3 A. 787; A. W. N. (1881) 57; 2 Ind. Dec. (N. S.) 453.

(4) 27 A. 266; 1 A. L. J. 632.

is whether an out-and-out transfer already effected in lieu of a consideration for immoral and even illegal co-habitation is a nullity. When the agreement is that parties are to live in adulterous co-habitation in future the contract is obviously illegal, but if in order to compensate the woman for the past illicit connection, the offending party gives her some property I would not be prepared to say that the consideration for it is illegal. The offence had already been committed. Payment of compensation for a past criminal offence cannot be deemed to be illegal, even though, under certain circumstances, it may be immoral. In my opinion there is a clear distinction between a mere contract to pay an allowance in future in order that an illicit connection be continued, and a transfer of property in favour of the woman for co-habitation which has already taken place. In the former case I would have no hesitation in saying that the agreement is illegal but in the latter case I would not be prepared to say that it is so.

Under the Muhammadan Law dower may be fixed at the time of marriage or even enhanced subsequently. It can thus be a consideration not only for future co-habitation but also for the past one. In the present case Ali Hasan on a demand of the dower debt (fixed at the time of the so-called marriage or enhanced subsequently) having been made, might well have imagined that he was estopped from challenging the validity of the marriage and had no real defence to such a claim. If being estopped, he attempted to satisfy that claim by transferring a part of the property, I am unable to say that the consideration of the transfer was illegal even though, as a matter of law, it might have been void.

As the decree-holder is a mere attaching creditor and not, in any other way, a representative of Ali Hasan she may well urge that she is not bound by any personal estoppel against Ali Hasan. She would then be entitled to say that the consideration of Rs. 5,000, even though not illegal, was certainly void as no legal marriage had in law taken place.

But if the consideration of Rs. 5,000 was merely void and not unlawful then the transfer cannot be a nullity unless the balance of Rs. 2,000 was also a void consideration. Under s. 6, sub-cl. (*h*), Transfer of Property Act, the transfer is a nullity when the transfer is for an unlawful object or consideration within the meaning of s. 23 of the Indian Contract Act. If the consideration is merely void the transfer may hold good if it purports to be in lieu of this void consideration as well as some other consideration which is good. Further in the absence of any clear authority I am not prepared to hold that s. 24 of the Contract Act which *prima facie* applies to a mere contract and would vitiate the whole of it if any one or any part of any one of several considerations is unlawful, would by implication apply to cases of an out-and-out transfer when that section has not been expressly made applicable. I am therefore of opinion that the mere fact that the consideration of Rs. 5,000 falls to the ground would not make the transfer void if the balance of the consideration was valid. Of course if the reduced consideration is grossly inadequate the transfer itself may be presumed to have been made with intent to defraud, defeat or delay creditors within tha meaning of s. 53 of the Transfer of Property Act.

I, therefore, find it impossible to dispose of this appeal without first having the questions of fact arising in this case determined. For ought one knows there might never have been any supposed dower debt or any other outstanding debt and the transaction in question might have altogether been a fictitious one. The questions of law would then become merely academic. I accordingly send down the following issues for determination which have been left undecided.

Was any sum of Rs. 5,000 or less fixed as dower at the time of the second supposed marriage or *bona fide* enhanced subsequently?

Were any debts amounting to Rs. 2,000 or less as referred to in the sale-deed actually outstanding against Ali Husan at the time of the alleged sale?

Was the transfer in question an honest and *bona fide* transfer in lieu of the supposed consideration or was it a mere fictitious transaction intended to defeat and delay the respondent decree-holder?

No fresh evidence will be allowed.

The Court below will submit its findings at an early date. On receipt of the findings the usual ten days will be allowed for objections.

JUDGMENT.—(*November 14, 1924*).—The facts of this case are fully set forth in

my order, dated the 6th of June 1924. Under that order I sent down three issues for findings. The findings on those three issues have now been returned and no objections whatsoever have been filed as to their correctness. I must, therefore, accept these findings as final for the purposes of this appeal.

The lower Appellate Court finds that at the time of the supposed second marriage a sum of Rs. 25,000 was actually fixed as the appellant's dower and that Rs. 5,000 at least were still outsanding at the time when the transfer took place. It has also found that the sum of Rs. 2,000 left in the hands of the vendee under the sale-deed was not a fictitious sum but, as a matter of fact, debts to that amount were due and the amount was subsequently realized in execution proceedings against the appellant. It has also come to the conclusion that the transfer in favour of the appellant was *bona fide*, and for consideration.

In view of the opinion which I expressed on the questions of law raised in this appeal, these findings now entitle the appellant to a decree.

I accordingly allow this appeal and setting aside the order of the Court below allow the objection of *Musammat* Mahtab-unnissa and order that the application for execution be dismissed as against her with costs including in this Court fees on the higher scale.

Z. K.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2323 OF 1920.
May 22, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Malan.

GIRDHARI LAL AND OTHERS—MORTGAGEE-DEFENDANTS—APPELLANTS

versus

KISHEN CHAND AND OTHERS—PLAINTIFFS—SALIG RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debt incurred by managing member—Sons, liability of—Alienation of co-parcenary property—Enquiry as to necessity—Family business, whether enough.

If the managing member a joint undivided estate incurs debt, his sons are liable for the payment of the debt to the extent of the estate of the joint family, provided that the debt is not tainted with immorality or illegality. [p. 464, col. 1.]

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.), followed.

The rule of the Hindu Law that no inquiry would sustain an alienation of the co-parcenary property unless the facts represented to the alienee were such as, if true, would have justified the loan is firmly established. [*ibid.*]

The mere existence of a family business is not sufficient, and the lender must also show that the money was required for the family business. [p. 464, cols. 1 & 2.]

Ganpat Rai v. *Munni Lal*, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54, *Khazana Mal* v. *Jagan Nath*, 74 Ind. Cas. 484; 4 L. 200; 5 L. L. J. 236; (1924) A. I. R. (L.) 44 and *Vithal Yeshwant Gande* v. *Shivappa Mallappa Hosmani*, 72 Ind. Cas. 659; 25 Bom. L. R. 323; (1923) A. I. R. (B.) 265; 47 B. 637, relied on.

Raghunathji Tarachand v. *Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255, dissented from.

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 16th July 1920.

Dewan *Mehar Chand*, for the Appellants.

Lala *Badri Das*, for the Respondents.

JUDGMENT.—On the 6th May 1915 Salig Ram and his brother Sham Das granted a mortgage for Rs. 8,000 in favour of Girdhari Lal and his three brothers. The mortgage was secured on an ancestral house which formed part of the joint estate of a Hindu co-parcenary, consisting of the mortgagors and the plaintiffs who are the sons of one of the mortgagors. In 1918 the present suit was brought by the wife of Salig Ram on behalf of his three minor sons to have it declared that the alienation was not binding on them. The Trial Court holds that the alienees have failed to establish necessity for the mortgage, and that the transaction cannot, therefore, bind the estate. The learned Subordinate Judge also finds that the plaintiffs have not succeeded in proving their allegation that the debt was incurred for an immoral or illegal purpose, and that the creditors are consequently entitled to seize the joint estate including the house in question in execution proceedings upon a decree for the payment of that debt.

Both the parties are dissatisfied with the judgment of the Subordinate Judge, and have preferred appeals to this Court. Now, the appeal preferred by the plaintiffs must fail on the short ground that they have wholly failed to prove that the debt was

incurred by their father for illegal or immoral purposes. As laid down by their Lordships of the Privy Council in the recent case of *Brij Narain Rai* v. *Mangla Prasad Rai* (1), if the managing member of a joint undivided estate incurs debt, his sons are liable for the payment of the debt to the extent of the estate of the joint family, provided that the debt is not tainted with immorality or illegality.

Coming now to the appeal filed by the mortgagees, we find that Rs. 3,000 out of Rs. 8,000, the total consideration for the mortgage, were paid to previous mortgagees, and the present mortgage in so far as it discharged this antecedent debt is binding on the estate. As to the balance of the money, there is no proof of any necessity such as would justify an alienation of the co-parcenary property. The learned Vakil for the appellants, however, urges that his clients lent the money after making a proper inquiry as to the necessity for the alienation; but the evidence does not indicate the nature of the necessity which was disclosed by the alleged inquiry and which led the alienees to make the loan. The rule of the Hindu Law is firmly established that no inquiry would sustain an alienation of the co-parcenary property unless the facts represented to the alienee were such as, if true, would have justified the loan.

Nor are we prepared to accept the contention pressed by Mr. Mehar Chand that his clients having made the loan to the manager of a joint family business were not bound to inquire into the purpose of the debt. The rule laid down in *Raghunathji Tarachand* v. *Bank of Bombay* (2), no doubt, supports the argument of the learned Vakil for the appellants, but that doctrine has not been accepted by any other High Court, *vide, inter alia, Ganpat Rai* v. *Munni Lal* (3) and *Khazana Mal* v. *Jagan Nath* (4) and has been recently dissented from even by the Bombay High Court in *Vithal Yeshwant Gande* v. *Shivappa Mallappa Hosmani* (5). We consider that the mere existence of a family business is not sufficient and that the lender must also show that the money was required for the family business. The burden was clearly upon the alienees, and they have failed to discharge it. The evidence on the record merely shows that the alienors, who are members of a mercantile community, were engaged in the ancestral business of selling sticks and other miscellaneous articles, but there is no satisfactory proof that the money borrowed from the mortgagees was required for carrying on this business.

The result is that we accept the appeal preferred by the mortgagees so far as to declare that the mortgage shall be binding on the plaintiffs to the extent of Rs. 3,000 only. As regards the rest of the debt, the law as laid down in various judgments and affirmed by the Privy Council in *Brij Narain Rai* v. *Mangla Prasad Rai* (1) is to the effect that the joint property can be taken in execution proceedings upon a decree obtained for the recovery of that debt. The parties are directed to bear their own costs in this Court as well as in the Court of the Subordinate Judge.

K. S. D. *Appeal accepted in part.*

(1) 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 931; 46 M. L. J. 23; 5 P. L. T. 2; 21 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.).

(2) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

(3) 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 54.

(4) 74 Ind. Cas. 484; 4 L. 200; 5 L. L. J. 236; (1924) A. I. R. (L.) 44.

(5) 72 Ind. Cas. 659; 25 Bom. L. R. 323; (1923) A. I. R. (B.) 265; 47 B. 637.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1021 OF 1920.

September 21, 1922.

Present :—Mr. Justice Mulla.

RAMPRATAB BRIJMOHANDAS AND OTHERS—PLAINTIFFS

versus

GAVRISHANKAR KASHIRAM—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXX, r. 10—Suit against firm, nature of—Person carrying on business under another name, suit against—Defendant dead at time of suit—Cause of action arising partly out of jurisdiction—Defendant residing out of jurisdiction—Leave to bring defendant on record—Letters Patent, (Bom.), cl. 12—Jurisdiction.

There is no such thing as a firm known to the law. [p. 466, col. 2.]

Ex parte Corbett, In re Shand (1880) 14 Ch. D. 122 at p. 126; 49 L. J. Bk. 74; 42 L. T. 164; 28 W. R. 569, followed.

A suit against a firm is essentially a suit against the partners constituting the firm. If a suit is brought against a firm in the firm's name and a decree is passed for the plaintiff, it is a decree against all the partners constituting the firm assuming that they were all

alive at the date of the suit and decree. If a partner dies before suit and the suit is against the firm in the firm's name, the suit is one solely against the surviving partners and judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. [p. 466, col. 2; p. 467, col. 1.]

Ellis v. *Wadesan*, (1899) 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508; 47 W. R. 420, relied on.

When a person carries on business in a name other than his own and a suit is brought against him in the name in which he carries on business, the suit is essentially one against him and he is the sole defendant in the suit. If he dies before suit, and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person. [p. 467, cols. 1 & 2.]

Mohun Chunder Koondoo v. *Azeem Gazee Chowkidar*, 12 W. R. 45; 3 B. L. R. A. C. J. 233 and *Veerappa Chetty* v. *Ponnon*, 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12, referred to.

Plaintiffs sued at Bombay the firm of defendant's father carrying on business at Ambala in the Punjab for recovery of amount due in respect of certain business transactions. The writ of summons having issued, the defendant's Attorneys wrote to the plaintiffs' Attorneys stating that the suit was not properly filed as the defendant's father who was the owner of the firm had died long ago and that defendant was the present sole owner and asked that a fresh writ should be served after amending the plaint. The plaintiffs thereupon obtained an order for amendment of the plaint and the name of the defendant was brought on the record. It appeared that although the defendant resided at Ambala and part only of the cause of action arose in Bombay, no leave under cl. 12 of the Letters Patent was obtained:

Held, that plaintiffs ought to have obtained leave under cl. 12 of the Letters Patent before the defendant was brought on the record and that no such leave having been obtained, the Court had no jurisdiction to entertain the suit. [p. 466, col. 2.]

Rampartab Samrathrai v. *Foolibai*, 20 B. 767; 10 Ind. Dec. (N. S.) 1082, followed.

Mr. *Setalvad* (with him Mr. *Taraporevalla*), for the Plaintiffs.

Mr. *Kania* (with him Mr. *B. J. Desai*), for the Defendant.

JUDGMENT.—This is a suit to recover Rs. 13,651 alleged to be due from the defendant to the plaintiffs at foot of an agency account.

The plaintiffs' firm carried on business in Bombay as *Muccadams* in cotton. There were two partners in the plaintiffs' firm, *viz.*, the firm of Hiralal Ramgopal and Brijmohandas Rampratab. The defendant's father, Kashiram Bhagwandas, carried on business at Ambala in the Punjab in the name of Beharilal Bisambardas. Kashirm consigned cotton to the plaintiffs' firm for sale in Bombay, and the plaintiffs' firm made advances to him against the consignments. The present suit is to recover the amount due to the plaintiffs' firm in respect of those transactions. The amount claimed, *viz.*, Rs. 13,651, includes an item of Rs. 11,000 to be presently referred to.

On May 1, 1917, Brijmohandas filed a petition in insolvency and a vesting order was made on May 3, 1917.

Kashirm died in May 1918, leaving a son Gavrishankar who is still a minor and a widow Bai Peli. It is established on the evidence given before me that the plaintiffs knew that Kashiram was the sole owner of the firm of Beharilal Bisambhardas, also that they knew about the death of Kashiram in October 1919, if not earlier.

On December 24, 1919, the plaintiffs sent a notice of demand by registered post to "Beharilal Bishambhardas Esq." The signature of the addressee on the postal acknowledgment is "Beharilal Bishambhardas by the hand of Baharilal" (Ex. A). The present suit was filed on April 26, 1920, against "Beharilal Bishambhardas a firm carrying on business at Ambala City in the Punjab." The suit was filed after obtaining leave under cl. 12 of the Letters Patent as part only of the cause of action had arisen within the local limits of this Court.

After the institution of the suit the duplicate writ of summons was sent by registered post to the firm of Beharilal Bisambhardas at Ambala. The signature of the addressee on the postal acknowledgment, which is dated June 11, is "Baharlal" (Ex. B). On July 16, Messrs. Malvi & Co. wrote to the plaintiffs' Attorneys stating that the duplicate writ of summons was placed in their hands, that they had obtained a warrant from Bai Peli, widow of Kashiram, the late proprietor of the firm of Beharilal Bishambhardas, and the mother of Gavrishankar, the present owner of the said firm, and they asked for copy proceedings (Ex. C). The copy proceedings were sent and on July 22 Messrs. Malvi & Co. wrote to the plaintiffs' Attorneys stating that it appeared from the copy proceedings that the suit was not properly filed as Kashiram who was the owner of the firm had died long ago and the present owner was Gavrishankar and that Bai Peli was managing his estate. The letter further stated that the plaint

should be amended and that a fresh writ should be served upon them. The plaintiffs' Attorneys replied on July 24, stating that the suit was properly filed. On July 26, Messrs. Malvi & Co. wrote to the plaintiffs' Attorneys stating that Kashiram was the sole owner of the firm of Beharilal Bishambhardas, that the firm had ceased to exist, and that the only person that could be sued was Gavrishankar, the minor son of Kashiram.

Thereafter the plaintiffs obtained a Judge's order on September 14 for amendment of the plaint. The material part of the order is as follows :—

"I do order that the plaintiffs be and they are hereby given leave to amend the title of the plaint by making Gavrishankar, the son of Kashiram Bhagwandas proprietor of the defendant firm, the defendant to this suit and to make such other consequential amendments in the plaint as may be necessary and I do further order that the said Bai Peli widow of the said deceased Kashiram Bhagwandas be and she is hereby appointed guardian *ad litem* of the said defendant Gavrishankar who is a minor."

After the date of the said order the plaint was amended by adding a new paragraph being para. 9A which is as follows :—

"The said Kashiram Bhagwandas, the owner of the defendant firm, died in May 1918 leaving his son Gavrishankar, the defendant herein and his only heir and as such the defendant is now the sole owner of the said firm of Beharilal Bishambhardas."

The title of the suit was amended by striking out the words "Beharilal Bishambhardas a firm carrying on business at" and substituting the words "Gavrishankar son of Kashiram a minor under the age of 18 years residing at." Though Gavrishankar resided at Ambala and part only of the cause of action had arisen in Bombay, no leave under cl. 12 of the Letters Patent was obtained before Gavrishankar was brought on the record.

At the trial of the suit the following issues were raised :—

(1) Whether the plaintiffs are entitled to maintain this suit against the present defendant without leave to sue being obtained under cl. 12 of the Letters Patent ?

(2) Whether the plaintiffs' claim against the present defendant is barred by limitation ?

(3) Whether the *Hawala* for Rs. 11,000 mentioned in para. 3 of the plaint is binding on the defendant ?

(4) Whether the High Court Suit No. 1070 of 1917 was compromised on the footing of the *Hawala* being a good one ?

(5) If so, whether the present defendant as the representative of Kashiram consented to the compromise on that basis ?

After the issues, were raised Counsel for the plaintiffs stated that the amendment of the title as made was incomplete and he asked for leave to complete the amendment so as to bring it in conformity with the said order. I granted leave and the title as finally amended is as follows :—

"Gavrishankar son of Kashiram (Bhagwandas, proprietor of the firm of Beharilal Bishambhardas), a minor under the age of 18 years residing at Ambala, etc."

The words within parenthesis are the words which I granted leave to add, the addition being in conformity with the order of amendment.

The first question to be determined is, whether having regard to the fact that no leave was obtained under cl. 12 of the Letters Patent before bringing Gavrishankar on the record, this Court has jurisdiction to entertain the suit. This question can best be answered if the relation of a partner to a firm of which he is a member and the nature and effect of suits by and against a firm have been determined. To begin with it may be observed that the Law of England as well as of British India knows nothing of a firm as a body or artificial person distinct from the members composing it. In this respect a firm differs from a company incorporated under the Companies Acts, such a company being a corporate entity separate from its shareholders, though the latter can control its action by passing resolutions in general meeting. The word "firm" is a short, collective name for the individuals who constitute the partners, and though under the Rules of the Supreme Court and under the C. P. C. actions may now be brought by and against partners in the name of their firm, the general doctrine that "there is no such thing as a firm known to the law" [*Ex parte Corbett, In re Shand* (1)] remains in force. It follows from this that a suit against a firm is essentially a suit against the partners constituting the firm. If a suit is brought against a firm

(1) (1880) 14 Ch. D. 122 at p. 126; 49 L. J. Bk. 74; 42 L. T. 164; 28 W. R. 569.

in the firm's name and a decree is passed for the plaintiff, it is a decree against all the partners constituting the firm assuming that they were all alive at the date of the suit and decree. If a partner dies before suit, and the suit is against the firm in the firm's name, the suit is one solely against the surviving partners and judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. The judgment cannot be enforced against the private estate of the deceased partner unless his legal representative is added expressly as a defendant, for a dead man cannot be sued though his legal representative can be sued in a proper case. If a partner dies between service of the writ and the trial of the suit and judgment, in that case equally the dead man's estate is not bound and judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets. But if his legal representative is brought on the record, judgment may be obtained against him also as such and execution enforced against his private estate. Supposing there were two partners both living at the date of the writ and both were served, and both died before the action came on for trial, no judgment could be obtained: *Ellis* v. *Wadeson* (2).

Turning now to suits against a person carrying on business in a name other than his own, the C. P. C., O. XXX, r. 10. provides that he may be sued in that name as if it were a firm name. The words "as if it were a firm name" are used advisedly, for one man cannot constitute a firm. When a suit is brought against such person in the name in which he carries on business, the suit is essentially one against him and he is the sole defendant in the suit. If he dies before suit, and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person: *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar* (3) and *Veerappa Chetty* v. *Ponnon* (4).

In the present case the plaintiffs were aware before the institution of the suit that Kashiram was dead. They were aware that he was the sole owner of the firm of Beharilal Bishambhardas. Notwithstanding this the suit was instituted against "Beharilal Bishambhardas a firm." The suit ought to have been brought against Kashiram's legal representative, that is, Gavrishankar. The plaintiffs did not realise this until Gavrishankar's Attorneys raised an objection to the suit as framed, and when the plaintiffs obtained the order for amendment they omitted to obtain leave to sue Gavrishankar under cl. 12 of the Letters Patent. In the first place, I think that no amendment ought to have been allowed at all. In the next place, I am clearly of opinion that leave ought to have been obtained under cl. 12 of the Letters Patent. Gavrishankar was to all intents and purposes a new party to the suit. The suit as originally instituted was not merely against a wrong person, but against no person at all. Though the plaint was amended by substituting the name of Gavrishankar for "Beharilal Bishambhardas a firm." the case was not one of substitution at all. It was a new suit against a new defendant. After the plaintiffs' Counsel obtained leave from me to add the words "proprietor of the firm of Beharilal Bishambhardas," he founded an argument upon those words the argument being that the original suit was against "Beharilal Bisambhardas a firm," that at the date of the suit Gavrishankar was the proprietor of the firm, and that the effect of the amendment was only to supply the name that was wanting in the original title. The answer to that is that the suit against "Beharilal Bishambhardas a firm" was in reality a suit against a dead man. Supposing the suit had been filed originally against the deceased Kashiram, it would have been clearly a nullity, and the defect could not have been cured by prefixing Gavrishankar's name in the title to the suit before Kashiram's name. Likewise the defect in the present case could not be cured by the amendment that was made. Gavrishankar could not be brought

(2) (1899) 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508; 47 W. R. 420.

(3) 12 W. R. 45; 3 B. L. R. A. C. J. 233.

(4) 31 M. 86; 17 M. L. J 551; 3 M. L. T. 12.

on the record except as the legal representative of Kashiram. In fact he was brought on the record as the son and heir of Kashiram (see plaint, para. 9A). If he inherited the firm from his father along with his other assets, his liability would be in his character of legal representative of his father and the extent of the liability would be the entire assets inherited by him and not merely the firm's property which formed part of those assets. The description of Gavrishankar as "the proprietor of the firm of Beharilal Bishambhardas" is a mere blind, and it cannot mend matters. I, therefore, hold, following the decision in *Rampartab Samrathrai* v. *Foolibai* (5) that the plaintiffs ought to have obtained leave under cl. 12 of the Letters Patent before Gavrishankar was brought on the record, and that no such leave having been obtained this Court has no jurisdiction to entertain the suit.

* * * * * * *

K. S. D. *Suit dismissed.*

(5) 20 B. 767; 10 Ind. Dec. (N. S.) 1082.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 214 OF 1923.

November 25, 1924.

Present:—Mr. Pullan, A. J. C., and Mr. Ashworth, A. J. C.

LACHHMIPAL SINGH—PLAINTIFF—APPELLANT

versus

BHAGWAT SINGH—DEFENDANT—RESPONDENT.

Oudh Laws Act (XVIII of 1876), ss. 7, 9—Oudh Land Revenue Act (XVII of 1876), s. 40—Pre-emption in respect of heritable, non-transferable lease—"Sub-division," meaning of.

Under s. 7 of the Oudh Laws Act, read with s. 40 of the Oudh Land Revenue Act, a right of pre-emption should be presumed to exist not only in the case of under-proprietary communities but also in the case of communities constituted by the holders of heritable and non-transferable leases. [p. 469, col. 2.]

Section 9 of the Oudh Laws Act allows a right of pre-emption to be exercised by a co-sharer of the sub-division of a tenure resulting from a heritable non-transferable lease. The sub-divisions contemplated by the section must be units bearing the relation one to another of having been called into existence by one and the same act or event of sub-division whatever the purpose of sub-division. [p. 470, cols. 1 & 2.]

Appeal against the judgment and decree of the Subordinate Judge, Partabgarh, dated the 26th February 1923, upsetting that of the Munsif, Partabgarh, dated the 19th September 1922.

Mr. *Ganga Dayal*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.

Pullan, A. J. C.—(*July 29, 1924.*)—The plaintiff in this suit sought to pre-empt a sale of certain property. The property was sold as being *haqqiat matahti patta istimrari*. In the ordinary meaning of the term *matahti* this must be supposed to be some form of under-proprietary tenure, and this view is borne out by the entry in the *khewat*. It is true that in the *khetauni* of the recent settlement the property does not appear to have been recorded as strictly speaking under-proprietary, but there is evidence on the record that other land of the same *khata* has already been transferred as being held in under-proprietary tenure. Obviously it did not lie in the mouth of the vendee to meet the plaintiff's claim by saying that the property was not transferable and, therefore no suit for pre-emption lay. Consequently the vendee has taken up a standpoint that the property is transferable but is not an under-proprietary tenure and is, therefore, not liable to pre-emption. In view of the wording of s. 7 of the Oudh Laws Act I am not prepared to hold that a transferable right which is not an under-proprietary right is not liable to pre-emption. Whether a right other than under-proprietary right can or cannot be transferred is a question which I have not to decide. The only finding of the lower Appellate Court on which it has allowed the appeal and dismissed the plaintiff's suit is that it has not been proved that the land is under-proprietary tenure and this being so no claim for pre-emption lies. As, in my opinion, this conclusion does not necessarily follow from the premises, and as I cannot go into any of the other questions which have not been decided by the lower Appellate Court I remand the suit to the Subordinate Judge of Partabgarh for findings on the other grounds of appeal to be returned within three months. On receipt of the findings ten days will be allowed for objections.

Ashworth, A. J. C.—(*November 25, 1924.*)—This second civil appeal arises out of a suit for pre-emption, brought by the plaintiff-appellant against the defendant-respondent, in respect of a deed of sale executed on the 27th January 1921, transferring to the defendant some land in *khata khewat* No. 511 in M. Ishri Singh, village Jiriari. The Court of first hearing, namely,

the Munsif of Partabgarh, decided that the plots were held on an under-proprietary tenure, and thus were liable to pre-emption under ss. 7 and 9 of the Oudh Laws Act (XVIII of 1876). He also held that the plaintiff had got a preferential right to that of the defendant. Lastly, he held that the purchase price had been inflated from seven hundred and fifty rupees to one thousand rupees. On first appeal, the Subordinate Judge of Partabgarh, allowed the defendant-respondent's contention that the onus of proving the land as part of an under-proprietary holding was on the plaintiff, and that the plaintiff had failed to sustain this onus. Accordingly he allowed the appeal and did not proceed to decide the other questions raised in the petition of appeal.

This appeal came up before my predecessor, Mr. Pullan, whose order dated 29th July 1924, is on the file. He remarked that, although there was some evidence, *e. g.*, the *khatauni* of the recent settlement, to support the view that the holding was not an under-proprietary one, yet, the plaintiff could not deny that other land in the same *khatauni* had been transferred, and obviously could not be permitted to maintain that the property was not transferable since he had bought it. He accordingly confined the plaintiff to the position that even if the property was transferable, yet it was not an under-proprietary tenure. He was not prepared to hold, in view of the wording of s. 7 of the Oudh Laws Act, that a transferable right, which is not an under-proprietary right, is not liable to pre-emption. Accordingly he remanded the case for decision by the First Appellate Court of the issues which it had left undecided.

The first question that arises in this case is whether I am bound by the findings of my predecessor in office as contained in his remand order. It was held in *Balwant Ramchandra Natu* v. *Secretary of State* (1), that a remand judgment was conclusive in all points therein specifically decided beyond possibility of revision. I am unable to hold in this case that my predecessor's brief order of remand can be held to have decided the points above stated beyond possibility of revision. In the Bombay case, the remand order was issued by a Division Bench, who came to a certain decision after a lengthy judgment. The case does not appear to be on all fours with the present case.

(1) 32 B. 432; 10 Bom. L. R. 531.

The next question is whether the lower Appellate Court was right in holding that the plots in question are not part of an under-proprietary tenure, but are merely an occupancy-holding. It has been proved to my satisfaction that the nature of the holding was that of a perpetual lease, not permitting the lessee a right of transfer against the lessor. The holding is described as a *matahtdari* one. This expression precludes it being a *kabiz darmiani*, that is, a strictly under-proprietary holding, and also precludes it being a mere tenancy. In a *khasra* Ex. 5, which, whether it bears the date 1300 or not, (the parties disagree as to this figure) is undoubtedly the *khasra* framed for the first year of the current settlement, because, it contains the *khasra* number of the previous settlement, as well as the new number for the ensuing settlement (a fact which stamps it as complying with the Board's order for the making of the first *khasra* of the present settlement), we find that the holding is described as a perpetual lease and not as an under-proprietary one. The entry of the holding in what is called the under-proprietor *khewat* (see Ex. 3) does not necessitate the holding being an under-proprietary one, inasmuch as, that *khewat* contains not only the register of all under-proprietors, but also the register of lessees whose rents have been fixed (see para. 156 (*c*) of Cir. 1, Deptt. VII of the Board's Circulars). It may be mentioned that in this *khewat* the column showing under-proprietors is blank; also in *khasra* Ex. 4 the column of under-proprietors, *kabiz darmiani*, is blank. I, therefore, hold that this finding is correct, though I agree with my predecessor that it is not a conclusive finding. The next question is whether, under ss. 7 and 9 of the Oudh Laws Act, a right of pre-emption is permitted in respect of a holding, which is neither proprietary or under-proprietary. It will be seen that under s. 7 of the Oudh Laws Act, read with s. 40 of the Land Revenue Act (XVII of 1876), the right should be presumed to exist not only in the case of under-proprietary communities, but also in the case of communities constituted as the holding of holders of heritable, non-transferable leases. The expression "non-transferable" in s. 40 of the Land Revenue Act must obviously be used in a different sense to that in which the word transferred is used in sub-s. (*b*) of s. 7.

Unless this is the case, sub-s. (*a*) of s. 7 would allow pre-emption in the case of such holdings, while sub-s. (*b*) would not allow it to extend to the transfer of such holdings or part of such holdings. The fact appears to be that heritable and non-transferable leases under s. 40 of the Land Revenue Act of 1876, meant leases, which could not be transferred as against the lessor, but subject to his interference could be transferred, [see *Ram Shanker* v. *Nanik Prasad* (2)]. Whereas "transferable rights" as used in sub-s. (*b*) of s. 7 of the Oudh Laws Act mean rights capable in any way of transfer. I hold, therefore, that the lower Appellate Court was not right in holding that pre-emption could not be claimed, merely because the holding in question was not proved to be an under-proprietary one. It appears to me not open to doubt that this lease was of a nature that the transfer could be objected to by the *zemindar*, but that otherwise the transfer would hold good. It is not, therefore, necessary to decide whether the vendee was entitled to claim that the property was not transferable after having bought it.

The next question is whether s. 9 of the Oudh Laws Act will allow a right of pre-emption to be exercised by a co-sharer of the sub-division of a tenure resulting from a heritable, non-transferable lease. The section begins with the words "If the property to be sold or foreclosed is a proprietary or under-proprietary tenure," but read with sub-s. (*a*) of s. 7, we must amplify this expression by the words "or the tenancy of the holder of a heritable and non-transferable lease" within the meaning of s. 40 of the Land Revenue Act. I, therefore, hold that the plaintiff had a right to pre-empt if he could show he was a co-sharer of the sub-division, and that the vendee was not one. The *patwari's* evidence shows that the whole perpetual lease holding was one originally of 47 *bighas*. This holding was subsequently sub-divided into five sub-divisions called 1, 2, 3, 4 and 5. Sub-division 5 was again sub-divided into three sub-divisions, and the land in question lies in what is *khata* No. 5/2. It is the plaintiff's case that he is the owner of *khata* No. 5/3, whereas the defendant-vendee has no right in *khata* No. 5 at all, but in some other *khata*. On behalf of the defendants it is urged that the word "sub-division", under s. 7 of the Oudh Laws Act, means a sub-division created by any division of the original holindg at any time whether sooner or later. He contends that when *khata* No. 5 was further sub-divided, it only had the result of increasing the number of the already existing five *khatas* or sub-divisions. The sub-divisions contemplated by s. 9 appear to be units bearing the relation one to another of having been called into existence by one and the same act or event of sub-division, whatever the purpose of such sub-division. This in effect is what was held in *Baij Nath Singh* v. *Mahabir Singh* (3). The last question to decide is whether the Court of first hearing was right in allowing pre-emption on three-quarters only of the purchase-money. The plaintiff produced evidence justifying this, and the defendant produced no evidence. It is maintained, however, that he would have produced evidence but for a wrongful order of the Munsif. It appears that three hours after the hearing of the case had been concluded on the 21st August, the defendant asked to be allowed to produce evidence on the ground that he had been too ill to produce it before. It appears, however, that up to the 21st August he had never made any attempt to summon any witnesses, though, it is said by the appellant's Counsel, that, he had been in Court a day or two previously. Be this as it may, there was no reason why the defendant should not have put in this petition before the parties left the Court. This petition was not supported by any affidavit. I consider that in the circumstances the Munsif was quite right in rejecting the application, on the ground that it would have meant a further delay for re-summoning of parties. Accordingly I allow this appeal, and restore the judgment of the Court of first hearing. The plaintiff will get his costs throughout.

Z. K. *Appeal allowed.*

(2) 24 Ind. Cas. 32; 1 O. L. J. 187; 17 O. C. 150.

(3) 20 Ind. Cas. 646; 16 O. C. 203.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 52 OF 1924.

July 29, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

FIRM GANESHI LAL-HARNARAIN—DEFENDANTS—APPLICANTS

versus

DEBI DAS—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XVII,

rr. 2, 3—Adjournment of case—Failure of defendant to appear—Order of Court, nature of—Application to set aside order, whether competent—Revision—High Court, whether will interfere—Ex parte proceedings—Court, duty of.

When a defendant does not appear on the date to which the hearing of the case has been adjourned at his request, and the Court proceeds to dispose of the suit, the order of the Court must be presumed to have been passed under O. XVII, r. 2 of the C. P. C. in the absence of anything to the contrary. [p. 472, col. 1.]

Where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge and the District Judge comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. [p. 472, col. 2.]

Bilami Kuar v. *Dinu Rai*, 8 A. 111; A. W. N. (1886) 28; 4 Ind. Dec. (N. S.) 1142 (F. B.), *Vuppuluri Atchayya* v. *Sri Kanchumarti Venkata Seetharama Chandra Rao*, 18 Ind. Cas. 555; 30 M. 195; 13 M. L. T. 60; 24 M. L. J. 112, *Vishvanath Govind Deshmane* v. *Rimbhat*, 15 B. 148; 8 Ind. Dec. (N. S.) 99 and *Ram Adhin* v. *Ram Bharose*, 85 Ind. Cas. 27; 22 A. L. J. 1041; L. R. 5 A. 740 Civ., referred to.

Where a party absents himself, whether on an adjourned date or not and whether he has taken time to produce any particular evidence or not, the provisions of O. XVII, r. 2, C. P. C., become applicable. [p. 474, col. 1.]

A Court by purporting to decide a case before it as a *contested case*, where, *as a matter of fact*, the contest has ceased owing to the absence for the time being of a party, cannot deprive the absent party from showing to the Court that he had a very good reason for his absence. [*ibid.*]

Ram Charan Lal v. *Raghuvir Singh*, 75 Ind. Cas. 337; 21 A. L. J. 495; 45 A. 618; (1923) A. I. R. (A.) 551, followed.

Where a defendant has filed a written statement denying some of the allegations of the plaintiff and issues have been framed on the pleas raised, the Court is bound to consider the issues and decide them even if the proceedings are *ex parte*. [p. 471, col. 2.]

Civil revision from an order of the District Judge, Agra, dated the 3rd of January 1924.

Messrs. *S. B. Johari* and *Bishambar Dayal*, for the Applicants.

Mr. *S. K. Dar*, for the Opposite Party.

JUDGMENT.

Sulaiman, J.—This is a defendant's application in revision from an order of the District Judge of Agra. It arises under the following circumstances:—

On the 7th of July 1923 a suit was brought in the Court of the Munsif of Agra for recovery of a certain sum of money. On the 24th of July 1923 a written statement was filed on behalf of the defendants and issues were framed. The 21st of September 1923 was fixed for final hearing in the case, but on an application made by the plaintiffs the date was subsequently altered to the 17th of August 1923. On that date the defendants were absent owing to an alleged illness and produced a medical certificate. The Court was prepared to adjourn the case on payment of a certain amount of costs. Readiness was expressed on behalf of the defendants to pay the amount and the Court then directed that it would proceed to hear the plaintiffs' evidence and postpone the case for the defendants' evidence. Defendants' Vakil objected to this procedure and ultimately intimated that he would apply for transfer of the case from that Court. A week's time was granted, but no application was made for transfer. On the 27th of August 1923 the defendant firm, neither through any recognised agent, nor through any Pleader, put in an appearance. The learned Munsif then proceeded to dispose of the suit. As the defendant had filed a written statement denying some of the allegations of the plaintiff, and issues had been framed on the pleas raised, the Court was bound to consider the issues and decide them even if the proceedings were *ex parte*. The operative portion of the order passed by him was in these words:—

"Suit of the plaintiff for Rs. 547-15-3 is decreed with costs and usual future interest." It is important to note that the judgment did not expressly say whether the Munsif proceeded under O. XVII, r. 2 or O. XVII, r. 3.

The defendant firm did not prefer an appeal from this decree, but filed an application under O. IX, r. 13 treating this order to have been passed *ex parte* against them. By the time this application came up for disposal the Munsif had been transferred and his successor dismissed the application holding that the previous order had been passed under O. XVII, r. 3 and, therefore, no application for setting it aside at all lay. The defendant firm not being satisfied with this last order preferred an appeal before the District Judge. The learned District Judge entertained the appeal and heard arguments in support of the appeal, but came to the conclusion that the previous order of the 27th of August 1923 was an order passed under O. XVII, r. 3 and that, therefore, the order of the Munsif dismissing the application was quite correct. This is an application in revision from this last order of the District Judge.

The first point which arises before us is whether a revision at all lies from the order of the District Judge. In my opinion even if no revision lies from the order of the

District Judge, it is open to us to entertain a revision from the order of the Munsif himself. So far as the order of the Munsif is concerned, I am clearly of opinion that he refused to exercise jurisdiction, provided of course it be assumed that the previous dismissal was under O. XVII r. 2 and an application to set asid the *ex parte* decree was preferred before him. He refused to hear the application on the ground that no application lay under O. IX, r. 13. If the Munsif was wrong in his conclusion that no application lay it is clearly a case of a refusal to exercise jurisdiction.

The next question is whether it is open to this Court to interfere in revision and set aside the order of the Munsif when an appeal lay to the District Judge and was actually dismissed by him. Section 115 would be applicable only where no appeal lies to this Court. The words are 'in which no appeal lies thereto.' Clearly the word 'thereto' refers to the High Court. It is clear that either no appeal lay to the District Judge at all or if an appeal refusing to set aside an *ex parte* decree lay to him then no second appeal lies to this Court. I would, therefore, be prepared to set aside the order of the Munsif provided the contention of the applicant is correct that he has refused to exercise jurisdiction on the erroneous ground that the previous dismissal was under O. XVII, r. 3.

This brings me to the real question involved in the case. I have already indicated that in the judgment pronounced by the Munsif on the 27th of August 1923 there was no express mention as to whether he was proceeding under O. XVII, r. 2 or O. XVII, r. 3. It also has to be admitted that on the day when the judgment was pronounced the defendant did not appear. It is also quite clear that that was a date to which the hearing of the case had been adjourned. In the absence of any express mention that the order passed by him was under O. XVII, r. 3, it must be presumed that it was an order passed under O. XVII, r. 2 and, therefore, in deciding the case he must be deemed to have proceeded under the provisions of O. IX of the Code. In this view of the matter an application to have the decree set aside as being an *ex parte* one would lie.

At the Bar a larger question was raised that even if the lower Court had purported to pass an order under O. XVII, r. 3, it must be deemed that its order was only under r. 2 because this was a case where the defendant had failed to appear. It is contended that if the defendant fails to appear then, no matter whether he also fails to produce his evidence or to cause the attendance of the witnesses or to perform any act necessary for the further progress of the suit for which time has been allowed, O. XVII, r. 2 and not r. 3 would apply and that r. 3 can only apply to the case where the defendant does appear and yet fails to perform any of the things mentioned in that rule. I would prefer not to express any opinion on this last question. I would only say that in the ruling of *Ram Charan Lal* v. *Raghubir Singh* (1) to which I was a party there was no mention of O. XVII, r. 3 in the judgment and the Court had not expressly said that it was proceeding under r. 3. In the view which I have taken of the other points in the case which are quite sufficient to dispose of the application I would allow this application and revising the order of the Munsif dated the 19th of September 1921 direct that the application be restored to its original number and disposed of according to law.

Mukerji, J.—This is an application to this Court to revise the orders of the two Courts below, *viz.*, the order of the Munsif of Agra and the order of the District Judge of Agra dated respectively the 27th of August 1923 and the 3rd of January 1924. The application arises in the following circumstances:—

A suit was brought against the applicants who were the defendants in it. The defendants filed a written statement and a date was fixed for final hearing. On the application of the plaintiffs, another date, which was a little earlier than the date originally fixed, was fixed, *viz.*, 17th of August 1923. On that date, the defendants applied for an adjournment and they obtained one for a period of seven days. The learned Munsif definitely fixed that date for the disposal of the suit. On that date which was the 27th of August 1923, the defendants did not appear and the suit was decreed. It is a matter for consideration whether the Munsif purported to act under O. XVII, r. 2 or O. XVII, r. 3. I am decidedly of opinion that the learned Munsif did purport to act under O. XVII, r. 3. My reasons are these. The Munsif wrote out a judgment as he would write in the

(1) 75 Ind. Cas. 387; 21 A. L. J. 495; 45 A. 618; (1923) A. I. R. (A.) 551.

case of a contested suit. He wrote out all the issues that had been raised by the defendants. He took up the issues one by one and then passed an order decreeing the suit. He, nowhere said that, he was treating the defendants as absent and, thererore, was passing a decree *ex parte*. A few days later, an application was made to the learned Munsif to set aside the decree on the ground that it had been an *ex parte* one. The successor-in-office to the Munsif, who had decided the suit held, as I hold now, that, the decree purported to have been passed on contest, in the sense that it was passed under O. XVII, r. 3, and that, therefore, no application under O. IX, r. 13 lay to him. Being dissatisfied with this order the defendants appealed to the District Judge. The learned District Judge affirmed the order of the Munsif, coming to the conclusion that no application under O. IX, r. 13 lay in the circumstances of the case. His language, which it will be necessary to quote, is as follows:—

"The rulings.....mentioned by Mulla govern the case and show that the case comes under O. XVII, r. 3. It is, therefore, not possible for the decree to be set aside under O. IX, r. 13."

In this Court two points have been urged against the granting of the application in revision. First, it has been urged that no application in revision lay and secondly, the Courts below were right inasmuch as the learned Munsif was right in making a decree under the provisions of O. XVII, r. 3.

On the first point some argument was addressed as to whether any revision lay from the order of the learned District Judge. It has been urged that the learned District Judge was competent to entertain an appeal from an order passed under O. IX, r. 13 of the C. P. C., and he did entertain one and that, therefore, even if he decided wrongly, he decided so in the exercise of his jurisdiction and, therefore, no revision lay under s. 115 of the C. P. C. This is a subject on which a good deal has been said by different Judges in different High Courts. In this case, this is really a matter of pure academic interest. My reason for saying this is that, the application in revision is directed against the order of both the learned Munsif and the learned District Judge. If the District Judge acted within his jurisdiction it must be conceded that the Munsif did not and it would be open to this Court to set aside the order of the Munsif, disregarding the order of the District Judge.

Personally speaking I am of opinion that where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge and the District Judge comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. It would be different if the District Judge came to a different conclusion from that of the First Court. An appeal would lie to the District Judge only when an application would properly lie to the Court of first instance under O. IX, r. 13. If we look to the language of O. XLIII, r. 1, cl. (*d*) we shall find that an appeal is provided against "an order under O. IX, r. 13 rejecting an application for an order to set aside the decrèe passed *ex parte*." Where the District Judge says, in appeal, that no application lay under O. IX, r. 13, it can hardly be said that, he was entertaining an appeal against an order passed under O. IX, r. 13. In my opinion both the Munsif and the District Judge, in a case like this, refused to entertain jurisdiction and, therefore, the orders of both the Courts are liable to revision by the High Court. As I have said, the point is not free from difficulty and various opinions have been given by various Judges. I may quote in support of my view some opinions expressed at different times. To start with, comes the case of *Badami Kuar* v. *Dinu Rai* (2), which was a case decided by five learned Judges of this Court. In that case there had been an appeal to the District Judge who confirmed the order of the Munsif and this High Court had no hesitation in entertaining an application in revision. There is the case of *Vuppuluri Atchayya* v. *Sri Kanchumarti Venkata Seetharamachandra Rao* (3). Here, there was a dissentient voice in the person of the third Judge, and two Judges took the same view as I take. In the case of *Vishvanath Govind Deshmane* v. *Rambhat* (4), there was an appeal to the District Judge who confirmed the order of the Subordinate Judge and the High Court interfered. The order of Court was "We reverse the *orders* of the

(2) 8 A. 111; A. W. N. (1886) 28; 4 Ind. Dec. (N. S.) 1142 (F. B.).

(3) 18 Ind. Cas. 555; 39 M. 195; 13 M. L. T. 60; 24 M. L. J. 112.

(4) 15 B. 148; 8 Ind. Dec. (N. S.) 99.

lower Courts and direct the Subordinate Judge....." Lastly, I may mention that in a recent case decided by myself sitting with Dalal, J., in Civil Revision No. 155 of 1923, decided on the 21st of July 1924 [*Ram Adhin* v. *Ram Bharose* (5)], this very question was decided by us and we held that an application did lie for the revision of both the orders of the Munsif and the District Judge. I hold, therefore, that both the orders are open to revision.

Coming to the second point, I am decidedly of opinion that where a party absents himself, whether on the adjourned date or not and whether he has taken time to produce any particular evidence or not, the provisions of O. XVII, r. 2 become applicable. In the language of Lindsay, J., in the case of *Ram Charan Lal* v. *Raghubir Singh* (1), the words "make such other order as it thinks fit" in r. 2, O. XVII do not entitle a Court in a case, where one of the parties is absent, to purport to decide the case as if it were a *contested suit*. In the revision case already mentioned, Dalal, J., gave our considered opinion and I gave some additional reasons for our view. It is not necessary to repeat our views here. It would be sufficient to state that, a Court by purporting to decide a case before it as a *contested case*, where, *as a matter of fact*, the contest has ceased owing to the absence for the time being of a party, cannot deprive the absent party from showing to the Court that he had a very good reason for his absence. He may have the very best of reasons for his absence and an appeal would be no remedy for him. Because the Appellate Court would not be in a position to find out from the record what were the reasons of his absence. I agree, therefore, in the order proposed to be passed by my learned brother.

By the Court.—This application is allowed and the order of the Munsif dated the 29th of July 1923 is set aside and the application purporting to be under O. IX, r. 13 is restored to its original number to be disposed of according to law. Costs in all Courts will abide the event.

K. S. D. *Application allowed.*

(5) 85 Ind. Cas. 27; 22 A. L. J. 1041; L. R. 5 A. 740 Civ.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 85 OF 1924.

July 29, 1924.

Present:—Mr. Justice Boys.

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—APPLICANT

versus

FAZAL ELAHI—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 77—Provincial Small Cause Courts Act (IX of 1887), s. 25—Goods, non-delivery of—Suit for damages—Notice, whether necessary—Wilful neglect—Finding of fact—Revision.

The fact that a plaintiff sues for damages on account of the "non-delivery" of goods consigned to a Railway Company does not absolve him from giving notice to the agent within six months. [p. 475, col. 2.]

G. I. P. Ry. Company v. *Jitan Ram-Nirmal Ram* 72 Ind. Cas. 440; (1923) Pat. 82; 4 P. L. T. 173; 1 P. L. R. 160; (1923) A. I. R. (Pat.) 235; 2 Pat. 412, followed.

Ram Sahai Chidda Lal v. *The East Indian Ry. Co.*, 65 Ind. Cas. 578; 20 A. L. J. 664; (1922) A. I. R. (A.) 230; 44 A. 645, *Cawnpore Cotton Mills Co., Limited* v. *Great Indian Peninsular Railway*, 71 Ind. Cas. 614; 21 A. L. J. 223; (1923) A. I. R. (A.) 301; 45 A. 353 and *East Indian Railway Co.* v. *Sri Ram Madaleo*, 79 Ind. Cas. 344; 21 A. L. J. 896; 46 A. 125; (1924) A. I. R. (A.) 177, distinguished.

East Indian Ry. Company v. *Kali Charan Ram Prasad*, 60 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106, not followed.

When a suit for damages in respect of goods consigned to a Railway has been decreed on the ground of wilful neglect on the part of the Railway Company, the High Court is *prima facie* bound in revision by such a finding of fact, but if substantial justice has not been done, it can take into consideration the grounds of that finding in considering the question whether the Railway Company is entitled to the full benefit of the fact that notice was not served in time [p. 476, col. 1.]

Civil revision against an order of the Judge, Small Cause Court at Allahabad, dated the 13th February 1924.

Mr. *Ladli Prasad Zutshi*, for the Applicant.

Mr. *Mushtaq Ahmad*, for the Opposite Party.

JUDGMENT.—This is a civil revision from the decree of the Court of Small Causes. The plaintiff sued the Railway for damages on account of the "non-delivery" of one of four cases of matches. The Court of Small Causes found as a fact that "the box, I think, was thrown out by any thieves or thief who got into the waggon when the train stopped near the signal." He did not find whether or not this temporary stopping of the train in his opinion made it a case of theft from a running train. He went on further to hold that inasmuch as the guard saw the box thrown out of the train and made no attempt to recover it beyond

reporting the loss at the next station, there was "wilful neglect" on the part of the Railway and on this ground he held that the Railway were not protected by the owner's Risk-Note Form B. The Railway further raised the defence that six month's notice had not been given to the Agent of the Railway But this defence was rejected, the Judge of the Small Causes Court relying on *East Indian Ry. Company* v. *Kali Charan Ram Prasad* (1), a case in which Mr Justice Jwala Prashad of the Patna High Court held that there is a difference between a suit founded on, "loss" and a suit founded on "non-delivery" and that in the latter case, which is also the case here, no notice was necessary. The Railway have applied in revision to this Court urging, firstly, that the lower Court, having found that the goods were stolen from a running train, it ought to have dismissed the suit; and, secondly, that the lower Court erred in holding that the Railway through its servants ought to have made some effort to recover the box. I need not deal with these grounds (the first of which is in itself not an accurate statement of the lower Court's finding) as the finding of wilful neglect is a finding of fact. The next two grounds of revision deal with the question of notice. Notice to the Agent was admittedly despatched after the lapse of more than six months. The main question, therefore, calling for decision here is whether the fact that the suit was based on "non-delivery" takes the case out of s. 77 of the Railways Act which calls for notice to be given within six months. It is clear that what the plaintiff wants in this case and in all similar cases is compensation because he has not got his goods. He does not care whether the Railway have got his goods and are withholding them or whether they have lost his goods or whether they have been stolen or whether they have delivered them to somebody else. Regarded from this point of view there is certainly no material difference between a suit for "loss" and a suit for "non-delivery." It may be admitted at once that *for some purposes* there is a material distinction between a suit for "loss" and a suit for "non-delivery," *e. g.*, for the purposes of the Limitation Act, Arts. 30 and 31. The reason is sufficiently obvious but it is clear that while there may be a material distinction for the purposes of the Limitation Act, and even for the purposes of the Carriers Act, ss. 9 and 10 (s. 10 is actually repealed by the Railways Act) it does not follow by any means that there is any effective distinction for the purposes of ss. 72 and 77 of the Railways Act and of the Risk-Note Form B. Mr. Justice Jwala Prasad in the Patna case [*East Indian Ry. Company* v. *Kali Charan Ram Prasad* (1)], to which I have already referred, gave as one reason for holding that for the purposes of s. 77 there is a material distinction between "loss" and "non-delivery," that in the case of the former the Railway required notice in order to give them a chance of enquiring into the loss and how it occurred, while according to the learned Judge in the case of "non-delivery" notice for this reason would not be necessary as the Railway would have no need to make any enquiry. I am unable to appreciate this distinction. It would seem that the Railway might require equally an opportunity for enquiring into the causes which had led them to fail to deliver. I should, therefore, find myself in any case unable to assent to the proposition that for the purposes of s. 77 there is any difference between a suit for "loss" and a suit for "non-delivery". So far as the ruling to which I have referred and on which the lower Court based its judgment is concerned I am relieved from the necessity of considering it in greater detail as it has been overruled as it would seem in *G. I. P. Ry. Company* v. *Jitan Ram-Nirmal Ram* (2), Mullick and Bucknill, JJ. A reference to this latter case will show that the case quoted in the earlier portion of the judgment [*Agent East Indian Ry. Co.* v. *Ajodhya Prasad* (3).] must certainly have been misquoted for *East Indian Ry. Company* v. *Kali Charan Ram Prasad* (1). I am therefore of opinion that the fact that the suit for "non-delivery" did not absolve the plaintiff from giving notice to the Agent within six months.

I may mention here that the defendant Company has relied on *Ram Sahai Chidda Lal* v *The East Indian Ry., Co.* (4), *Cawnpore Cotton Mills Co. Limited* v. *Great Indian Peninsular Railway* (5) and *The East Indian*

(1) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.

(2) 72 Ind. Cas. 440; (1923) Pat. 821; 4 P. L. T. 173; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442.

(3) 49 Ind. Cas. 498; (1919) Pat. 150.

(4) 66 Ind. Cas. 578; 20 A. L. J. 654; (1922) A. I. R. (A.) 280; 44 A. 615.

(5) 71 Ind. Cas. 614; 21 A. L. J. 223; (1923) A. I. R. (A.) 301; 45 A. 353.

Railway Company v. *Sri Ram Mahadeo* (6). I only mention these cases because they have been pressed upon my attention but they appear to me to have no bearing on the distinction between "loss" and "non-delivery" for the purposes of s. 77.

The next question for consideration is whether I ought to set aside the decree or whether I should hold that substantial justice having been done this Court should not interfere merely on the ground that the notice was two or three days late. I am not, however, satisfied that substantial justice has been done. I am *prima facie* in revision bound by a finding of fact even in a case under s. 25 of the Court of Small Causes and I have, therefore, accepted the lower Court's finding of fact that there was "wilful neglect" and I should not consider any opinion of my own to the contrary justification for setting aside the decree on that ground; but I hold that I am entitled to take into consideration the grounds of that finding in considering the question whether I should give the defendant Railway the full benefit of the fact that notice was not served in time even though it was only two or three days beyond time and even though no earlier notice would have enabled them to recover the property. It is clear that if this was a theft from a running train and no further wilful neglect was proved the Railway would be absolved by the risk-note. The learned Judge of the Court of Small Causes has not found whether or not the theft was from a running train. If he meant to hold that a stop for a few minutes at the signal meant that the train ceased to be a running train I should find great difficulty in agreeing with him. He has, however, apparently based his decree on what he finds to be a wilful neglect and as far as I am able to ascertain the only basis of that finding is that the guard knew that the box had been thrown out and neither he nor anybody else took any steps to endeavour to recover it and he confined his interest in the matter to making a report. I feel great doubt myself as to whether there were really any steps which the guard could have taken which would have led to the recovery of the box and this means that I have grave doubts as to whether the finding of wilful neglect was justified. To these doubts I am entitled to give weight when determining the question whether the Railway should be given the full benefit of their technical plea that they had been given notice a few days beyond time. I hold, therefore, that they are entitled to the full benefit of that plea which I have decided in their favour. I accordingly allow the application in revision and set aside the decree of the Court of Small Causes with costs on the higher scale.

K. S. D. *Application allowed.*

(6) 79 Ind. Cas. 341; 21 A. L. J. 896; 46 A. 125; (1924) A. I. R. (A.) 177.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1516 OF 1921.

July 18, 1924.

Present:—Mr. Justice Ross.

HARIHAR SINGH—DEFENDANT—APPELLANT

versus

DASRATH AHIR AND OTHERS—PLAINTIFFS AND RAM PRASAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Malicious prosecution—Damages, suit for—Accusations substantially true—Reasonable and probable cause.

The first thing that a plaintiff in a suit for damages for malicious prosecution has to prove is his innocence. [p. 477, col. 1.]

Sheikh Muchi Osta v. *Horsmul Marwari*, 19 Ind Cas. 24; 17 C. W. N. 434, relied on.

Where information given to a Magistrate which led to the institution of proceedings under s. 107 of the Cr. P. C. against the plaintiff included more than one specific accusation and the Court found that one of those accusations was not supported by evidence but that there was reasonable and probable cause for the information which was given to the Magistrate:

Held, that the plaintiff was not entitled to recover damages for malicious prosecution as the case, as a whole, had not been found to have been laid without reasonable and probable cause. [p. 477, col. 2.]

Appeal from a decision of the Subordinate Judge, Saran, dated the 17th August 1921, confirming that of the Additional Munsif, Chapra, dated the 29th May 1920.

Mr. *Baikuntha Nath Mitter*, for the Appellant.

Messrs. *Ram Prasad* and *B. K. Sinha*, for the Respondents.

JUDGMENT.—This is an appeal by defendant No. 2 against a decree of the Subordinate Judge of Saran in a suit for damages for malicious prosecution. The plaintiffs' case was that the defendant No. 1

who was the *peshkar* of the Deputy Commissioner of Darjeeling had made an application to the Magistrate of Saran on the 3rd December 1918, which resulted in proceedings being taken against the plaintiffs under s. 107, Cr. P. C., which ended in their favour. Defendant No. 2 is the son of defendant No. 1. The principal allegations in the application to the Magistrate were that the defendant No. 1 had been assaulted by the plaintiffs on his way home from Ekma Railway Station, and further that they had carried away the crops of his paddy field of 1¼ *bighas*. This second allegation was based on a telegram sent by defendant No. 2 to defendant No. 1.

The finding of the learned Munsif was that the criminal case under s. 107 of the Cr. P. C. was not wholly a concocted story and without any reasonable or probable cause," and he dismissed the suit. The finding of the learned Subordinate Judge was that he was not prepared to believe that the assault was a total myth, and that he had no doubt that defendant No. 1 believed the assault to have been committed at the instance of the plaintiffs. With regard to the telegram about the cutting of the paddy of 1¼ *bighas* sent by defendant No. 2 to defendant No. 1 he held that there was no justification for defendant No. 2 sending the telegram, and that the case was started without reasonable and probable cause by defendant No. 2, but the application by defendant No. 1 so far as he was concerned was not without reasonable and probable cause and was started as an ordinary prudent man would have done under the circumstances. While dismissing the appeal so far as defendant No. 1 was concerned the learned Subordinate Judge gave the plaintiffs a decree for Rs. 147-8 0 against the defendant No. 2. It was held in *Sheikh Muchi Osta* v. *Horsmul Marwari* (1) that the first thing that the plaintiff in a suit for damages for malicious prosecution has to prove is his innocence. Now on the findings of neither Court below can it be said that the plaintiffs have proved their innocence. In the opinion of both Courts there was reasonable and probable cause for the information to the Magistrate which led to the proceedings under s. 107, Cr. P. C. That information included more than one specific accusation and the fact, that one of these accusations has not been supported by evidence is, in my opinion, no ground for giving the plaintiffs a decree for damages for malicious prosecution, when the case as a whole has not been found to have been laid without reasonable and probable cause. No authority was cited to support such a contention and in view of the findings as to the nature of the proceedings under s. 107, Cr. P. C., as a whole, it seems to me impossible to give the plaintiffs a decree for damages.

I, therefore, allow this appeal with costs, set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif and dismiss the suit with costs throughout.

Z. K. *Appeal allowed.*

(1) 19 Ind. Cas. 24; 17 C. W. N. 434.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 437 OF 1924.

November 17, 1924.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

MAHFUZ ALI KHAN—OBJECTOR—APPELLANT

versus

Seth RADHA KISHEN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (n)—Execution of decree—Attachment—Right to future maintenance.

A dispute between one *M.* and his wife with regard to the dower-debt due to the latter was referred to arbitration and the arbitrators made an award which declared that the property of *M.* should, from the date of the award, be construed to be the property of his wife but that *M.* should be allowed to remain in possession of the property and to manage it and to collect the income. Out of the income *M.* was to pay a certain sum to his wife, the balance being retained by himself by way of maintenance and also to enable him to pay his debts. A creditor of *M.* obtained a simple money-decree against him in respect of a debt incurred by *M.*, and in execution of that decree sought to attach and sell *M.'s* right of possession as a life-tenant in the property acquired by him under the award:

Held, that what was reserved to *M.* under the award was something more than a mere right of future maintenance within the meaning of s. 60 (*n*) of the C. P. C. and was not, therefore, exempt from attachment under the provisions of that section. [p. 478, col. 2.]

Execution second appeal from a decree of the District Judge, Shahjahanpur, dated the 11th December, 1923.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Baleshwari Prasad* for Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The facts that give rise to this appeal are as follows:—

One Mahfuz Ali Khan was the owner of certain *zemindari* property. He married first *Musammat* Sharifan and then *Musammat* Ijazi. *Musammat* Sharifan died leaving her surviving a son, Mashuq Ali. On behalf of Mashuq Ali, who is a minor, a demand was made for the dower debt due to his mother from Mahfuz Ali Khan. As this dower was far more than the property was worth, it appears that *Musammat* Ijazi also put in a claim for dower on her own account. The matter was referred to arbitration and the arbitrators after reciting the circumstances under which they were called upon to make their award, came to the conclusion that both Mashuq Ali and *Musammat* Ijazi were entitled to dower; but that, if their claims were satisfied, the property will be wholly insufficient to satisfy their claims. They, therefore, decided that the best thing to do was to agree that the property should from the date of the award be construed the property of Mashuq Ali and *Musammat* Ijazi. At the same time Mahfuz Ali Khan was allowed to remain in possession of the property and to manage it and to collect the income. Out of this income he was to pay Rs. 150 a year in cash and nine maunds of wheat to Mashuq Ali and Rs. 300 and eighteen maunds annually to *Musammat* Ijazi, the balance of the income he was to retain himself and it is said that, out of it, he could pay his debts. This arrangement is described in the award as having been come to enable Mahfuz Ali Khan to maintain himself. It appears that this arrangement was carried out. Although Mahfuz Ali Khan remained in possession of the property, he was not allowed to charge it for the payment of any future debts and was forbidden to transfer it by sale or mortgage or otherwise. Similarly Mashuq Ali and *Musammat* Ijazi had no right to deal with the property as owners during his lifetime except, of course, with his express consent. In 1922, Seth Radha Kishen obtained a simple money decree against Mahfuz Ali Khan for a debt incurred in 1919 and in execution of his decree sought to attach and sell Mahfuz Ali Khan's right of possession as a life-tenant in the property in suit, which was described as having been acquired by him under the award above-mentioned. Mahfuz Ali Khan objected on the ground that what he had acquired under the award was a right to future maintenance and that as such it was not liable to attachment under s. 60 (*n*) of the C. P. C. Both the Courts have overruled this plea and he comes here in second appeal.

It is argued on his behalf that under this arrangement he ceased to be owner of the property and became entitled to the balance of the income for his maintenance and thus came within cl. (*n*) of s. 60. On the other hand, it is argued that he remained a restricted owner of the property and was entitled to a great deal more than maintenance, that, subject to the payment of the amounts mentioned in the award, he was entitled to possession for his life and could dispose of the balance of the profits in any way he pleased, and that this was a great deal more than a right of future maintenance as contemplated in the section. The words in the section are 'a right of future maintenance.' It seems to us that construing the award as a whole what was reserved to Mahfuz Ali Khan was certainly something more than a right of future maintenance, and that being so we think that the decision arrived at by the Court below was correct. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

August 13, 1924.

Present:—Justice Sir C. V. Kumaraswami Sastri.

In re SECTION 45, SPECIFIC RELIEF ACT, 1877, SECTION 66 OF THE INCOME TAX ACT, 1922, AND OF RATNA SINGH MOTOR SERVICE.

In re RATNA SINGH—PETITIONER.

Income Tax Act (XI of 1922), ss. 10 (2) (7), (9), 66—Expenditure on renewal of parts of car, nature of—"Obsolete," meaning of—Total destruction of machinery, whether renders it obsolete—Reference to High Court.

The question whether a particular expenditure on certain parts of a motor-car is capital expenditure or merely a repair of wasting parts of the car, is a ques-

tion of fact. The test is, whether, having regard to the part of the car which is repaired, it is such as requires a renewal from time to time, or such that with ordinary repair it lasts for the lifetime of the car. For instance, the body or the radiator or the wheels generally last for the lifetime of the car, while the tyres or the hood or such other parts are to be renewed periodically. [p. 479, col. 2.]

The question whether the total destruction of machinery which renders it unfit for the purpose for which it was originally intended and compels the owner to sell it as scrap iron, entitles him to claim an allowance in respect of the machinery under sub-cl. (7) of cl. (2) of s. 10 of the Income Tax Act, is one of considerable importance on which the Commissioner of Income Tax may be directed to state a case for the opinion of the High Court. [p. 479, col. 2; p. 480, col. 1.]

Semble.—The word "obsolete" in sub-cl. (7) of cl. (2) of s. 10 of the Income Tax Act, should be taken to include cases of unfitness arising from whatever cause. Where a car falls into a ditch or otherwise becomes so damaged that it cannot be used as a car and has to be sold as scrap iron, it ought to be regarded as having become "obsolete" within the meaning of that expression. [p. 479, col. 2.]

Mr. *K. V. Sesha Iyengar*, for the Petitioner.

Mr. *C. V. Anantakrishna Iyer*, Government Pleader, for the Commissioner.

JUDGMENT.—In this matter a reference is asked for on two questions. The first is as regards the sum of Rs. 3,309 disallowed on the ground that it is capital expenditure and the other is as regards a sum of Rs. 8,653 which is claimed as the loss on a car which was so damaged by an accident that it had to be sold as scrap iron.

As regards the first point the Commissioner was of opinion that what was done was not merely a renewal of wasting assets but that new parts were put on to the car. It is not disputed that 20 per cent. of the value of the car is allowed on the footing that the life of the car was only 5 years. It is also not disputed that the cost of repairs is allowed. The point which is now raised is that sub-cl. 9 of s. 10, cl. 2 allows a further deduction. Sub clause 9 of s. 10, cl. 2 runs as follows: "Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." Where a claim is made as in the present case the question which has to be decided is whether the expenditure incurred is in the nature of capital expenditure or not. Having regard to the items which have been disallowed by the Commissioner, I do not think it can be said that they were merely renewal of wasting assets. The materials before me are not sufficient to hold that the Commissioner is wrong and that a reference should be made. Unless it appears from the evidence before the Commissioner that the expenditure was only in respect of renewal of wasting assets, I think the allowance of 20 per cent. and the allowance for repairs should be taken to cover the ordinary wear and tear of the car. I do not think that any useful purpose would be served by directing a reference to the High Court of a question which will practically turn on evidence and on the scanty materials before me I cannot say that the petitioner has proved on the facts that the expenditure was necessary as a renewal of wasting parts of the car. No doubt in one sense every part of the car does waste by use. But the test I think will be whether having regard to the part of the car which is repaired it is such as requires a renewal from time to time or such that with ordinary repair it lasts for the lifetime of the car. For example the body or the radiator or the wheels generally last for the lifetime of the car while the tyres or the hood or such other parts are to be renewed periodically.

As regards the second question raised it turns upon the construction of the word 'obsolete.' Where a car falls into a ditch or otherwise becomes so damaged that it cannot be used as a car and it has to be sold as scrap iron, I think *prima facie*, the person is entitled to claim allowance. Mr. Anantakrishna Iyer contends that in such cases no allowance ought to be given and that the word "obsolete" must be confined to cases where owing to change in the machinery or owing to new discoveries the machinery is not fit for the purpose for which it was originally intended or would not be fit without incurring expenditure which is unreasonable in the circumstances. It seems to me that it is unreasonable that a person can claim allowance on the machinery which though in working order has been superseded by invention which makes its use not profitable but that a total destruction of the machinery leaves the trader without any remedy. I think the word "obsolete" should be taken to include cases of unfitness arising from whatever cause. I am of opinion that a question of considerable importance is involved and that it is desirable to have an authoritative ruling on the question whether the total destruction of a machinery which

renders it unfit for the purpose for which it was originally intended and a sale of which as scrap iron entitles a person under sub-cl. 7 of cl. 2 of s. 10 to claim allowance and I direct the Commissioner of Income-tax to state a case to the High Court for that purpose.

Costs of this application will abide and follow the result.

V. N. V.
Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 461 OF 1923.
November 25, 1924.
Present:—Mr. Justice Mukerji.
Thakur RUDRAPAL SINGH AND OTHERS —PLAINTIFFS—APPELLANTS.
versus
MATABADAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXXIV, rr. 7, 8—Mortgage—Redemption, suit for—Possession not obtained by mortgagor—Second suit for redemption, whether maintainable—Res judicata.

Where in spite of a previous suit for redemption the right of redemption of the mortgaged property still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption is not barred. An order of the Court which would have the effect of extinguishing the right of redemption would, however, bar a second suit for redemption and it is not necessary that the order should also *purport* to extinguish the right of redemption. [p. 481, col. 1.]

A decree in a redemption suit directed the mortgagee to withdraw the amount which had already been deposited by the mortgagor and to deliver possession of the mortgaged property. The mortgagor made an application for delivery of possession of the property to him, but after making this application he gifted the property to the plaintiff, and the application for delivery of possession was subsequently dismissed. Plaintiff, thereafter, brought another suit to redeem the property from the defendant who had continued in possession of it:

Held, that the decree in the previous suit was not a decree as contemplated by r. 7 of O. XXXIV of the C. P. C., but was a combined decree under r. 8 of the Order and as it permitted the mortgagee to withdraw the money which was already in deposit, it had the effect of extinguishing the mortgage and a second suit for redemption was not, therefore, competent. [*ibid.*]

Second appeal against the decree of the Subordinate Judge, Jaunpur, dated the 23rd of December 1922.

Mr. *Mushtaq Ahmad* (with him Dr. *K. N. Katju*), for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal presents only a question of law for determination, the facts being all admitted.

The history of the case is briefly this. There was a mortgage by father and son Ram Saran Singh and Mahadeo in favour of the predecessor-in-title of the defendants. Mahadeo brought a suit for redemption after having deposited in Court the full amount of the mortgage money, *viz.*, a sum of Rs. 100, under s. 83 of the Transfer of Property Act. Evidently because the mortgagees did not withdraw the money from Court, Mahadeo, brought a suit for redemption and a decree was passed in his favour on the 26th of June 1918. The language of the decree is important and is as follows:—

"That the suit for possession by redemption of the mortgage set up by the plaintiff be decreed and the claim for mesne profits up to the date of the suit be dismissed. The plaintiff will get *pendente lite* and future mesne profits, the amount of which will be determined in the execution department. If the amount of the mortgage money, Rs. 100, deposited by the plaintiff under s. 83 of the Transfer of Property Act has been withdrawn, he is given six months' time from to-day to pay into Court the said sum, failing which the mortgaged property will be sold. If the deposite under s. 83 of the Transfer of Property Act has not been with withdrawn, defendants will be entitled to withdraw it."

As happened to be the case, the money deposited under s. 83 of the Transfer of Property Act was still in Court and was actually withdrawn by the mortgagees on the 6th of February 1919. Mahadeo knew that the mortgage money was already in Court and he accordingly applied at once for delivery of possession. This application was made on the 25th of July 1918. Unfortunately, however, this application was dismissed for default on the 13th of November 1918. After having presented the application for delivery of possession, Mahadeo gifted away the plaint property to one of his sister's sons Ram Jagat. Ram Jagat died and his four brothers the plaintiffs Nos. 2 to 5 inherited his property. They and the plaintiff No. 1 who obtained a portion of the property from the other plaintiffs by a deed of exchange have launched a fresh suit to redeem the property which is still in the possession of the defendants, the representatives of the original mortgagees.

The question that has to be answered is whether the suit is barred as *res judicata*.

The suit succeeded in the Court of first instance, but the learned Judge of the Court below was of opinion that the suit was barred.

On the authorities of this Court, there can be no two opinions on the point that if the right of redemption still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption would lie. Nobody says that the right of redemption has been extinguished by an act of the parties. The only question, therefore, is whether the decree that was passed on the 26th of June 1918 had the effect of extinguishing the right of redemption that initially lay in Mahadeo.

Incidentally, I may mention here that it was contended on behalf of the appellants that the order that would extinguish the right of redemption should be an order *purporting* to extinguish that right. This contention has no force, not only because it does violence to the language of para. 2 of s. 60 of the Transfer of Property Act but also because the only order which is pointed out in argument, as the only order of the Court which can extinguish a right of redemption, *viz.* the order under r. 8, O. XXXIV, C. P. C, does not at all speak of extinction of a right of redemption. It is clear, therefore, that all that is necessary to bar a second suit is an order of the Court which would have the effect of extinguishing the right of redemption.

This brings us to the consideration of the decree that was passed by the Court on the 26th of June 1918. It must be conceded that the decree that was passed is not a decree in accordance with the terms of O. XXXIV, r. 7 of the C. P. C. That order merely contemplates that *in future* payment will be made by the mortgagor. In this particular case the mortgage money was in deposit in Court and the learned Munsif authorised the mortgagees by his decree to take away that money in satisfaction of the mortgage. This decree I need hardly repeat is not in accordance with the decree contemplated by r. 7, O. XXXIV, C. P. C. The money was, as a matter of fact, withdrawn later on. But before this was done Mahadeo was advised that he was entitled under the decree to ask for delivery of possession. I do not think that in this he was wrongly advised. Because the money was there to be taken away by the mortgagees whenever they wanted to do so. If they put off taking the money away from the Court for years that fact could not prevent Mahadeo from asking for delivery of possession. The decree that was passed was, so to say, a combined decree under O. XXXIV, r. 8, C. P. C. As it permitted the mortgagees to withdraw the money the result was bound to follow, *viz.* the extinction of the mortgage. All that remained to be done was to take over possession from the mortgagees. The mortgage money having been satisfied under the orders of a Court, it cannot be said that the right of redemption still exists.

A large number of rulings were cited by the learned Counsel for the appellants but I have not thought it necessary to discuss them in my judgment, for the simple reason that each case was decided on the language of the decree that was passed in the former suit for redemption or for sale.

I agree with the Court below that the suit is barred as *res judicata* and dismiss the appeal with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 108 OF 1924.

December 16, 1924.

Present :—Mr. Dalal, J. C.

MAHARAJ DIN—PLAINTIFF—APPLICANT

versus

BALBHADDAR PARSHAD—DEFENDANT—RESPONDENT.

Jurisdiction—Suit of Small Cause nature filed on Regular Side—Appeal—Plaintiff, whether can plead want of jurisdiction—Estoppel—Contribution, suit for—Suit against two defendants—Contest by one of them—Contribution, basis of.

Plaintiff filed a suit triable by a Court of Small Causes in the Court of the Munsif. The suit was partly decreed and the plaintiff appealed to the District Judge. His appeal was dismissed. In revision it was contended on his behalf that as the suit was triable by the Court of Small Causes the judgments of the lower Courts were void on the ground of want of jurisdiction:

Held, that the plaintiff himself having sought the jurisdiction of the Court which decided the suit, and having obtained the further advantage of an appeal

which he would not have obtained if the case had been tried on the Small Cause Court side, was now estopped from pleading want of jurisdiction in the lower Courts.

Etizad Husain v. *Beni Bahadur Munshi*, 33 Ind. Cas. 619; 18 O. C. 364 and *Bhagwan Singh* v. *Bisheshar Nath*, 38 Ind. Cas. 677; 20 O. C. 37, distinguished.

A suit was brought against two defendants by a plaintiff to declare a certain deed to be fraudulent and voidable in consequence. One of the defendants put in a written statement and failed to appear subsequently. The other defendant contested the suit and a decree was passed against both of them. The contesting defendant satisfied the decree as to costs and brought a suit to recover half the amount of the costs from the other defendant:

Held, that the defendant who became *ex parte* after filing his written statement was liable only to contribute costs of the prior suit on the basis of *ex parte* pleadings and not on the basis of contentious pleadings.

Civil revision from the decree of the Subordinate Judge, Sitapur, in Civil Appeal No. 36 of 1923, dated the 17th April 1924, upholding that of the Munsif, Biswan, Sitapur, dated the 12th December 1922.

Mr. *Radha Krishna*, for the Applicant.

Mr. *H. D. Chandra*, for the Opposite Party.

ORDER.—The plaintiff brought a suit for contribution against the defendant for a sum under Rs. 500 which was triable by a Court of Small Causes in the town of Sitapur at the time. He, however, filed the suit in the Court of the Munsif and his suit was partly decreed. He appealed to the Court of the District Judge and the appeal on transfer was heard by the Subordinate Judge of Sitapur. The appeal was dismissed. The plaintiff has now come up here in revision on the ground that the subordinate Courts had no jurisdiction because a trial ought to have been held by a Court of Small Causes. In my opinion such an argument cannot prevail when the plaintiff himself sought the jurisdiction of the Court which decided the suit. He put the opposite party to the expenses of the litigation and now tries to run away from the result thereof. The ruling quoted by the learned Counsel in *Etizad Husain* v. *Beni Bahadur Munshi* (1) is not applicable here and the difference of jurisdiction in the case of *Bhagwan Singh* v. *Bisheshar Nath* (2) was of jurisdiction between the Civil and Revenue Court and that is not the case here. Here in fact the plaintiff has obtained the opinion of a Court on the Regular Side instead of a Court on the Summary Side and has had by his action obtained the further advantage of an appeal which he would not have obtained if the case had been tried on the Small Cause Court Side. Under these considerations I hold that the plaintiff cannot now plead want of jurisdiction.

As regards the other points, the judgment of the Trial Court is very clear and gives cogent reasons for holding that the defendant is liable to contribute costs of the prior suit to the extent of *ex parte* pleading and not contentious pleading. A suit was brought against both parties by a woman to declare a certain deed to be fraudulent and voidable in consequence. The defendant put in a written statement and was absent subsequently. There was no agreement between the parties that the plaintiff should contest the suit on behalf of them both. Under the circumstances the presumption arises that the defendant in the present suit thought the matter not worth fighting for and avoided the contest. The plaintiff who was also defendant in the prior suit desired to contest and failed. He should, therefore, bear the burden thereof.

I dismiss this application with costs.

Z. K. *Application dismissed.*

(1) 33 Ind. Cas. 619; 18 O. C. 364.
(2) 38 Ind. Cas. 677; 20 O. C. 37.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 131 OF 1923.

February 19, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Mirza MOHAMMAD JAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Shaikh FAZAL UDDIN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 37—Transfer of Property Act (IV of 1882), s. 40—Contract of pre-emption—Time for performance not limited—Contract, whether can be enforced against representatives of parties.

Per *Lindsay, J.*—The obligation which arises under a contract subsists until the contract is performed or until non-performance of it is excused or justified under operation of law. [p. 485, col. 1.]

A contract for pre-emption is enforceable between the representatives of the parties if the parties have died before performance, and having regard to s. 40 of the Transfer of Property Act, the contract is enforceable against a person who has taken property affected by the contract with notice of the contract or who has taken it gratuitously. [p. 484, col. 1.]

A contract for pre-emption is not void or unenforceable merely because no time is limited for performance. [p. 485, col. 2]

London and South Western Railway Co. v. *Gomm*, (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620, referred to.

Balli Singh v. *Raghubar Singh*, 82 Ind. Cas. 643; 21 A. L. J. 413; 45 A. 492; (1923) A. I R. (A.) 511 and *Gopi Ram* v. *Jeot Ram*, 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514, dissented from.

Per *Sulaiman, J.*—It is of the essence of a contract that the liabilities which it imposes must be imposed on definite persons within a definite time, and the rights created by it must of themselves be definite. By a definite time is meant a period not unlimited in its duration. If a contract is supposed to bind an indefinite class of persons, generation after generation and to bind them for an indefinite length of time, it completely looses its character of an obligation *in personam*. If no period of time is fixed by the parties themselves, the Court would not be justified in filling up the gap and fixing a time which it considers reasonable. [p. 487, col. 2.]

Under the provisions of s. 37 of the Contract Act a contract of pre-emption can be enforced against the personal representatives of the promisor in case of his death before performance, unless a contrary intention appears from the contract, but where a contract does not specify any period of time within which it has to remain in force, it is too vague, indefinite and uncertain to be capable of being enforced except in the lifetime of the parties thereto. [p. 488, col. 1.]

Balli Singh v. *Raghubar Singh*, 82 Ind. Cas. 643; 21 A. L. J. 413; 45 A. 492; (1923) A I. R. (A.) 511 and *Gopi Ram* v. *Jeot Ram*, 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514, followed.

First appeal from an order of the Judge of Small Causes Court, Allahabad.

Mr. *Zamirul Haq*, for the Appellants.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.

Lindsay, J.—The points which arise for decision in this appeal have practically been settled by my judgment in First Appeal from Order No. 108 of 1923 decided on 28th of January 1924 [*Basdeo Rai* v. *Jhagru Rai* (1)]. The facts with which we are concerned here are briefly as follows :—

There was litigation in the year 1915 between Shaikh Fazal Uddin, the plaintiff in the present case, and two defendants, Nawab Ali and *Musammat* Bilauri Bibi, who were husband and wife.

It appears that Fazal Uddin is the son of Nawab Ali's sister.

It further appears that Nawab Ali's daughter is married to Shaikh Fazal Uddin.

The dispute in the Court of the Mnnsif was with regard to a family house and the suit terminated in a compromise by which a half share of this house was awarded to the plaintiff and the remaining half share to the defendants. It was agreed under the terms of the compromise that if either party wanted to transfer his share in the property, an offer was to be made to the other party in the first instance in order that he might secure the share by right of pre-emption. A decree was passed in terms of this compromise. The present suit was brought by Fazal Uddin in order to enforce the contract of pre-emption which arose out of this compromise and decree.

The first defendant in the suit was Mirza Muhammad Jan. This man is the brother of *Musammat* Bilauri Bibi now deceased. When she died she left as heirs her four daughters and this brother Muhammad Jan who got a one-third share of her property.

It appears that on the 11th July, 1921, Muhammad Jan transferred his one-third share of his interest in this house to the second defendant Fazal Husain by a deed which purports to be a deed of gift. This man Fazal Husain is the daughter's son of *Musammat* Bilauri Bibi.

It was the case for the plaintiff that the document, although drawn in the form of a document of gift, was in fact a deed of sale, and it has been found by the Courts below that the transaction was a sale and not a gift. There can be no doubt that on the evidence afforded by the document itself this is a correct conclusion.

Fazal Uddin, therefore, claimed to pre-empt this transfer on the basis of the contract for pre-emption which had been entered into at the time of the compromise and decree above referred to.

The suit was resisted on various grounds. The First Court dismissed the suit but the lower Appellate Court has reversed the decree of the Court of first instance and remanded the case to the Court of first instance for disposal on the issues which were left undecided.

It is contended here in the first ground of appeal that the lower Appellate Court has put a wrong construction on the deed of transfer in this case. That question is really not open. The finding is a finding of fact and as has already been said, the transaction was clearly a transaction of sale and not of gift.

The second ground taken is that the contract for pre-emption was bad inasmuch as it could not for all time to come bind the representatives of the covenantor.

(1) 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; (1924) A. I. R. (A.) 400.

I have dealt with a similar question in the case above mentioned which has only been recently decided and I have held and still hold that a contract for pre-emption can be enforced against the representatives of the parties to the contract. The previous case arose out of a contract embodied in a *wajib-ul-arz* which was drawn up at the time of settlement. This contract was described as being a binding contract for the period of the settlement.

In the present case, however, it is pointed out that there is no limit of time and it has, therefore, been sought to be argued that because no time was limited for the performance of the contract entered into under this compromise and decree, the contract is unenforceable.

In the judgment in the earlier case I expressed the opinion that a contract for pre-emption is enforceable between the representatives to the parties if the parties have died before performance. I further held that having regard to the provisions of s. 40 of the Transfer of Property Act a contract for pre-emption is enforceable against a person who has taken the property affected by the contract with notice of the contract or who has taken that property gratuitously.

It has, however, been argued in the present case that the contract with which we are here concerned differs from the contract in the earlier case just mentioned by reason of the fact that here no time for performance has been limited whereas in the earlier case the contract was expressly declared to be binding only for the period of the settlement, that is to say, a period of about thirty years.

The argument is that because no time is limited for the performance of this contract of pre-emption, the contract is not enforceable because it is uncertain. I am unable to accept this argument. The only section of the Contract Act which deals with agreements which are void for uncertainty is s. 29 which lays down that agreements, the meaning of which is not certain or capable of being made certain, are void.

There can be no question whatever as to any ambiguity or uncertainty about the meaning of the contract with which we are dealing in this case. There is absolutely no uncertainty as to the meaning and, therefore, s. 29 cannot be appealed to for the purpose of arguing that the contract is entirely void. Further I am of opinion that no contract is void merely because no time for performance is specified. There are many kinds of contracts in which no time for performance is fixed and with respect to which no argument could possibly be entertained that they are void. Take for example, the case of a promissory note by which the executant undertakes to pay money on demand. Here no time is fixed for performance and yet it has never to my knowledge been argued that a contract of this kind is void because of uncertainty. Or take again the class of contracts referred to in Ch. III of the Indian Contract Act, namely, contingent contracts. Section 31 defines a contingent contract as being a contract to do or not to do something if some event collateral to such contract does or does not happen. Section 32 declares that contracts to do or not to do anything if an uncertain event happens cannot be enforced by law unless and until that event has happened. In a contract of this latter description it is clear that no time for performance can possibly be fixed and yet such a contract is recognized as being a perfectly good contract under the law.

It is true that the law of limitation may intervene and declare that, for example in the case of a contract under a promissory note to pay on demand, the contract must be enforced within a particular time but the fact that the law of limitation insists upon a suit for performance being brought within a specified time cannot mean that the contract is void. On the contrary the validity of the contract is clearly recognized and all that is insisted upon is that performance of it must be sought within the time limited by the law.

I do not see how it is possible to argue that any contract unlimited in point of time is a void contract. This question was raised in a well known English case which has been cited before us and which was cited before us at the hearing of the earlier case, namely, *London and South Western Railway Co.* v. *Gomm* (2). The learned Judge who presided over the Court of first instance in that case pointed out that a covenant to pay £ 1,000 when demanded with interest meanwhile, if not barred by the

(2) (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

Statute of Limitation, might be enforced by an action of convenant at any time. Similarly in the Court of Appeal it was pointed out by Jessel, M. R., that the contract with which the Court was there concerned was a contract unlimited in point of time. The learned Judge observed at page 580* of the report as follows :—

"Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words 'within a reasonable time' or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time but it is obviously intended so to be. The Railway Company do not want the land now, and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the Company the owners or owner for the time being of the land are or is to convey to the Company. The very essence of the contract is that it shall be indefinite in point of time."

There is no suggestion in these remarks that a contract can in any way be deemed to be void because it is indefinite in point of time and it was not because of any uncertainty in the contract that performance of it was refused by the Court. The ground upon which that case was decided was that the contract for pre-emption gave rise to an interest in land and was, therefore, obnoxious to the rule against perpetuities.

The obligation which arises under a contract subsists until the contract is performed or until non-performance of it is excused or justified under operation of law.

I have already poined out that in the case of a promise to pay money on demand, although the law of limitation lays down certain limits within which performance must be sought, the contract is not treated as void. I need only further refer to Art. 10 of the Schedule to the Indian Limitation Act, Act IX of 1908, which in the case of a suit to enforce a right of pre-emption, where the right is founded on law, general usage or special contract, lays down that the suit must be brought within one year from the time when the purchaser takes under the sale sought to be impeached, physical possession of the property sold or, in cases where the subject of the sale does not admit of physical possession, one year from the date when the instrument of sale is registered.

In my opinion, therefore, it is impossible to contend that a contract for pre-emption in which no time is limited for performance is void and unenforceable.

I am aware that in coming to this decision I am dissenting from the view which was taken by a Bench of this Court in *Balli Singh* v. *Raghubar Singh* (3) and *Gopi Ram* v. *Jeot Ram* (4). I must, however, assume whatever responsibility attaches to the course I am taking. It seems to me that if I were follow the principles laid down in the rulings referred to, I should have to hold that every contract for payment of money on demand or every contingent contract was void *ab initio*.

The only point which remains for consideration in this case is this : I have already mentioned that in the earlier case to which I was a party I held that a contract for pre-emption was enforceable against a transferee with notice or a gratuitous transferee.

In the case before us no plea of notice was taken and indeed no plea of notice could have been properly taken by the second defendant Fazal Husain who put forward the case that the transfer to him was a gratuitous transfer, namely, a transfer by way of gift. It has, however, been held by the Courts below and the finding is accepted, that the transfer was a transfer for consideration and amounted to a sale. In my opinion the contract cannot be enforced against the second defendant Fazal Husain unless he is shown to be affected with notice of it. This is a question which has not been gone into and I think, therefore, that in dismissing this appeal it ought to be laid down for the guidance of the First Court that the contract should not be enforced against the second defendant unless it is shown to the satisfaction of the Court that he had notice of it.

It is the fact as has been pointed out that the second defendant is the daughter's son of one of the parties to the contract. It would not, however, be proper to infer from this circumstance alone that he was affected with knowledge of the contract. I think the Court of first instance to which the suit has been referred for disposal ought to raise

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(3) 82 Ind. Cas. 643; 21 A. L. J. 413; 45 A. 492; (1923) A. I. R. (A.) 511.

(4) 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514.

an issue regarding this question of notice and the parties ought to be allowed to call evidence. If the Court of first instance finds that the second defendant had notice of the contract, the contract should be enforced against him. If it finds that he had not such notice, the suit should be dismissed.

Sulaiman, J.—This is a defendants' appeal arising out of a suit for pre-emption on the basis of an alleged contract. The plaintiff alleged that under a compromise decree passed in Suit No. 551 of 1915 between himself and Nawab Ali and *Musammat* Bilauri a covenant for pre-emption was specifically entered into so as to bind the parties and their representative in regard to transfer of the house in question, that Muhammad Jan, defendant No. 1, as heir of *Musammat* Bilauri Bibi since deceased, in breach of the said contract, sold the property to defendant No. 2 for Rs. 50 under a deed dated the 11th of July, 1921, which was wrongly described as a deed of gift; hence the suit for pre-emption.

Both the defendants contested the claim. The main defence was that the deed in question was not a deed of sale but a deed of gift without consideration and that the alleged contract of pre-emption was invalid and could not be enforced as against the defendants. It is also to be noted that after the suit had been filed, the defendant No. 2 executed a deed of relinquishment in favour of defendant No. 1 and on the strength of it a plea was raised that the *status quo ante* was restored and the plaintiff was not entitled to a decree.

The Court of first instance found that the deed in question was not a sale-deed; that the *status quo ante* was restored by the deed of relinquishment and so the plaintiff could not pre-empt the property; and it also found that the contract embodied in the compromise decree had not the effect of binding for all time to come the representatives of the parties to that decree. It did not determine the remaining issues, but dismissed the suit.

On appeal the lower Appellate Court has decreed the claim and remanded the case for the remaining issues to be determined. The lower Appellate Court found that the transaction in question was a sale transaction for consideration, that the deed of relinquishment *pendente lite* did not affect the plaintiff's right of pre-emption and that on the authority of the case of *Bimal Jati* v. *Biranji Kaur* (5) the contract embodied in the decree was enforceable.

The defendants have come up in appeal and challenge all the three findings.

The finding that the transaction in question was a sale transaction and not a gift cannot now be seriously disputed. The lower Appellate Court has found that the transaction was really for consideration. It appears that there was a decree against *Musammat* Bilauri and the defendant No. 2 Fazal Husain for about Rs. 150. Fazal Husain, however, had been impleaded merely as a surety. *Musammat* Bilauri was, therefore, the principal debtor. On *Musammat* Bilauri's death one-third share in her estate was inherited by Muhammad Jan, defendant No. 1, Muhammad Jan, therefore, was liable to pay at least one-third of the decretal amount to the extent of the assets in his hands. It was Fazal Husain who paid off the decree and in lieu of a 1/3rd share in the decretal amount so paid off, Muhammad Jan executed this deed of transfer in favour of Fazal Husain. Although, therefore, the deed was styled ostensibly as a deed of gift, there can, on the facts found, be no doubt that it was a sale transaction. It is noteworthy that the value of the property described in the deed of transfer is also stated to be Rs. 50.

The other finding of the lower Appellate Court also cannot be seriously challenged. A deed of relinquishment by itself did not amount to a recoveyance. A mere disclaimer cannot be deemed to be a transfer. Furthermore, it is manifest that a transfer of the property in dispute after the suit had been brought was subject to the doctrine of *lis pendens*. The defendant could not by transferring the property, sought to be pre-empted, in any way affect the right of the plaintiff pre-emptor.

I am, however, unable to agree with the view expressed by the lower Appellate Court on the third point. In fact the learned Judge of the Court below did not quite appreciate what the Court of first instance had held. That Court had not said that the transaction was altogether void. What it had held was that it could not be enforced against the personal representatives of the original parties. This point is not at all considered by the lower Appellate Court and the case of *Bimal Jati* v. *Biranji Kaur* (5) relied on by it, so far as appears from the judg-

(5) 22 A. 238; A. W. N. (1900) 49; 9 Ind. Dec. (N. S.) 1190.

ment, was one against the original parties to the contract and their own vendees.

I may here correct one mistake in the judgment of the First Court. The plaintiff does not claim to pre-empt the sale as a representative of the plaintiff in the former suit, but as one who himself was a party to that suit. He, however, claims against the heir of *Musammsat* Bilauri, (who has died since) and his transferee.

This last question raises a point which is somewhat similar to the one raised in F. A. F. O. No. 108 of 1923 decided by us on the 28th of January, 1924 [*Basdeo Rai* v. *Jhagru Rai* (1)]. In the course of my judgment in that case I tried to review all the leading cases on the question how far a covenant of pre-emtion was enforcible against the representative of the original parties. In view of the provision contained in s. 54 of the Transfer of Property Act that a contract of sale creates no interest in land and in view of the provisions of s. 40 of the Transfer of Property Act laying down how the benefit of an obligation, arising out of a contract annexed to the ownership of property but not amounting to an interest therein or easement thereon, could be enforced against gratuitous transferees or transferees with notice, I there expressed the view that it was impossible to hold that a contract of pre-emption or one for reconveyance came under the rule against perpetuities. I pointed out that the English cases were distinguishable insmuch as in England such covenants created an equitable interest in land. When under the Indian Law no interest in land was created by a mere contract, it was impossible to bring in the rule against perpetuities. I still adhere to the same view. I did, however, also indicate in my judgment in that case that "if the contract had been for an unlimited period of time, it might well have been contended that it was unenforceable against the heirs and the representatives as being too vague and uncertain."

I took pains to distinguish most of the cases referred to by me on the ground amongst others that there the contract was *unlimited in point of time*. The present case, however, cannot be distinguished on this latter ground at the contract for pre-emption here happens to be for an unspecified and indefinite time.

The question then is whether such a contract can be enforced after the death of one of the parties and will remain in force for all time to come generation after generation. As no period at all is fixed for the performance of the contract, it cannot be quite clear for how long the parties intended that it should remain operative. The words "in perpetuity," are not to be found in the clause in question and in case of such a trivial property I am not convinced that the intention must necessarily have been to keep such a convenant alive for all time to come and against all the successive heirs and representatives. For aught one knows, the contract might have been intended to remain in force for a period shorter than the one that has already expired. Under circumstances of such vagueness and uncertainty, I am unable to hold that it is still enforceable against the heir of the deceased party and his transferee.

I understand it to be of the essence of a contract that the liabilities which it imposes must be imposed on definite persons, within a definite time, and the rights created by it must of themselves be definite. By a definite time I do not mean a period which is to expire on a fixed date but merely a period not unlimited in its duration. If a contract is supposed to bind an indefinite class of persons, generation after generation and to bind them for an indefinite length of time, it completely looses its character of an obligations *in personam*. If no period of time is fixed by the parties themselves, the Court would not be justified in filling up the gap and fixing a time which it considers resonable. From the very nature of the contract it is apparent that no action for a performance could arise unless there was an intention to sell the property.

In such a case the Court cannot under s. 46 of the Contract Act fix any time as being a reasonable one. Even if the contract were to be treated as a contingent contract within the meaning of s. 31 of the Act, it cannot, in my opinion, remain in force for an indefinite length of time. I am, therefore, of opinion that the contract in question according to the terms in which it is worded is too vague, indefinite and uncertain to be now enforced against the heir of the deceased party.

I should like to point out the distinction between the case of a personal representative of the original party to the contract, who is made liable under s. 37 of Indian

Contract Act and the case of a transferee against whom the contract may be enforced under s. 40 of the Transfer of Property Act. In the case of transferees it is apparent that for all practical purposes a limit of time is indirectly imposed by the condition that he must have notice. After each succession the possibility of proving actual notice continually diminishes and transferees at a distant date may well be safe, whereas in the case of personal representatives no question of any consideration or notice arises. If, therefore, a contract for an indefinite time is to be enforced against them, it must always remain in force in perpetuity until it is either performed when the occasion arises or has been rescinded by consent of the representatives of the other parties thereto.

Although, therefore, I am of opinion that under the provisions of s. 37 of the Indian Contract Act a contract of pre-emption can be enforced against the personal representatives of the promissor in case of his death before performance, unless a contrary intention appears from the contract, nevertheless I held that where a contract does not specify any period of time within which it has to remain inforce, against the actual parties it is too vague, indefinite and uncertain to be capable of being enforced except as to the parties to the contract in their lifetime. I may here note that the two recent cases of this Court, *Balli Singh* v. *Raghubar Singh* (3) and *Gopi Ram* v. *Jeot Ram* (4) are cases which I am unable to distinguish from the facts of the present case, as in both of these the time for performance was unlimited. Even if I had entertained a different opinion on the enforcibility of the contract in this case, I would not have merely dissented from the previous decisions but would have suggested a reference to a higher Bench.

There is another point which requires mention. In the plaint there was no suggestion that the transferee (defendant No. (2) had any notice of this contract, nor was there apparently any evidence led on the point. The defendant too did not specifically set up want of notice as he claimed to be a donee. The claim cannot be enforced against the transferee if he had had no notice of the contract. As against defendant No. 1 there is no claim for any damages.

I would, therefore, allow this appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs.

By the Court.—The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 218 OF 1923.

August 1, 1924.

Present:—Mr. Justice Ross and Mr. Justice Sen.

THE OFFICIAL ASSIGNEE OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL—OPPOSITE PARTY—APPELLANT

versus

Musammat JAGA BIBI AND OTHERS—PETITIONERS—RESPONDENTS.

Execution of decree—Executing Court, whether can go behind decree—Objections taken to maintainability of suit considered in judgment, whether can be taken again in execution.

Where objections to the maintainability of a suit are considered by the Court and a decree is passed in the suit, the Executing Court cannot go behind the decree and the judgment-debtor is not entitled to re-agitate, in execution proceedings, the objections which have been disposed of by the Court in its judgment before passing the decree. The decree must be executed as it stands.

Appeal from an order of the Subordinate Judge, First Court, Shahabad, dated the 26th May 1923.

Mr. *Abani Bhusan Mukharji*, for the Appellant.

Messrs. *Siveswara Dayal* and *Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Sen, J.—The facts necessary for the decision of this appeal are as follows:—

On the 26th of July, 1911, the judgment-debtor executed a mortgage bond in favour of the decree-holder respondent. The mortgagor having executed the document refused to register it. Hence the creditors applied for compulsory registration and the document was duly registered on the 8th of August 1912. Before registration, however, on the 24th of November 1911, the mortgagor was adjudicated an insolvent and a vesting order was made under s. 17 of the Presidency Insolvency Act vesting the property of the insolvent in the Official Assignee. A suit was then instituted by

the mortgagee being Suit No. 214 of 1918 on foot of the mortgage. This suit was resisted by the Official Assignee on various grounds. First, it was contended that in view of the vesting order the mortgagee could not bring a suit, but must prove the debt in insolvency. The mortgagee on the other hand, relied on the proviso to s. 17 of the Presidency Insolvency Act. Secondly, the character of the mortgage was assailed and it was contended that the mortgage was not a *bona fide* transaction, nor for consideration. Thirdly, it was also contended that in any event the mortgagee should not be ranked as a secured creditor inasmuch as the mortgage in his favour, though executed before the vesting order, was registered after it, and was, therefore, inoperative at the time of the vesting order.

The learned Subordinate Judge of Patna went into all these matters and decided in favour of the mortgagee and passed a decree on the 29th of March 1921. On the first and second points he held that the mortgage was executed *bona fide* by the mortgagor as *karta* of a joint family for family necessities and that the properties mortgaged were joint family properties. In view of the definition of "property" in s. 2 of the Presidency Insolvency Act, he further held that the joint family property of the mortgagor, who was *karta*, was not property over which the insolvent mortgagor could be said to have disposing power for his own benefit. He further held that in view of s. 47 of the Indian Registration Act, the mortgage must be deemed to have operated from the time from which it would have commenced to operate if no registration thereof had been required or made. On the above grounds the Court held that the plaintiffs were entitled to the usual mortgage-decree and a decree was made in the presence of all the defendants. In the Executing Court the same grounds were urged by the Official Assignee but his objections were disallowed. Hence this appeal.

The difficulty in the way of the appellant is that none of these grounds can be urged at this stage. The Executing Court cannot get behind the decree. The learned Vakil for the appellant contends that this is one of those cases where the decree may be considered to be a nullity; and, therefore, the Executing Court may go into the question as to whether there is a decree to execute. In my opinion this contention is not tenable. The Court decreeing the suit went into all these matters carefully and the decree cannot be challenged in execution proceedings. The learned Vakil has cited a number of cases in support of his contentions mentioned above which are identically the contentions urged by the Official Assignee before the learned Subordinate Judge at the trial of the suit. In view of the above conclusion that we have come to, I think it is unnecessary to deal with those cases.

The appeal is dismissed with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1923.

September 25, 1924.

Present:—Mr. Dalal, J. C.

RAMAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BARATI—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow—Necessity—Enquiry by alienee—Burden of proof—Appeal, second—Question of law.

It is not sufficient for a person who proposes to take an alienation of property from a Hindu widow to assure himself that necessity for the alienation exists. He must further assure himself that such necessity cannot be satisfied without borrowing; although he is in no way responsible to prove that the money advanced by him was really utilized in satisfying the necessity.

The amount of enquiry necessary in such a case is a question of law and a finding on this point is liable to be examined in second appeal.

Second appeal against a decree of the Additional Sub-Judge, Gonda, dated the 15th May 1923, preferred against a decree of the Munsif, Gonda, dated the 13th October 1922.

Mr. *S. N. Roy*, for the Appellants.

Mr. *Abdul Rauf*, for the Respondent.

JUDGMENT.—The mortgagee from a Hindu widow sued for possession of the mortgage which was usufructuary and the allegation in the plaint was that the defendants, the reversioners after the death of the widow, had unlawfully ejected him. The question at issue was whether the mortgage was for legal necessity or not. The First Court held that it was not and dismissed the suit, while the lower Appellate Court held in favour of the plaintiff and passed a decree. The learned Counsel for the respondent argued that the question was one

of fact as the Appellate Court had held that sufficient inquiry was made by the plaintiff. The amount of inquiry necessary is, however, a question of law and the finding of the Appellate Court is liable to be examined by this Court in second appeal in that matter. What the plaintiff stated here was that a decree against the widow was shown to him and that he accepted that pressure on the estate existed. In fact no such pressure existed because it is in evidence that Rs. 22 out of the decretal amount of Rs. 35 had been paid on the very day the decree was passed, that is, 15th August 1914, *i.e.*, three weeks prior to the execution of the mortgage-deed. No portion of the money borrowed was paid in satisfaction of the decree because the estate had to take out execution for the balance of the decree. Necessity, therefore, did not exist in fact. The question to decide, therefore, is whether the inquiry made by the plaintiff was sufficient. Even taking it at its face value it was insufficient. The plaintiff stated that he was assured by the widow of the pressure but he never asked her whether she was able or not to satisfy the claim without borrowing. That is another necessary point of inquiry. It is not sufficient for the creditor to assure himself that necessity existed but he must further assure himself that such necessity cannot be satisfied without borrowing. The learned Judge of the Appellate Court is perfectly correct in holding that the plaintiff is in no way responsible to prove that the money advanced by him was really utilized in satisfying the necessity. That, however, is not the question here. What the plaintiff failed to inquire was whether the widow could independently of the borrowing satisfy the decree. It he had made such inquiry he would have at once discovered that Rs. 22 had already been paid and a balance of Rs. 13 was recoverable. It is clear to me that the inquiry, even if we accept the plaintiff's statement, was insufficient.

This is putting the plaintiff's case at its highest. The plaintiff did not inquire of the creditor and his statement that he asked the *patwari* is not substantiated by any testimony.

In my opinion the Trial Court was correct. I set aside the decree of the Appellate Court, restore the decree of the First Court and dismiss the plaintiff's suit with costs in all Courts.

Z. K. *Decree set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1537 OF 1922.
July 3, 1924.
Present :—Mr. Justice Daniels and Mr. Justice Neave.

NARAIN—DEFENDANT—APPELLANT
versus
RAM SARAN DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Mortgage of portion of family property by one brother—Partition—Allotment of mortgaged property to other brother, effect of—Sale in execution of mortgage-decree—Suit to recover property, whether maintainable.

One of two undivided brothers executed a mortgage of a portion of the family property. Subsequently a partition took place between the two brothers and the property to which the mortgage related was assigned wholly to the other brother. After the partition the mortgagee brought a suit for sale on his mortgage against the mortgagor, obtained a decree and bought the property in execution proceedings. The brother to whose share the property had fallen brought a suit to recover the property from the mortgagee auction-purchaser:

Held, that the plaintiff was entitled to recover the property and was not estopped from bringing the suit merely because he did not intervene in the mortgage suit brought by the defendant against his mortgagor.

Bhup Singh v. *Chhedda Singh*, 58 Ind. Cas. 171; 42 A. 596; 18 A. L. J. 807; 2 U. P. L. R. (A.) 345, followed.

Second appeal from a decree of the Subordinate Judge, Muzaffarnagar, confirming that of the Munsif, Baghpat at Ghaziabad.

Mr. *A. Sanyal*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The plaintiff, Ram Saran Das, and the second defendant, Shadi Ram, were two undivided brothers. Shadi Ram, in 1913, executed a mortgage of his undivided share in favour of the father of the appellant. Subsequently a partition took place between the two brothers and the particular property to which the mortgage related was assigned wholly to the plaintiff. After the partiton the appellant's father brought a suit for sale on his mortgage but did not implead the plaintiff. He obtained a decree against Shadi Ram, and the appellant, his father having died, bought the property in execution proceedings. The plaintiff subsequently brought the present suit to recover the property, and under the rule laid down in *Bhup Singh* v. *Chhedda Singh* (1) his right to do so cannot be disputed. Narain has put forward three grounds of appeal. The first is that Shadi Ram should be treated as having executed

(1) 58 Ind. Cas. 171; 42 A. 596; 18 A. L. J. 807; 2 U. P. L. R. (A.) 345.

the mortgage in the capacity of manager of the joint family. This is a plea which was never raised in either of the Courts below, and it is too late to put it forward now. The second plea is that the plaintiff is estopped from brining the suit, because he did not intervene in the suit brought by the appellant against Shadi Ram. This plea is obviously without force. The third plea is that the partition between the two brothers was fraudulent. This is a plea which was raised and decided in the Courts below and the finding of both Courts is that no fraud is established. The appeal, therefore, fails and it is hereby dismissed with costs. Under all the circumstances of the case, we refrain from allowing fees on the higher scale.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 28 OF 1923:
SUIT No. 15 OF 1921.
September 5, 1923.

Present:—Justice Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

KARSANDAS PURSHOTTAMDAS—DEFENDANT—APPELLANT

versus

GOPALDAS TRIKAMJI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 22—Specific performance—Delay by vendor—Deposit, return of—Time of essence of contract—Notice—Reasonable time—Discretion of Court.

Equity will not assist a vendor under a contract for the sale of immoveable property where there has been undue delay on his part and the vendee has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction to decree specific performance when the character of the property or other circumstances would render such exercise likely to result in injustice. [p. 495, col. 1.]

The dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow a vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by a notice given by the purchaser requiring the completion of the contract within a certain time, as unreasonable time. [p. 495, col. 2.]

Where in a contract for sale there has been no default on either side but the Court for some reason refuses to grant specific performance in the exercise of its discretion, the purchaser would be entitled to a return of the deposit. In order to enable the vendor to retain the deposit, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part f the contract. [p. 497, col. 2.]

Appeal against the judgment of Mr. Justice Fawcett.

FACTS.—Defendant agreed to take a building lease for a period of 999 years of a plot of ground from the Bombay Improvement Trust. In purusance of this agreement he put up buildings on the plot which were practically completed in October 1919. Till, however, all the conditions laid down in the agreement were fulfilled the defendant was to be treated as a tenant-at-will under the Trust. In October 1919 the defendant sublet the premises to Garriock & Co., the proprietors of the Bombay Motor Service, for a period of three years, with an option to the sub-lessee to continue the sub-lease for an additional period of two years, and possession of the premises was delivered to the sub-lessee.

On 12th March 1920, defendant entered into a written agreement with the plaintiff to sell the premises to the latter for four *lacs* of rupees out of which twenty five thousand rupees had already been received by the defendant as earnest money in December 1919. The written agreement provided that the purchase must be completed within two months from the date of the agreement. Shortly afterwards, however, it appeared that there was some difficulty in obtaining the completion certificate from the Improvement Trust and that some dispute had also arisen between the defendant and Garriock & Co. Correspondence continued to pass between the Solicitors of the parties but the defendant's Solicitors failed to reply to some of the requisitions made by the plaintiff's Solicitors. On the 7th October 1920 plaintiff's Solicitors wrote to the defendant's Solicitors as follows :—"In continuation of our letters of the 12th, 25th and 31st May last to which we never received a reply, we give your client notice, through you that unless he complies with our client's requisitions and completes the sale on or before the 28th instant, time being hereby made of the essence of the contract, our client will treat the agreement as at an end and call upon your client to return to him the earnest money with interest there on at 9 per cent. per annum."

In the course of their reply to this letter the defendant's Solicitors worte as follows

on 17th October :—"With reference to your letter of the 7th instant, your client is not entitled to call upon our client to complete the sale on or before the 28th instant, as mentioned by you in your said letter. It is distinctly provided in the agreement for sale that the sale is to be completed after the execution of the lease of the premises by the City of Bombay Improvement Trust and assignment in your client's favour is to be executed thereafter. Therefore, until the City of Bombay Improvement Trust executes the lease either in our client's favour or in favour of your client as required by us the sale cannot be completed and your client has no right to treat the agreement as at an end or to require our client to pay the earnest money...."

The plaintiff's Solicitors thereafter wrote several letters to the defendant's Solicitors in which they insisted upon their right to make time of the essence of the contract and finally treated the contract as having been broken by the defendant and demanded re-payment of the earnest money together with interest and costs etc. Defendant's Solicitors failed to reply to these letters and plaintiff filed a suit to recover the earnest money with interest and costs. Defendant pleaded that the plaintiff had no right to make time of the essence of the contract and that the delay in completion of the contract was not due to his default and made a counter-claim for specific performance of the contract and payment of the balance of the purchase-money.

The completion certificate was not issued by the Improvement Trust till long after the filing of the suit and shortly before it came on for hearing.

The Trial Judge on the original side held that the plaintiff was entitled to make time of the essence of the contract but he decreed the plaintiff's claim for return of the earnest money and dismissed the defendant's counter-claim. The defendant appealed.

Mr, *G. N. Thakour* (with him Mr. *M. C. Setalvad*), for the Appellant.

Mr. *Kemp*, (with him Mr. *Coltman*), for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—[After stating the facts the judgment proceeded :—] The plaintiff filed this suit on January 7, 1921, claiming Rs. 25,000 with interest.

The defendant filed his written statement on February 19, 1921, in which he pleaded that the plaintiff had no right to make time of the essence of the contract; that the time given under the notice was unreasonably short ; that really the plaintiff had no right to specific performance until the Improvement Trust gave a completion certificate and executed a lease; that the plaintiff was aware of the disputes between him and the sub-lessees ; that he was responsible for the delay which was due entirely to the conduct of the sub-lessees and to official routine of the Improvement Trust and that the plaintiff was not entitled to a return of the deposit money and to the costs, charges and expenses in connection with the agreement. He also counter-claimed that the plaintiff should be required to specifically perform the agreement, and to pay the balance of the purchase-money with interest at nine per cent. from October 29, 1920.

The suit came on for hearing on February 22, 1923, and the learned Trial Judge delivered his judgment on March 5, 1923. Until then the lease by the Improvement Trust was not executed. The completion certificate was issued by the Trust Architect on December 2, 1922, and the last letter dated February 14, 1923, (Ex. 140) shows that by that time the draft was nearly ready.

So far I have not referred to the correspondence between the defendant and his sub-lessees and between him and the Improvement Trust. It is not necessary to refer to it in detail at this stage. But it may be mentioned that from November 1919 to March 1920 and from March to December 1920 really the differences between the defendant and the sub-lessees were going on. The effect is stated by the witness Burjor Ardeshir Patel. The letter Ex. D addressed by the Trust Architect to the defendant's architects contains a statement of the requisitions made by the Improvement Trust in February 1920. A similar letter (Ex. Y) was written which shows what requisitions remained to be complied with then. The following extracts from the evidence of Mr. Patel show as to how some of these requisitions remained unattended to for a long time :—

"...The building was completed from architect's point of view in October 1919, when completion certificate was sent to the Municipality. If all the minor requisitions of the Improvement Trust had been complied with then we could have got their

completion certificate. I expected in October 1919, it would be given shortly. The building must have been occupied in December 1919 as you assert, but I am not sure...

"Requisition (7) of Ex. D was made in January 1919. We had not done that by October 1920. The Trust took this objection from the beginning when sanctioning the plan. It was an oversight of ours. The Trust waived it later on in 1922 almost at the end of the year. Requisition (9) of Ex. D would have been done by the contractor, if we had insisted on it. It must have been done at the end of 1921 or beginning of 1922. I have no reason to give for the delay except carelessness or negligence on the part of some one...

"Requisition (9). I don't know when the first application for permission to put up the petrol tank was made, Narandas or his representative had to apply for it.

"Requisition cl. 3 (c) of the sub-lease Ex. B. I will find out the date of the first application to the Board to do those things: I have here a letter to the Trust Architect about it dated December 23, 1920. I think it is the only application we made...

"Requisitions of January 1919 (referred to in Ex. D) were all matters which could have been done easily...Regarding Ex. Y all the requisitions could have been completed within a short time except No. 9. The latter would take two or three months. We could have applied the same day. It would take two or three months for the Board to consider it. No. 10 could have been done in a short time. I don't know how long it took the Board to reply regarding No. 9 in this case. Permission was asked for on October 10, 1920, and reply was given on February 9, 1921, refusing sanction. Petrol tank was sanctioned on April 5, 1921..."

The reasons for this non-compliance for such a long time may be found in the voluminous correspondence between the defendant and his sub-lessees and the Improvement Trust. Ultimately the differences between the defendant and his sub-lessees led to a suit. The defendant filed Suit No. 4438 of 1922 against the sub-lessees in February 1922 for a declaration that the lease was forfeited and determined and for possession, compensation and injunction. The fifth defendant, *i.e.*, the Bombay Motor Service Ltd., filed a written statement, Ex. A 28, in which they made a counter-claim in January 1923 for a renewal of the lease and for damages. This suit was pending at the time of the hearing of the suit; and is still pending.

At the hearing the following issues were raised :—

1. Whether the plaintiff is entitled to require the defendant to complete the sale before the Improvement Trust executed a lease in favour of the defendant or agreed to execute a lease direct in favour of the plaintiff?

2. Whether the plaintiff was entitled to make time of the essence of the contract as he purported to do by his letter of October 7, 1920?

2A. Whether in any event the time allowed for completion by the said letter was a reasonable time?

3. Whether the delay in obtaining the lease from the Trust was due to any default on the part of the defendant?

4. Whether the plaintiff did not himself cause the delay by preventing the defendant through his (plaintiff's) son and partner from carrying out the requisitions made by the Trust?

5. Whether the plaintiff is entitled to any or if so what relief?

6. Whether the defendant is entitled to his counter-claim?

The learned Trial Judge found Issues Nos. 2, 2A and 3 in favour of the defendant. But on Issue No. 1 he found that though the execution of a lease in favour of the defendant by the Improvement Trust or their agreement to pass such a lease in favour of the plaintiff was a condition precedent to the completion of the purchase the delay in getting such a lease could not debar the plaintiff from his ordinary rights (such as they are) to obtain specific performance of the agreement. On the remaining issues he found that the defendant was not entitled to specific performance, that the plaintiff was entitled to get back his earnest money but not the costs incidental to the contract. The plaintiff was allowed a moiety of the costs of the suit.

The defendant has appealed from this decree and the plaintiff has filed cross-objections. We have, therefore, to consider the whole case.

The questions as relating to the reliefs are :

(1) Whether the defendant is entitled to

a specific performance of the agreement under the circumstances of the case?

(2) If not, is the plaintiff entitled to recover (*a*) the deposit money (*b*) the costs incidental to the agreement?

(3) Whether the said items should be a charge on the moiety?

Before dealing with these questions it will be convenient to dispose of Issues Nos. 1 and 4 as framed in the lower Court.

The view taken by the Trial Court on Issues Nos. 1 and 4 has not been seriously challenged before us.

As regards the first issue, it is necessary to have regard to the terms of cl. 6 of the agreement which is as follows:—

"6. Upon payment of the balance of the purchase-money at the time and in the manner aforesaid and upon execution of the lease of the said premises by the City of Bombay Improvement Trust the vendor and all the necessary parties if any shall make and execute a proper assignment of the said lands, hereditaments and premises to the purchaser or to such other person or persons as the purchaser may nominate which assignment shall be drawn and prepared by the purchaser's Attorneys provided, however, the City of Bombay Improvement Trust executed a lease of the said premises direct in favour of the purchaser the assignment shall not be executed."

According to this it was necessary to have a lease from the Improvement Trust or to get the Improvement Trust to agree to pass a lease in favour of the plaintiff, before the purchase could be completed. But it does not follow that the plaintiff was bound to wait for any length of time in order that the defendant may place himself in a position to fulfil that condition. In cl. 2 of the agreement the time limit of two months was fixed, It is true that the time is not of the essence of the contract; but it shows that the parties intended that the condition under cl. 6 was to be fulfilled at least within a reasonable time, if not in two months. Whether the defendant has exceeded the limit of reasonable time or not is a question which I shall deal with separately. But the fact that the defendant has not obtained a lease from the Improvement Trust or succeeded in securing the consent of the Improvement Trust to accept the plaintiff as a nominee for the defendant by itself is no ground for delaying the performance of the contract beyond reasonable time.

As regards the fourth issue, there is no evidence in the case that the plaintiff caused the delay by preventing the defendant through his (plaintiff's) son from carrying out the requisitions made by the Trust. In fact the plaintiff's son ceased to be a partner from March 22 in the firm of the defendant's sub-lessees; and there is nothing in the case to show that the plaintiff had any knowledge of the development and causes of disputes between the defendant and his sub-lessees. The only direct knowledge that he had was due to the letter of March 15, 1920, addressed to him by the sub-lessees' Solicitors (part of Ex. J.). A week after that the plaintiff's son ceased to be a partner in the firm of the sub-lessees: and the mere fact that his son was a partner in that firm up to March 22, and that subsequently in November 1920 the plaintiff became a Director of the limited Company, which took over the concern of the sub-lessees, cannot be held to be evidence in support of the inference that the sub-lessees were put up to create trouble for the defendant by the plaintiff. The learned Judge has accepted this view: and it is not challenged. Even as regards the knowledge of the correspondence between the defendant and the sub-lessees after March 15 there is no evidence. It is significant that in the correspondence, the defendant never taxed the plaintiff with any responsibility for the delay caused by the sub-lessees.

It is urged on behalf of the appellant in support of the appeal that the learned Judge having found that the plaintiff was not entitled to make time of the essence of the contract in October 1920, that the time allowed by the notice was not reasonable, and that the defendant not being responsible for the delay caused in obtaining the lease from the Improvement Trust, the defendant is entitled to specific performance of the agreement. On the other hand it is urged that the findings of the Trial Court on Issues Nos. 2, 2A and 3 are not correct, that even assuming that as between the defendant and the sub-lessees the sub-lessees were in the wrong and that as between the defendant and the Improvement Trust, the delay was due to the official routine of the Trust and not to any omission on the part of the defendant, still the plaintiff was not bound to wait for any indeterminate length of time; that he acted reason-

ably in giving notice in October and that the time allowed under the notice was reasonable under the circumstances. It is further urged that the lower Court is not right in holding that the defendant is not at all responsible for the delay. It is contended that in any view of the case it would be unfair to allow specific performance of the agreement under the circumstances, and that as no kind of default is attributable to the plaintiff, he is entitled to the return of his purchase-money. Several decisions have been cited at the Bar; but I think it will be enough to refer to *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1) and *Stickney* v. *Keeble* (2).

In the former case their Lordships observe at page 33* of the report as follows:—

"But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would reder such exercise likely to result in injustice."

In *Stickney* v. *Keeble* (2) the passage at page 400† is relevant :—

"I will merely observe that the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect, having regard to the state of the law relating to real property in England. It is safe to say that this relief will always be refused when to grant it would be essentially unfair. In the view I take of the facts...it would be essentially unfair that in this case the vendors, who, either by themselves or by those for whose action they alone are chargeable as against the purchaser, have caused great delay in completion, should be enabled to forfeit the deposit of a purchaser against whom no one has attempted to make good any delay whatever."

The observations at pages 418† and 419† also have a bearing upon the present case but I shall quote only the concluding observations at page 419†:—

"Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred an unreasonable time."

It is needless to refer to the sections of the Specific Relief Act and the Indian Contract Act as it is not suggested—and in view of the decision in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1) it cannot be suggested—that the effect of the statutory provisions is in any sense different.

The question whether the plaintiff was entitled to give notice in October making time of the essence of the contract and the further question whether the time allowed was reasonable or not are questions of fact which must be determined with reference to the circumstances of this case. Now so far as the plaintiff is concerned it is clear that soon after the contract he commenced to press the defendant to expedite matters so as to avoid delay. After his letter of March 27 the defendant's Solicitors did not write at all to the plaintiff's Solicitors. The plaintiff wrote three letters in May but the defendant did not reply to any of them. The plaintiff waited up to October 7, when he gave notice making time of the essence of the contract and giving the defendant three weeks. It is true that the plaintiff was aware of the sub-lease, though there is nothing to show that the plaintiff was aware of the differences which had gone on between the defendant and the sub-lessees from March to October. I am willing to accept the view taken by the Trial Court that the sub-lessees were making trouble and the defendant could not avoid the delay. But I do not think that the prolonged disputes between the defendant and his sub-lessees could afford any adequate ground for making the plaintiff wait for any length of time. He had agreed to pay a heavy price for this property. According to him the prices in 1920 had gone up very high, and as a prudent purchaser he was entitled to take account of the possibility of a fall in the market-value of immoveable property after it had gone up so

(1) 32 Ind. Cas. 246; 43 I. A. 26; 18 Bom. L. R. 163; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 23 C. L. J. 358; 20 C. W. N. 744; 40 B. 289 (P. C.).

(2) (1915) A. C. 386; 84 L. J. Ch. 259; 112 L. T. 664.

*Page of 43 I. A.—[*Ed.*]

†Pages of (1915)—A. C.—[*Ed.*]

high. According to him in 1921 the prices in fact commenced to go down. The plaintiff's evidence on this point is unchallenged and it is a fact which may be referred to as having come to the notice of this Court in the course of litigation of this kind on the Original Side. Thus it seems to me that after waiting for more than six months, though the original time fixed was two months, in October he could with propriety say that he could not wait any more. The question to my mind is not whether the delay was one for which the defendant was responsible as against the sub-lessees and the Improvement Trust: but whether the defendant having accepted certain contractual obligations towards the plaintiff, he was not guilty of undue or unnecessary delay as regards the plaintiff. In the absence of any such obligation towards the plaintiff, he might have taken all the time he took with his sub-lessees and the Improvement Trust. But the question to my mind is whether he can be said to have acted in a spirit of give and take with the third parties so as to avoid delay beyond reasonable limit in the fulfillment of his obligation towards the plaintiff. The correspondence between the defendant and the sub-lessees and the defendant and the Improvement Trust fails to disclose that the defendant acted in that spirit. I accept the conclusion reached by the learned Trial Judge as indicated in the following passage:—

"I have come to the conclusion that he cannot in any event be held responsible for all the delay that ensued. This delay was mainly due to four causes. In the fore-front comes the unfortunate dispute between the defendant and his sub-lessees. *Secondly*, the delay was due to the necessity of getting the sanction of the Improvement Trust to various things. *Thirdly*, there was a user of the premises by the sub-lessees in a manner which was objected to by the Improvement Trust. And *fourthly* there was a non-compliance by the defendant with certain requisitions made by the Improvement Trust."

I do not wish to express any opinion as to the merits of the disputes between the defendant and his sub-lessees. It is enough to say that the plaintiff is not in any sense responsible for the same, and the defendant's share in the responsibility for this delay cannot be held to be entirely negatived. In fact he seems to me to have acted with a certain degree of indifference as he thought the prices were high and that he was not undergoing any risk by delaying the matter. While I am on this point I may note that in the beginning the plaintiff seems to have been anxious to buy. He gave Rs. 25,000 on December 19, 1919; and the correspondence between the defendant's Solicitors and the plaintiff's Solicitors between that date and the date of the agreement distinctly tends to show that the plaintiff was more anxious to buy than the defendant to sell (see Exs. Nos. 6 7, 8, 9, 10 and 11). Thus, though I accept for the purpose of this appeal the learned Trial Judge's view that the defendant was not solely responsible for the delay in relation to the sub-lessees and the Improvement Trust, I think that the plaintiff was in no sense responsible for the delay and that though as between himself and the third parties the defendant may not be responsible, as between himself and the plaintiff the defendant was responsible. I do not think that the plaintiff could wait indefinitely long: and as, according to the statement of Mr. Patel, the requisitions of the Improvement Trust referred to in Ex. D were all matters which could have been done easily, I cannot absolve the defendant from his responsibility for the delay so far as the plaintiff is concerned. Thus the plaintiff was, in my opinion, entitled in October 1920 to give reasonable notice to the defendant that he must complete the contract within a definite time.

The next question is whether the time allowed under the notice (Ex. U) was reasonable. This question must be answered with reference to the circumstances of the case. The time given was three weeks. On October 16, when the defendant replied to the notice, he did not reveal the fact that the Improvement Trust had refused to entertain the defendant's application to give the lease to the plaintiff on March 24, and he simply said that the disputes between him and the sub-lessees had not been finally settled. Further he insisted upon a construction of the terms of the agreement, which while dealing with Issue No. 1 in the Trial Court I have held to be untenable. In fact according to the defendant's view the plaintiff was bound to wait until the lease was executed by the Improvement Trust, *i. e.*, in view of the events that have happened the plaintiff should have waited up to March or April

1923. With such an answer from the defendant, it mattered not then whether he allowed three weeks or thirteen weeks under the notice. As a matter of fact the plaintiff waited for nearly two months after the expiration of the time fixed in this notice. I agree with the Trial Court that it is difficult to determine what time is reasonable. But in view of the attitude of the defendant the difficulty appears to me to be appreciably reduced. I asked the learned Counsel in the course of the argument as to what time he would suggest as being reasonable assuming that the plaintiff was entitled to give such a notice. He suggested in reply that six months at least should have been allowed. I do not accept the reasonableness of the suggested reply: but on the facts even that would not have been sufficient. Therefore, if the plaintiff had to fix the time, I think that he was not reasonably bound to give more than three weeks as the time fixed in the agreement was two months and as he had waited for more than four months after the expiration of the said two months without any explanation from the defendant as to how much longer he would have to wait and further as the attitude of the defendant made it immaterial whether the time allowed by the plaintiff was a few weeks more or less. I hold that the time allowed was reasonable under the circumstances.

These findings render unnecessary any elaborate discussion of the question whether the defendant is entitled to specific performance.

If I am right as to the effect of the letter of October 7, there is an end of the defendant's case.

Apart from that I think that the learned Trial Judge is right in his view that it would be unfair to allow specific performance to defendant or to let him retain the deposit money. I should consider it unfair to allow specific performance to the vendor for the following reasons:—

First, up to the time the suit was decided, he was not in a position to fulfil his contract. As observed by the learned Trial Judge "he (the defendant) has not even yet got a lease from the Improvement Trust which is necessary before a good title can be conveyed."

Secondly, it would be essentially unfair to the plaintiff to decree specific performance as the plaintiff cannot be put in the same position in which he would have been if the contract had been performed in reasonable time in view of the fluctuations in the market-price.

And, lastly, the litigation between the defendant and the sub-lessees introduces an element of some uncertainty which may be said to prejudice the position of the plaintiff; though I must say that I do not attach such importance to this circumstance as the learned Trial Judge has done.

As to the deposit money it is clear that the plaintiff cannot be said to be in default in any sense, unless the notice given in October 1920 can be said to amount to a default on his part. I do not see how the notice can constitute such a default. Even assuming that the defendant was not responsible for the delay, it would be a case in which there was default on neither side. If in such a case for any reason the Court refuses to grant specific performance in the exercise of its discretion the plaintiff would be entitled to a return of the purchase-money. The following observations of Cotton, L. J. in *Howe* v. *Smith* (3) are pertinent (page 95*):—

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

This view was followed in *Balvanta* v. *Bira* (4). If the plaintiff was justified in giving notice on October 7, as I hold he was, the plaintiff would be entitled to a return of the deposit money. As regards the sum of Rs. 653-8-0, I think that in the view I take, the plaintiff is entitled to the sum. If I had not taken a view favourable

(3) (1884) 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(4) 23 B. 56; 12 Ind. Dec. (N. S.) 37.

*Page of 27 Ch. D.—[*Ed.*]

to the plaintiff as to the notice of October 7, I would not have allowed this sum.

In conclusion I may add that I agree with the learned Trial Judge that this is a case in which parties ought to be restored to the position they were in before the agreement; and the variations that we make in the decree are more or less incidental. Under s. 55, sub-s. 6, cl. (*b*), of the Transfer of Property Act, the plaintiff is entitled to a charge on the porperty in respect of the sum of Rs. 25,000.

In the result I would dismiss the appeal with costs and allow the cross-objections to the extent indicated below with costs. The decree of the Trial Court is affirmed subject to the following variations:—(1) Decree the plaintiff's claim for Rs. 653-8-0; (2) declare that the deposit money is a charge on the property in question; and (3) the plaintiff to have his costs of the suit.

Crump, J.—I agree that the judgment under appeal ought to be confirmed. I find no reason whatever to doubt that the learned Trial Judge has correctly appreciated the facts, but on those facts I should myself hold that plaintiff was entitled to call upon the defendant to complete the contract as he did by his letter of October 7, 1920, and that the time allowed was in the circumstances reasonable.

In my opinion each case must of necessity be judged upon its own facts. Here the agreement to sell was made on March 12, 1920. It is common knowledge that the market for immoveable property in Bombay was at that time anything but stable. The parties fixed two months for completion, and though that does not in itself make time of the essence of the contract the time so fixed is a term of the contract and cannot be entirely disregarded. Defendant could not complete the contract without obtaining a lease from the Improvement Trust, but surely it would be a *reductio ad absurdum* to hold that plaintiff was bound to wait for that event, however, long the delay might be. Defendant was unable to obtain that lease until after the decision of the suit, *viz.*, March 5, 1923. If the argument for defendant were to prevail we must hold that plaintiff was bound to wait for over three years.

Now there has been no attempt to show that plaintiff was in any way responsible for the delay. The learned Trial Judge has found that the delay was due partly to defendant's failure to comply with certain requisitions, partly to the disputes between defendant and his sub-lessees. It cannot be said that defendant was not in part at least to blame. The dispute with the sub-lessees was his misfortune but I cannot understand why in equity plaintiff should be compelled to wait indefinitely because defendant's sub-lessees were obstructive. I find nothing in the cases cited to compel me to accede to this proposition.

As to the time fixed—three weeks—that was, in my opinion, reasonable having regard to the long delay which had already occurred, and the comparatively simple nature of the requisitions of the Improvement Trust as deposed to by defendant's own architect.

On these short grounds I agree with the judgment of the learned Chief Justice and the orders proposed.

Z. K. *Appeal dismissed: Decree varied.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1923.

July 2, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Sulaiman.

GAYA PANDE—DEFENDANT—APPELLANT

versus

AMAR DEO PANDE—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 42—Civil Procedure Code (Act V of 1908), s. 102—Mortgage-deed executed by two persons of property belonging to one of them—Executants, whether co-mortgagors—Suit for contributian, nature of—Jurisdiction of Small Cause Court.

Plaintiff and defendant joined in executing a document whereby certain property which belonged exclusively to the plaintiff was mortgaged and in the mortgage-deed the executants described themselves as mortgagors. Subsequently, the plaintiff paid off the mortgage-debt and brought a suit for contribution against the defendant:

Held, (1) that although the parties were described in the mortgage-deed as mortgagors the real mortgagor was only the plaintiff and that the defendant was not a mortgagor at all;

(2) that, therefore, this was not a suit for contribution by one of several joint mortgagors within the meaning of Art. 42 of Sch. II to the Small Cause Courts Act and was a suit of the nature cognizable by a Small Cause Court.

Letters Patent Appeal from a judgment of Mr. Justice Gokul Prasad, in Second Civil Appeal No. 987 of 1921, dated December 20, 1921, and printed as 71 Ind. Cas. 393, reversing a decree of the District Judge, Ghazipur, reversing that of the Munsif, Saidpur.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *A. Sanyal*, for the Respondent.

JUDGMENT.—We are of opinion that this appeal must succeed. We do not say that the defence is without merits for a reason which will appear in a moment—but we are quite clear that our brother ought not to have interfered with the decision of the lower Court, because he had no jurisdiction to hear the appeal. It is possible that he felt that the plaintiff was entitled to sympathy, and that he stretched a point in his favour. He certainly does not give any strong reason why he overruled the preliminary objection. The point is really quite simple. The plaintiff and the defendant joined in a document, which was a mortgage, whereby certain property was hypothecated in consideration of a loan, and they described themselves as mortgagors. *Prima facie* they were joint mortgagors or co-mortgagors. But a description of that sort which may be due either to the man who writes the document, or to carelessness of the lawyer who does not think it necessary to go into detail, cannot alter the fact, and in this particular case in fact only one of them mortgaged his property, and the other transferred, hypothecated and mortgaged none, and, therefore, he did not become a mortgagor in any sense of the word, or within the definition of s. 58 of the Transfer of Property Act. He might, in certain cases, be prevented from denying it, which is what the law calls estoppel, so that for certain purposes he would become in the eyes of the law a mortgagor and be treated as such. He would only be treated as such by estoppel, which is an artificial principle of law, and it would not make him a mortgagor in fact when he was not one. But as against anybody who knew the facts, particularly his co-mortgagor, there could be no estoppel. Nobody, knew the facts better than his co-debtor, the actual mortgagor. The plaintiff paid the debt, or discharged the greater part of the debt, and he now seeks contribution. The question is—the claim being under Rs. 500—whether there is any second appeal. If it is a suit of a Small Cause Court nature, there is none. The only way in which the plaintiff can take it out of the category of a suit of a Small Cause Court nature, is by bringing it within Art. 42. But Art. 42 applies to a suit by one of several joint mortgagors, and as we have pointed out here, there were no joint mortgagors, but only one mortgagor. When the plaintiff, having lost his suit in the Court of the District Judge, appealed in second appeal to this Court, this objection, which we have just stated, was taken by the respondent. The learned Judge accurately set out the objection in his judgment. He dismissed it without giving any convincing reason being content to say that as they both joined in executing the document, he thought they could be brought within the words "joint mortgagors." We find ourselves unable to agree. Joint executants they certainly were, joint debtors they certainly were, joint participants in a mortgage transaction they certainly were, but there was only one mortgagor. The preliminary objection, therefore, before the learned Judge ought to have prevailed, and we are of opinion that he was wrong in dismissing it. This is sufficient to dispose of this appeal, but it does happen that the Court of first appeal, namely, the District Judge, definitely dismissed the claim on the ground that the plaintiff had failed to establish by proof the mortgage debt, or the right to contribution at all, and if that decision is right a matter which the High Court cannot consider it is clear that the defendant is right on the merits as well as on the technical objection. We must allow this appeal, overruling the learned Judge and giving effect to the technical objection and hold definitely that this was not a suit within Art. 42. The appellant must have the costs here and below.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 899 of 1922.

August 27, 1924.

Present :—Mr. Justice Wallace.

V. MANICKAM PILLAI—DEFENDANT—PETITIONER

versus

MAHUDAM BATHUMMAL AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 1 TO 5 AND 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151,

O. IX, rr. 8, 9—Plaintiff's Pleader instructed to apply for adjournment—Adjournment refused—Dismissal of suit, nature of—Application to set aside dismissal—Dismissal, whether can be set aside as matter of grace—Illegality—Revision.

Where a plaintiff's Pleader has instructions to apply only for an adjournment, and the adjournment is refused, it is a case of non-appearance of the plaintiff, and the dismissal of the suit, in consequence, is for default of appearance. [p. 500, col. 1.]

Order IX, r. 9 of the C. P. C. gives no power to a Court to set aside a dismissal of a suit for default of appearance of the plaintiff as a matter of grace, nor has the Court any inherent power to set aside the dismissal on this ground. [p. 500, col. 2.]

Gadi Neelaveni v. *Marappareddigari Narayana Reddi*, 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M. W. N. 19 (F.B.), followed.

Gopala Row v. *Maria Susaya Pillai*, 30 M. 274; 17 M. L. J. 225, dissented from.

A party who goes to law is entitled to insist that the law shall be followed and that an order not in accordance with the law shall not be allowed to be in force. [p. 501, col. 1.]

When an order is passed wholly without jurisdiction the High Court is bound to interfere in revision and not to allow the order to remain in force. [*ibid.*]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Tuticorin, dated the 2nd of August 1922, in Interlocutory Application No. 558 of 1922, in O. S. No. 16 of 1921.

Mr. *P. V. Krishnaswamy Iyer*, for the Petitioner.

Messrs. *A. Swaminatha Iyer* and *K. R. Rangaswamy Iyengar*, for the Respondents.

JUDGMENT.—This is a petition for the revision of the order of the Subordinate Judge of Tuticorin in setting aside on certain conditions the dismissal of the plaintiff's suit for default of appearance. The allegations in the petition to set aside the dismissal were that the plaintiff is a Muhammadan woman whose husband had lately died and who, therefore, could not appear in Court, that on the day of hearing, 6th April 1922, the plaintiff's Vakil appeared before the Court and asked for an adjournment apparently because he had not been served and had not turned up although *batta* had been paid for process, that on the adjournment being refused the Vakil reported no instructions and the suit was then dismissed for default of appearance.

That an order of dismissal for default of appearance was the proper order in such circumstances has been now clearly laid down by a Full Bench of this Court in this very case, the question referred to it being whether, when a Pleader has instructions to apply only for an adjournment and when the adjournment is refused it is a case of non-appearance of the party and the dismissal of the suit is for default of appearance.

As to the reasons for non-appearance even on the facts the affidavit the plaintiff's domestic situation was not preventing her from prosecuting the suit or from taking out process to the witnesses for the date of hearing and her son was looking after the case for her. In these circumstances the lower Court was constrained in its order to admit that: "the allegations in the affidavit are, no doubt, not sufficient *per se* to excuse the default. But having regard to the fact that plaintiff is a woman and the value of the suit is nearly Rs. 10,000, I think the dismissal may be set aside on terms as a matter of grace" and, consequently, as a matter of grace, it set aside the dismissal. I am asked by the respondent in this petition to hold that what the Subordinate Judge really meant was that the plaintiff had shown good cause for not appearing. I am quite sure the Subordinate Judge did not mean this, and I agree with him that the plaintiff did not show good cause for not appearing. The setting aside the dismissal was, therefore, a mere act of grace or clemency on the part of the learned Subordinate Judge. Now O. IX, r. 9, C. P. C., gives no power to a Court to set aside a dismissal of a suit for default of appearance as a matter of grace, nor has a Court any inherent power to do so. I think the principle laid down in *Gadi Neelaveni* v. *Marappareddigari Narayana Reddi*, (1), by a Full Bench in interpreting O. IX, r. 13, C. P. C., applies equally to O. IX, r. 9 C. P. C. The ruling to the contrary cited by the plaintiff, namely, *Gopala Row* v. *Maria Susaya Pillai* (2), quoted in the discussion in the Full Bench case, has been referred to and implicitly dissented from in the judgment of the Officiating Chief Justice. It is not, therefore, open to a Court to set aside as a matter of grace a dismissal of a suit for default of appearace. I think it would introduce a most undesirable element of uncertainty into the trial of cases if it was to be held that a Court may as a matter of grace go beyond the law of procedure whenever it feels that that law is acting harshly. It has often been said that hard cases make bad law, and the

(1) 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 606; (1920) M W N 19 (F. B.).
(2) 30 M. 274; 17 M. L. J. 225.

present case is no exemption. I am bound to hold that the Subordinate Judge had no jurisdiction to pass his order.

When an order is passed wholly without jurisdiction this Court is bound to interfere and not allow it to remain in force. A party who goes to law is entitled to insist that the law shall be followed and that an order not in accordance with the law shall not be allowed to be in force. It is urged in this case by the plaintiff that, as the petitioner did not apply for any stay of trial while his revision petition was pending, the trial actually went on and that she has obtained a decree for Rs. 4,000 which decree is now pending appeal in this Court, and I am urged not to interfere in revision when there has been in fact a trial of the case on the merits between the parties. I feel the weight of this contention but I am of opinion that it cannot balance the weight of the other principle already cited, namely, that an order passed without jurisdiction cannot be allowed to remain in force. I must, therefore, set aside the order of the lower Court as passed without jurisdiction, and the dismissal of the suit for default, therefore, remains.

As the petitioner by not applying for the stay of trial has unnecessarily occasioned much expenditure to the plaintiff in continuing the trial of the suit, I refuse him his costs. Each party will bear his own costs here and below.

V. N. V. *Petition allowed.*
Z. K.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 72 OF 1924.

July 29, 1924.

Present :—Mr. Justice Young and Mr. Justice Carr.

D. H. ATCHIA AND COMPANY—APPELLANTS

versus

M. E. JEEWA—RESPONDENT.

Rangoon Small Cause Court Act (VII of 1920), ss. 17, 23—Civil Procedure Code (Act V of 1908), O. XXI, r. 36—Ejectment decree against tenant—Property in possession of sub-tenant—Symbolical possession.

The provision in O. XXI, r. 36, C. P. C., is, under s. 23 (*a*) (*iii*) of the Rangoon Small Cause Court Act, applicable to a decree for ejectment obtained under that Act. [p. 501, col. 2.]

Therefore, in a decree for ejectment against a tenant obtained under the Rangoon Small Cause Court Act, only symbolical possession can be given when the premises are in occupation of a sub-tenant not bound by the decree. [p. 502, col. 1.]

Miscellaneous appeal against an order of the Small Cause Court, Rangoon, in C. M. No. 379 of 1924.

Mr. *Doctor*, for the Appellants.

Mr. *A. B. Banerjee*, for the Respondent.

JUDGMENT.

Young, J.—The respondent filed an application for execution of a Small Cause Court decree for ejectment obtained against one H. M. Suleman, his tenant, alone, by actual ejectment of the judgment-debtor the said H. M. Suleman and all persons claiming under him including the present appellants, one of his sub-tenants. The suit and decree was against H. M. Suleman alone, and the appellants were no party to the one and not bound by the other. Under the C. P. C., O. XXI, r. 36, only symbolical possession can be granted where the tenant is not bound by the decree.

This provision of the law is applicable to the Small Cause Court, *vide* s. 23 (*a*) (*iii*). Therefore, only symbolical possession and not actual possession could be granted of the premises in question. The order, therefore, declaring that the respondent is entitled to obtain an order compelling the appellants to deliver up possession is incorrect and must be altered to a declaration that the respondent is only entitled to symbolical possession as regards D. H. Atchia and Company.

As this does not operate as an order for actual possession the appellants have succeeded and must have their costs three gold *mohurs*.

Carr, J.—In a proceeding under s. 17 of the Rangoon Small Cause Court Act the respondent obtained an ejectment order against one Suleman. In execution he sought to enforce this order against the appellant, who claims to be a sub-tenant under Suleman, and who is admittedly in occupation of the premises. Appellant applied to cancel the order against him and the Judge dismissed his application. The reason he gave was that the respondent, having obtained an ejectment order against Suleman is entitled under s. 17 of the Act to obtain an order compelling the appellant to deliver up possession.

This shows that the learned Judge has

misunderstood s. 17. The procedure under that section is prescribed in r. 79 *et seq* under the Act, and, as I have said, it was under that section that respondent obtained his order against Suleman. Such an order cannot be passed in execution and if the respondent wishes to eject the appellant, he must proceed as laid down by the rules.

The appellant was not a party to the proceedings and, therefore, is not bound by the order. In such circumstances under O. XXI, r. 36, of the C. P. C. only symbolical possession can be given. This provision is applicable to the Small Cause Court under s. 23 (*a*) (*iii*) of the Act and, therefore, only symbolical and not actual possession can be given as against the appellant.

It has been objected that since the appellant is not a party to the suit he has no right of appeal. In my view since the respondent has sought to eject the appellant as if he were a party he cannot now contend that appellant has no right of appeal. I do not, however, consider this question of importance, for even if there were no right of appeal I should certainly interfere in revision.

I would allow the appeal and declare that the ejectment order is not enforceable against the appellant. The respondent to pay the appellant's costs. Advocate's fee three gold *mohurs*.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 8 OF 1924.

July 23, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

SHAH MUHAMMAD FAKHRUDDIN —DEFENDANT—PETITIONER

versus

RAHIMULLAH SHAH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision pending suit—Suit, reference of, to arbitration—Award based on compromise—Order setting aside award—Revision, whether competent.

Where the matter to be revised arises out of the proceedings of a pending suit, there can be no revision till the suit has been decided. [p. 502, col. 2.]

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 19 A. L. J. 558; 43 A. 564, followed.

The parties to a suit having agreed to refer the matter in dispute to arbitration, stated before the Arbitrators that they had arrived at a compromise and the Arbitrators made an award in accordance therewith. On the matter going before the Court, one of the parties took exception to the award on the ground that the compromise had been arrived at by means of lottery and was not binding. The Court gave effect to this objection and set aside the award. The other party applied to the High Court in revision:

Held, that no application in revision lay against the order passed by the Court. [p. 503, col. 1.]

Civil revision against an order of the Subordinate Judge, Ghazipur, dated the 2nd November 1923.

Mr. *U. S. Bajpai*, for the Applicant.

Messrs. *Iqbal Ahmad*, *Mukhtar Ahmad* and *S. Raza Ali*, for the Opposite Party.

JUDGMENT.—These two applications in revision arise out of the same facts. There were two suits before the learned Subordinate Judge of Ghazipur, the plaintiff of one of which was the defendant in the other. The parties agreed to refer the matters in dispute to arbitration and three persons were appointed Arbitrators. Before the Arbitrators, the parties stated that they had arrived at a compromise by which the suit instituted by the applicant before us should be decreed and the suit institued by the opposite party, Rahimullah, should be dissmissed. The arbitrators recommended that the Court should dispose of the two suits according to this compromise. When the matter went before the learned Subordinate Judge, Rahimullah took exception to the award on the ground that the compromise recorded by the Arbitrators had been arrived at by means of lottery and the compromise was not binding on him. The learned Subordinate Judge gave effect to this objecton and set aside the award. It is against this order that the two applications in revision have been filed.

It appears to us that no revision would lie under s. 115 of the C. P. C. This section was interpreted by a Full Bench case of this Court, *viz.*, *Buddhoo Lal* v. *Mewa Ram* (1). In that case three learned Judges as against two held that where the matter to be revised arose out of the proceedings of a pending suit there would be no revision till the suit had been decided. In the case before the Full Bench, it appears, the question was as to whether the Trial Court had jurisdiction to hear a particular suit. The Trial Judge decided that he had the jurisdiction and accordingly proceeded to

(1) 63 Ind. Cas. 15; 19 A. L. J. 558; 43 A. 564.

hear the suit. Then, an application in revision was filed to this Court. The majority of the Judges hearing the application were of opinion that the order of the Trial Judge deciding that he had jurisdiction to hear the suit was not a "case" and no revision lay. The language used by Piggott, J., leaves no room for doubt on the point. He says:—

"If this view is correct it follows that, whereas all 'cases' are not 'suits,' every 'suit' is at least a 'case'. From this I would go on to conclude that, where the 'case' in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit' then this 'suit' is itself the 'case' referred to in s. 115 of the C. P. C., which requires to be decided before the record is called for."

Following this Full Bench case we are of opinion that no application in revision lies against the order passed by the learned Subordinate Judge. We may add that the applicant is not without his remedy. On the trial of the suits he may succeed and there may be no occasion for him to complain of the order passed by the learned Subordinate Judge. If the decision on the merits goes against him he can appeal on the merits of the case and also urge the ground that the Trial Court ought to have accepted the compromise and the award as final between the parties.

We dismiss the applications in revision but without costs as nobody appears to resist the applications.

K. S. D. *Applications dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 343 OF 1922.

August 6, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Jackson.

GOOTY AGRAHARAM SUBRAMANIAN AND ANOTHER—DEFENDANTS Nos. 1 AND 2—APPELLANTS

versus

AGRAHARAM RAMACHANDRA RAO—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Partition, partial, suit for, whether maintainable—Property in possession of tenants, whether can be excluded.

A partial partition of Hindu joint family properties should be allowed where there are circumstances which militate against the division of all the family properties, for instance, where property which has not been included in the suit is in possession of strangers claiming adversely. The mere fact, however, that certain items of the property are in the possession of tenants does not entitle the plaintiff to exclude such items from the suit.

Rajendra Kumar Bose v. *Brojendra Kumar Bose*, 77 Ind. Cas. 790; 37 C. L. J. 191; (1923) A. I. R. (C.) 501 and *Pakkirikanni* v. *Muhammad Manjoor Sahib*, 75 Ind. Cas. 334; 46 M. 844; (1923) M. W. N. 565; 45 M. L. J. 321; 18 L. W. 345; 33 M. L. T. 44; (1924) A. I. R. (M.) 124, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Anantapur, in A. S. No. 130 of 1920, preferred against the decree of the Court of the District Munsif, Gooty, in O. S. No. 90 of 1918.

Mr. *K. Kameswara Rao*, for the Appellants.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—The only point argued in this second appeal is that the suit is not maintainable as it does not embrace all the properties belonging to the plaintiff and the defendants Nos. 1 and 2.

The plaintiff admits in his evidence that there are several lands belonging to him and the defendants which are in the possession of tenants, that he himself had leased the lands before the date of suit and that the income from the lands was payable to himself as well as to the defendants Nos. 1 and 2.

The District Munsif held that the suit was maintainable and the Subordinate Judge dismissed the appeal of the defendants on the ground that the suit was maintainable. We are clearly of opinion that this is not a case in which there was any inconvenience or difficulty in the way of including the other lands belonging to the plaintiff and defendants among the properties to be divided in the suit. If some property belonging to the plaintiff and the defendants was in the hands of a third party claiming adversely to them, and if some property was alienated by one of the co-sharers and if there was some difficulty in including such alienee in the suit then it may be that the Court would not be inclined to hold that such properties should be brought into the suit. But in this case, no such difficulty is alleged to exist. On the other hand the only allegation is that the other properties are in the possession of the tenants of the plaintiff. It was held in *Rajendra Kumar Bose* v. *Bro-*

jendra Kumar Bose (1) that a suit for a partial partition would not ordinarily lie. In *Pakkirikanni* v. *Muhammad Manjoor Sahib* (2) a Bench of this Court held that in certain cases partial partition may be allowed but there must be circumstances which militate against the division of all the family properties and which would be a sufficient reason for the Court to hold that the suit for partial partition should be allowed.

But in this case no such circumstances have been brought to our notice. There is no reason why the plaintiff should not have included all the properties belonging to himself and the defendants in his prayer for partition.

In the circumstances we allow the appeal of the defendants but at the same time we do not think that the suit of the plaintiff should be dismissed on this technical ground. We allow him an opportunity to amend his plaint within two months from to-day. He will pay the costs of the defendants throughout and the District Munsif will allow the amendment only after he pays the amount of costs to defendants Nos. 1 and 2. If he does not amend the plaint the suit will stand dismissed with costs throughout.

V. N. V.

Z. K. *Appeal allowed.*

(1) 77 Ind. Cas. 790; 37 C. L. J. 191; (1923) A. I. R. (C.) 501.

(2) 75 Ind. Cas. 334; 46 M. 844; (1923) M. W. N. 565; 45 M. L. J. 321; 18 L. W. 345; 33 M. L. T. 44; (1924) A. I. R. (M.) 124.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 33 OF 1919:

SUIT No. 413 OF 1918.

April 8, 1920.

Present:—Sir John Heaton, Kt., Acting Chief Justice, and Mr. Justice Marten.

JAMSHEDJI NAOROJI GAMADIA AND ANOTHER—APPELLANTS

versus

SORABJI NAOROJI GAMADIA AND ANOTHER—RESPONDENTS.

Compromise—Consent given under misapprehension—Court, power of, to refuse to act on compromise—Counsel, power of, to compromise, limits on—Originating Summons—Joinder of parties—One individual interested in different capacities—Procedure.

Where a decree has once been passed and entered on a compromise, a fresh action is necessary to have the compromise set aside. But before a decree is passed there is power in the Court to refuse to put its seal on what has been done under some misapprehension as to the true state of affairs. [p. 506, col. 1.]

Where no limitation is placed on Counsel's authority, he may bind his client by agreeing to a compromise. If, however, Counsel is only empowered to compromise on certain terms, he is thereby impliedly prohibited from settling on other terms, and if notwithstanding that prohibition, he does effect a settlement on such other terms, that settlement does not bind his client. [p. 507, col. 2.]

Case-law discussed.

In an Originating Summons the same individual, even in different capacities, cannot appear both as an applicant and as a respondent, nor can the same individual appear as two persons, even on the same side, nor can he appear by two different sets of Counsel. [p. 505, col. 1.]

Procedure in cases where the same individual is interested in different capacities indicated.

Rustomji v. *Sheth Purshotamdas*, 25 B. 606 at p. 612; 3 Bom. L. R. 227 at p. 230, followed.

Lake v. *South Kensington Hotel Company*, (1879) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514, referred to.

Mr. *Strangman*, Advocate-General, and Mr. *Coltman*, for the Appellants.

Messrs. *Inverarity Desai*, *Taraporevala*, *Campbell*, *Kanga*, *Jinnah*, *Bahadurji*, *Mulla*, *Setalvad* and *Weldon*, for the Respondents.

JUDGMENT.

Marten, J.—We have three applications before us, *viz.*, (1) an application by respondent No. 1 to approve the draft minutes embodying the consent and other terms alleged to have been arrived at on the hearing of this appeal on Friday September 19, 1919; (2) a notice of motion by the second respondent dated October 7, 1919, asking for a declaration that the arrangement, if any, arrived at to take a consent-decree, is not binding on him, and that the hearing of the appeal be proceeded with, and that if necessary he, the applicant, be made a party appellant; and (3) a notice of motion by the appellants dated October 9, 1919, asking that their consent may be excluded from the proposed decree, and that the said decree be not certified to be for the benefit of the minor respondent No. 10. [After stating the facts his Lordship proceeded :—]

It is certainly curious to find an appeal presented on the ground that the Trial Judge has given the appellants too much, *viz.*, absolute interests, and that he ought to have given them less, *viz.*, protected and determinable life-interests. But it was stated by their Counsel that this was

due partly to filial piety, and partly to family disputes over the rights of residence.

The procedure adopted in the memorandum of appeal was also curious; and must be mentioned having regard to what subsequently happened. It describes the appellants as two of the beneficiaries, so presumably the appeal was presented by them in their personal capacity and not as executors. That being so, respondent No. 2 should have been made a respondent in his representative as well as in his personal capacity. The course actually taken of joining the executors as respondents Nos. 2, 3 and 4 and of joining respondent No 2 over again as respondent No. 5 in his own right was in my judgment incorrect procedure. As was said by Sir Lawrence Jenkins in *Rustomji* v. *Seth Purshotamdas* (1):

"This doctrine is founded on the elementary rule of procedure, too often disregarded in this countary, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action. While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in *Luke* v. *South Kensington Hotel Company* (2)."

So here the same persons (*viz.*, the appellants) could not be both appellants and respondents. Nor could the same person (*viz.*, respondent No. 2) appear as two persons, *viz.*, respondents Nos. 2 and 5. Nor could the same person appear by two different sets of Counsel, the one may be to argue white and the other to argue black. It is true that in the Trial Court the Advocate-General, according to the learned Judge's notes, appeared for defendants Nos. 1, 2 and 3 as executors and Mr. Weldon appeared for the same three defendants as individuals. This, however, could easily have been rectified by letting one of these defendants represent the executors, and leaving the other two defendants to argue for their individual rights. In that case the Advocate-General could have appeared for the former, and Mr. Weldon for the two latter defendants. That, I think, would have been the correct procedure, and I do not think that what actually took place can be reconciled with what Sir Lawrence Jenkins has said. In ordinary cases, there is often one independent executor, and in that event it is best to leave him to represent the executors before the Court, and to allow the beneficiary executors to argue for their individual rights, unless perhaps there are many others in the same interest. The great point is to see that there is some one to represent all possible conflicting interests. I may refer to Marcy's Forms of Originating Summons as illustrating what I mean. In Forms Nos. 9 and 21 some trustees will be found as plaintiffs and the others as defendants.

I deal with this at some length because I have been often troubled in Bombay with this disregard of what Sir Lawrence Jenkins calls an "elementry rule of procedure." One may perhaps be permitted to express the hope that if, as seems likely, this case should reach the Privy Council, their Lordships would be pleased to lay down the correct practice to be followed here.

* * * * * *

I may now come to the applications themselves. The main application is the notice of motion of October 7. It is based on the grounds: (1) that respondent No. 2 instructed his Solicitors to fight the case out, and that he was not present in Court and never consented to the terms; (2) that Counsel for respondent No. 2 was not informed of these instructions, and gave his consent under the impression that the appellants whom he personally consulted had authority to act for the second respondent; (3) that respondent No. 8 was not represented by Counsel at all and never gave her consent; and (4) that the interests of unborn issue, if not of the minor, were not adequately represented before the Court, and that the terms ought not to be sanctioned by the Court.

Now, in considering this matter, it must be borne in mind that no decree has yet been passed and entered. We have not even yet approved the draft minutes of the proposed decree, and, therefore, the position is a very different one from what would be the case if the decree had been passed and entered. If a decree has once been passed

(1) 25 B. 606 at p. 612; 3 Bom. L. R. 227 at p. 230.
(2) (1879) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514.

and entered, a fresh action is usually necessary to have the compromise set aside: see *Ainsworth* v. *Wilding* (3). On the other hand, before that is done, there is, I think, power for the Court to refuse to put its seal on what has been done under some misapprehension as to the true state of affairs. I am not attempting to define the Court's powers in this respect, but I may refer to *Holt* v. *Jesse* (4) as an illustration of what a Court may do in certain cases. There, Vice-Chancellor Malins says (page 184):—

"Where there has been a misapprehension on the part of Counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the Counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls: 'If the Counsel says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the Court to bind the Counsel to that mistake.' I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which Counsel ought to have when he gives a consent is not before him, it never has been the rule of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension".

The above passages were cited with approval by the Court of Appeal in *Hickman* v. *Berens*, (5) and the principle followed (see pages 646 and 648). So, too, in *Harvey* v. *Croydon Union Rural Sanitary Authority*, (6) Lord Justice Cotton says (page 255):

"If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn up."

Then in *Neale* v. *Gordon Lennox* (7) Lord Lindley said at page 473:—

"Before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned Judge who made that order to stay the drawing of it up if he had been informed that the Court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order."

Now, here, speaking for myself, I was prepared to approve the consent terms on the basis that in effect it was a family arrangement agreed to by all the adult parties, and acquiesced in by Counsel for the minor. But it has now turned out that respondents Nos. 3 and 8 do not give their consent. Further, Mr. Coltman has stated in effect that he agreed to these terms under a misapprehension of fact, *viz.*, that the appellants had the authority of respondent No. 2 to agree to the terms on his behalf. He says: "All I did was with the express authority of the Solicitors and of the two appellants, my impression being that the two appellants had authority of respondent No. 2 to come to any settlement they thought advisible. I expressly consulted appellants Nos. 1 and 2 in person." I entirely accept that statement of Counsel, and I distinctly recollect that Mr. Coltman was particularly careful to consult his professional and lay clients at different stages of the proceedings, though of course I did not know whether all the lay clients were then in Court. Further, the evidence of respondent No. 2 and his Solicitor is that the last instructions given were to fight the case out. It may be that this is somewhat at variance with the fact that no Counsel was originally briefed for respondent No. 2 in his personal capacity. Counsel was only briefed for him in his representative capacity. But that may have something to do with costs, for in the latter capacity he would be almost sure of his costs whereas if in his private capacity he supported the appellants and failed, he might be left to bear his own costs.

It was further stated or suggested that

(3) (1896) 1 Ch. 673; 65 L. J. Ch. 432; 74 L. T. 193; 44 W. R. 540.

(4) (1876) 3 Ch. D. 177; 46 L. J. Ch. 254; 24 W. R. 879.

(5) (1895) 2 Ch. 638; 46 L. J. Ch. 785; 12 R. 602; 73 L. T. 323.

(6) (1889) 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389.

(7) (1902) A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757.

respondent No. 2's Solicitors (who were also the appellants' solicitors) misunderstood the effect of the striking out of the names of respondents Nos. 3, 4 and 5, and that they did not appreciate that respondent No. 2 would thenceforth appear in his representative capacity, as well as in his personal capacity. It was accordingly suggested that there was no one before the Court to represent the executors and trustees as such, and that accordingly unborn issue, whose interests under s. 43 of the Specific Relief Act would normally be represented by the trustees, were not represented before the Court. So, too, under the English practice the trustees would represent the interest of unborn issue in a case like the present: see *In re Whiting's Settlement, Whiting* v. *De Rutzen* (8). As to this latter argument, the interests of the unborn issue were the same as those of the minor respondent No. 10, and one would expect the argument, if any, to come from respondent No. 10. In an ordinary case it would be simple to get over the difficulty by certifying the decree to be for the benefit of unborn issue as well as the minors, provided we were satisfied that the trustees were before the Court and that there were independent Counsel to put forward the rival contentions. Similarly, as regards the difficulty that respondent No. 8 was not originally represented by Counsel, that of course could have been got over by producing a consent brief on her behalf.

But as the facts are so very different from what we imagined them to be at the hearing of the appeal, I feel this is a case where it would not be proper for us to certify the terms as being for the benefit of the minors and unborn issue. Further, as all the parties are standing on their strict legal rights, it seems to me that the fact that respondent No. 8 was not represented by Counsel is a further objection. Only Counsel or the party in person had a right of audience before us, and as neither of those facts happened, the consent terms would appear to be defective. It is true that her Solicitors were the same Solicitors as appeared for her husband appellant No. 2, but I am not satisfied that they in fact gave their consent as such, nor that the Court could take cognizance of that consent except by the party in person or Counsel.

(8) (1905) 1 Ch. 96; 74 L. J. Ch. 207; 91 L. T. 821; 53 W. R. 293; 21 T. L. R. 83.

I am not prepared to accept the position as being that of an agreement arrived at out of Court, which is now being sought to be enforced by specific performance.

As regards the remaining question, which was much argued, *viz.*, as to whether Mr. Coltman's consent given on behalf of his client respondent No. 2 is binding. I am disposed to think that, under all the circumstances, it was not binding. If he had realised that the appellants had not the authority of their brother to come to any arrangement, I do not think he would have consented to the terms, nor do I think he would have done so if his Solicitor had informed him that respondent No. 2's instructions were to fight the case out. In a case of that sort, I should be sorry to think that a *bona fide* mistake of Counsel due in no way to any fault of his own, should not be capable of rectification before the decree is finally passed. If, for instance, Counsel had come immediately after the midday adjournment on September 19, and had stated that the course he adopted as regards stage No. 1 was made under a mistake of fact, *viz.*, as to the consent of all his clients, and that he asked leave to withdraw his consent and continue the appeal, I can hardly believe that any Court would have refused that. I need not refer again to what Malins, V. C., has said in the case above cited.

Does it then really make any material difference that stages Nos. 2, 3 and 4 were subsequently reached? Even then the draft consent terms had to be brought in for our approval, and until that was done, I doubt whether it could be said that we had finally disposed of the appeal.

In arriving at the above opinion, I wish to make it quite clear that I do not intend in any way to depart from the well-settled principles which governs Counsel's authority to bind his client. Cases such as *Mathews* v. *Munster* (9) show that where no limitation, is imposed on Counsel's authority, he may bind his client by agreeing to a compromise. *Neale* v. *Gordon Lennox* (7), on the other hand, shows that if Counsel is only empowered to compromise on certain terms, he is thereby impliedly prohibited from settling on other terms, and if notwithstanding that prohibition, he does effect a settlement on such other terms, then that settlement does not bind his client.

(9) (1887) 20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260.

We have carefully considered all the authorities which have been cited to us, and on the facts of this particular case, I think respondent No. 2 is not bound by what took place on September 19.

One further point remains. It was strongly contended by Counsel for respondent No. 1 that although the consent terms arrived at stages Nos. 2, 3 and 4 might be bad, that stage No. 1 was merely an abandonment of the appeal *pro tanto* and not any consent terms, and that accordingly respondent No. 2 could only take up the appeal as from the end of stage No. 1 and must accept that *pro tanto* abandonment of the appeal. I am, however, unable to accede to that argument. On the facts above stated I think the only proper and satisfactory course is to re-hear this appeal *de novo*, and that if any liberty is necessary for Counsel for the appellants and respondents Nos. 2 and 7 to withdraw any admission previously made, that liberty should be given to them.

Z. K.

Application accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1123 OF 1921.
July 10, 1924.

Present:—Mr. Justice Devadoss.

MUHAMMAD MATTHIAR ROWTHAN—DEFENDANT No. 1—APPELLANT

versus

KASA ROWTHAN AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 2 TO 5 AND LEGAL REPRESENTATIVES OF DEFENDANT No. 4—RESPONDENTS.

Limitation Act (IX of 1908), s. 10—Money entrusted by one brother to another in trust for former's son—Trust—Suit to recover money—Limitation.

A deed executed between two Muhammadan brothers recited the fact that a deceased brother of theirs had entrusted a certain sum of money to one of them for his son, and that the one to whom the money had been entrusted would be responsible for its payment. In a suit by the son of the deceased brother to recover the money from his uncle to whom it had been entrusted by his father:

Held, that an express trust had been created by plaintiff's father in his lifetime in respect of the money and that the recital in the deed was merely evidence of such a trust having been created and that the defendant being an express trustee the suit was governed by the provisions of s. 10 of the Limitation Act and no question of limitation could arise.

Rajammal v. *Lakshmammal*, 22 Ind. Cas. 936; 1 L. W. 577; (1914) M. W. N 606; 16 M. L. T. 199 and *Krishnan Patter* v. *Lakshmi*, 66 Ind Cas. 858; 45 M. 415; (1922) M. W N. 117; 42 M. L. J. 119; 30 M. L. T. 238; (1922) A. I. R. (M.) 57; 16 L. W. 886, distinguished.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Madura, in Appeal Suit No. 3 of 1920 (A. S. No. 256 of 1919, District Court Madura), preferred against the decree of the Court of the First Additional District Munsif, Madura, in Original Suit No. 210 of 1918.

Mr. *W. S. Subrahmanya Iyar*, for the Appellant.

Messrs. *K. Bhashyam Iyengar*, *N. R. Govindachariar* and *P. R. Srinivasa*, for Respondent.

JUDGMENT.—The question argued in this appeal is whether the claim of the plaintiff was barred by limitation. The plaintiff's case is that his father entrusted a certain amount to his paternal uncle, Peria Kadir Rowther, and that Peria Kadir Rowther was in possession of it till his death and, therefore, Peria Kadir Rowther was a trustee on his behalf, and being an express trustee he is not entitled to claim the benefit of the Law of Limitation. Both the lower Courts have found that Peria Kadir Rowther was an express trustee. Mr. Subramania Iyer on behalf of the appellant urges that Ex. A cannot create a trust as the father of the plaintiff was dead at the time when Ex. A was executed and that for the purpose of creating a trust there must be a transfer of the right of the owner to the trustee. It is quite clear from the recitals in Ex. A that the trust was not created by means of Ex. A but Ex. A mentions that the trust had been created by the father of the plaintiff in his favour and that Peria Kadir Rowther and his brother were trustees. The recital is: "Whereas even 12 years before our father's death our brother, the said Naina Muhammad Rowther died entrusting to the persons mentioned below his earnings, namely, Rs. 745-4-0, wife and his son Kasa Rowthan, a male child then a minor of about 2 years of age." In the face of this language I do not think it is reasonable to contend that Ex. A itself creates a trust. Exhibit A is only evidence of the fact that a trust had been created and Peria Kadir Rowther undertook to be responsible for the amount entrusted to him and to his brother. Mr. Subramaina Iyer wanted to contend that here there was only a mere deposit and that would not by itself create a trust. He relied

upon *Rajammal* v. *Lakshmammal* (1) and also upon *Krishnan Patter* v. *Lakshmi* (2). But the facts in this case are quite clear that the trust was created by the father of the plaintiff in favour of the plaintiff during his life time and Ex. A is only evidence of the fact. In the face of these facts, I do not think that the contention that there was no trust in this case can prevail. There is no other question involved in the case.

The second appeal fails and is dismissed with costs of the 1st respondent. The other respondents will bear their own costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 22 Ind. Cas. 936; 1 L. W. 577; (1914) M. W. N. 606; 16 M. L. T. 199.

(2) 66 Ind. Cas. 858; 45 M. 415; (1922) M. W. N. 117; 42 M. L. J. 119; 30 M. L. T. 238; (1922) A. I. R. (M.) 57; 16 L. W. 886.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 OF 1923.

September 8, 1924.

Present:—Mr. Dalal, J. C., and Mr. Neave, A. J. C.

Syed MOHAMMAD HASAN—PLAINTIFF—APPELLANT

versus

Syed ALI HYDER AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss. 2, 11, 13, 19, 22 (7), (11)—Succession to estate of taluqdar—*Widow, position of—Collateral, rights of—Succession, when opens—Construction of document*—Taluqdari sanad—*"Male heir," meaning of—Females, exclusion of—Will by* taluqdar *-Formalities—Attestation—Acknowledgment of execution at time of registration, effect of—Succession Act (X of 1865), s. 50—Evidence Act (I of 1872), s. 115—Estoppel—Admission of validity of Will and title of devisee, effect of—Costs—Separate sets of defendants—Separate sets of costs.*

The vesting of a remainder which is a doctrine borrowed from English Law does not find a place in the scheme of devolution of property settled under s. 22 of the Oudh Estates Act. Under that Act where a widow succeeds to the estate of her husband, succession to the collaterals opens on the death of the widow just as under the ordinary Hindu Law. [p. 511, cols. 1 & 2.]

The Oudh Estates Act applies the principles of Hindu Law applicable to the case of a widow to a Muhammadan widow also. A Muhammadan reversioner, therefore, does not succeed to a vested right on the death of the last male-holder but has only an expectation and no interest. The right of the person entitled to succeed in such a case must, therefore, be determined at the date of the widow's death and not at the date of the death of the last male-holder. [p. 511, col. 2.]

Under the scheme of devolution of property laid down in s. 22 of the Oudh Estates Act no estate devolves under cl. (11) of the section until the previous clauses have exhausted themselves, *i. e.*, till after the death of the widow. The effect of cl. (11) is simply to refer the parties to the law which would govern the descent when the special provisions of the Act are exhausted. So long as the widow is alive those provisions would not be exhausted and no right of any heir under cl. (11) would vest during the lifetime of the widow. [p. 512, col. 2.]

A widow is not an heir under the Oudh Estates Act but she inherits the property. Not being an heir she is debarred from transferring the property during her life because the provisions of s. 11 of the Act will not apply to her, but during that term she is vested with the full estate. [*ibid.*]

A *taluqdari sanad* provided that the estate shall descend to the "nearest male heir according to the rule of primogeniture":

Held, that not only females but also the descendants of females were excluded from succession to the estate under the *sanad*. [p. 513, col. 2.]

Ordinarily in a Muhammadan family where a custom of exclusion of succession prevails the entire family line is excluded and not only the female on account of her sex, admitting her male issue to succesion. [p. 514, col. 2.]

The Statute Law of India is based on the principles of English Law, but in its application the Courts should follow the opinions of the Indian Courts acquainted with Indian ways of life and thought and not of English Courts which deal with people widely different from Indian in their social habits and intellectual developments. p. 517, col. 2.]

Where a Will is acknowledged by the testator in the office of the Sub-Registrar in the presence of witnesses and such witnesses sign the Will in the presence of the testator at the same time or separately, the witnesses must be regarded as attesting witnesses within the meaning of s. 50 of the Succession Act. [*ibid.*]

In the case of a Will made by a *taluqdar* in favour of a person who is the next successor to the *taluqdar* under cl. (7), of s. 22 of the Oudh Estatas Act, the directions contained in s. 13 of the Act need not be carried out, but in virtue of the provisions of s. 19 of the Act, which is applicable to all Wills made by a *taluqdar*, the Will must conform to the provisions of s. 50 of the Succession Act. [p. 515, cols. 1 & 2.]

Where a devisee under a Will transfers a portion of the property received under the Will in favour of a rival claimant to the estate on receipt of a representation by him that he admits the validity and operative nature of the Will and accepts the devisee as the absolute owner of the estate; the person making the representation cannot afterwards be allowed to deny the truth of his representation in a suit between himself and the representative of the devisee. [p. 519, col. 2.]

Where the interests of parties arrayed on the same side are different they are not bound to engage the same Pleaders and are entitled to separate sets of costs. [p. 520, col. 1.]

(Case-law on all points discussed.)

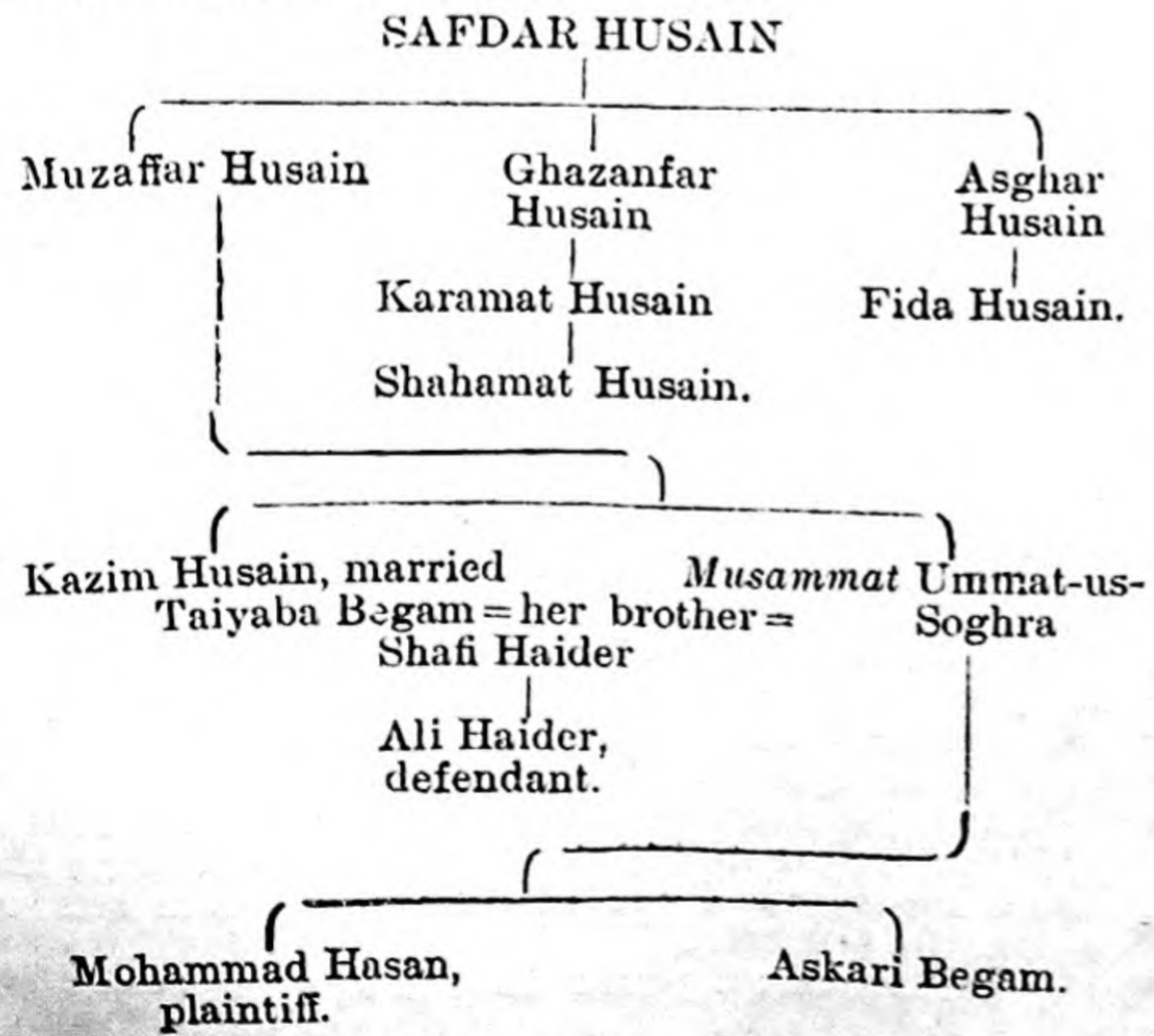
First appeal against the decree of the Subordinate Judge, Mohanlalganj, Lucknow,

dated the 5th March 1923, in Original Suit No. 38/31 of 1921.

Messrs. *G. N. Misra*, *J. N. Chak* and *K. P. Misra*, for the Appellant.

Messrs. *Abid Hasan*, *Shahinshah Husain*, *Mojiz Hasan*, *Makhan Lal*, *Mohammad Hafiz* and *Zahur Ahmad*, for the Respondents.

JUDGMENT.—The property in suit is known as the Waira Qazi estate in the Bahraich District and has been the subject of litigation more than once before. It was granted by the Government as a *taluqdari* estate to Muzaffar Husain and entered in List No. III of s. 8 of the Oudh Estates Act, 1869. He gifted it to his successor, his only son Kazim Husain, who, therefore, became *taluqdar* of the estate on his father's death. Kazim Husain died on the 12th of May 1894 and his widow *Musammat* Taiyaba Begam entered into possession. He had left him surviving a sister *Musammat* Ummat-us-Soghra and two sons of his paternal uncles. Karamat Husain son of his eldest uncle and *Musammat* Ummat-us-Soghra are now dead. Karamat Husain had left a son Shahamat Husain while the children of *Musammat* Ummat-us-Soghra are Mohammad Hasan the plaintiff and *Musammat* Askari Begam. Ali Haider the principal defendant is the son of a brother of *Musammat* Taiyaba Begam and has been put in possession by the Revenue Court on the death of the lady. The following pedigree will show at a glance the relationship of the various persons mentioned above :—



The plaintiff's case in the Court of Trial was that on the death of Kazim Husain the estate descended to the widow for her life under cl. 7 of s. 22 of Act I of 1869 (Oudh Estates Act, 1869) and that the remainder vested in him. Under the Muhammadan Law of the Shia denomination, to which the parties belong, Kazim Husain's sister would have been heir but was debarred under the *sanad*, granted to Muzaffar Husain, which regulated the devolution of *taluqdari* property. When the widow died, the remainder fell into possession and the plaintiff became owner. On 8th November 1913, the widow had transferred 5 annas 6 pies share (a little over 1/3rd of the property) to the plaintiff, so the present claim was confined to the balance of the property. The other defendants are the transferees of the widow or of the defendant Ali Haider and it was pleaded that the plaintiff was not bound by those transfers.

The defence was that when property descended under s. 22 to a widow there was no remainder and succession opened out not on the death of the *taluqadar* but on the death of his widow. This defence becomes of importance by reason of the amendment of the Oudh Estate Act by Act III of 1910, which came into operation on 21st February 1910. Under s. 22 (10) of the current Act, Shahamat Husain the nearest male agnate of the last *taluqdar* would have precedence over the plaintiff. If, however, the plaintiff could prove the vesting of an interest in him, prior to the passing of the Act of 1910, the saving cl. (21) of the new Act would save a right already vested in him from lapsing.

The next plea was that if any vesting of a remainder was permitted under s. 22, the plaintiff would not be an heir of the last *taluqdar* under cl. (11) of s. 22 as the *sanad* debarred from succession not only his mother but her entire line, including the plaintiff.

Another defence was that Kazim Husain had made a Will in favour of his wife who, therefore, succeeded to the full estate and on her death the heirs to the estate would be discovered among her successors and not among the successors to the last *taluqdar*.

Arising out of this plea there were pleas of a bar under s. 11, C. P. C., on the ground that the Will had been held to be genuine and valid during previous litigations between the parties.

The plea of limitation was repelled by the lower Court and was not repeated by the respondents here.

The last plea in defence was raised on behalf of some of the defendants only. It was that there was a family settlement in 1913, under which the plaintiff received 5 annas 6 pies share, after admitting the widow's full proprietary title to the balance of the property, which the plaintiff was estopped from claiming now. This is a plea by way of estoppel.

We shall examine the defence pleas in the order in which we have stated them above. The entire suit must fail on a decision adverse to the plaintiff on any one of the pleas (other than the last) but as this Bench is subject to an appeal to a higher tribunal it would be advisable to record our finding, on every one of the issues raised.

We are of opinion that the vesting of a remainder, which is borrowed from English Law, does not find a place in the devolution of property settled under s. 22 of Act I of 1869. As regards the succession to a Hindu *taluqdar* the question has been set at rest by the Privy Council decision in the *Kamavar case : Harnath Kuar* v. *Indar Bahadur Singh* (1). The decision of a Bench of this Court, which was confirmed on appeal is reported as *Har Nath Kuar* v. *Indra Bahadar Singh* (2). In that case, on the death of a Hindu *taluqdar*, a senior widow succeeded and while she held the property the next presumptive reversioner transferred his interest. In that case, a Bench of this Court decided that the transfer was of an expectant interest and not of a vested right and so void. The learned Judges of this Court said in the course of their judgment that according to the scheme of inheritance which is defined in s. 22 there is no descent of the deceased's estate in a case like this until the widow's death. In other words, the single person out of those mentioned in cl. (11) of s. 22 cannot be ascertained until the time of the widow's death. It is true that as a further argument the Judges referred to the Hindu Law under which the reversioner cannot be ascertained until the time of the widow's death. Their Lordships of the Privy Couhcil when confirming the decision of this Court [*Harnath Kuar* v. *Indar Bahadur Singh* (1)] did not confine themselves to the principles of the Hindu Law as the basis of their judgment. What they said at page 183* of the report was "whatever view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hiudu Law." This no doubt is a principle of ordinary Hindu Law also. The same year on the authority of *Harnath Kuar* v. *Indar Bahadur Singh* (1), their Lordships affirmed the principle as applicable to Hindu Law that a reversioner has not a saleble right in his expectancy [*Anand Mohan Roy* v. *Gour Mohan Mullick* (3). This *dictum*, however, is not sufficient, in our opinion, to support the appellant's contention that the ruling in *Harnath Kuar* v. *Indar Bahadur Singh* (1), was based on the principles of Hindu Law and not on a construction of cl. (7) of s. 22 of the Oudh Estates Act, 1869.

Looking at the matter from another point of view, the Muhammadan Law of succession (either Sunni or Shia) does not recognise a life estate in a widow and the Act of 1869 applies the principles of Hindu Law to a Muhammadan widow. The same incapacity will, therefore, follow and a Muhammadan reversioner will not succeed to a vested right on the death of the last male-holder but will only have an expectation and no interest. Under the Shia Law a life estate may be created by Will or gift and the remainder may be devised or gifted to another person. In such a case the remainder vests immediately on the life estate coming into existence [*Siraj Husain* v. *Mushaf Husain* (4) and *Banoo Begum* v. *Mir Abed Ali* (5).] The same principle will not be applicable where a life estate is created by Statute and no clear intention of the creation of a remainder over is disclosed by the context or other provisions of the Act. It was further argued on behalf of the appellant that there must be a vesting of his property on the death of a Muhammadan dying intestate *Khadersa Hajee Bappu* v. *Puthen Vecttil Ayisso*

(1) 71 Ind. Cas. 629; 45 A. 179; (1922) A. I. R, (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 P. L. R. 237 (P. C.).

(2 47 Ind. Cas. 214; 5 O. L. J. 277.

(3) 74 Ind. Cas. 499; 50 C. 929 at p. 934; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.).

(4) 65 Ind. Cas. 132; 9 O. L. J. 149; 24 O. C. 321; (1922) A. I. R. (O.) 93.

(5) 32 B. 172; 9 Bom. L. R. 1152.

*Page of 45 A.—[*Ed.*]

Ummah (6). The principles of Muhammadan Law do not apply here and the property vests in the widow according to Hindu Law, which is adopted in s. 22. In all the *Birwa Mehnon* cases, where various claimants tried to oust the husband of the deceased life-holder Brij Raj Kuar, the reversion was held to have opened on the death of the life-holder [*Achal Ram* v. *Udai Partab Addiya Dat Singh* (7), *Bhai Narindar Bahadur Singh* v. *Achal Ram* (8), *Achal Ram* v. *Kazim Husain Khan* and (9) and *Debi Bakhsh Singh* v. *Chandrabhan Singh* (10)] is another where the reversion was held to have opened on the death of the widow. It is further instructive as it refutes a very ingenious argument of the appellant's learned Counsel. He argued that property vested in a Hindu widow under the Oudh Estates Act because she combined in herself succession both under cl. (7) and cl. (11); the *Birwa Mehnon and Kamayar estates* were of List No. II governed by the Act alone and not by any *sanad*. Where there was no *sanad*, the Hindu widow would succeed under the Hindu Law under cl. (11) and besides the estates of a widow under cl. (7), she would have a life interest under cl. (11). Naturally therefore, her case would be distinguishable from that of a Muhammadan widow and in her case reversion will open at her death. This elaborate argument is unsubstantial. In *Debi Bakhsh's case* (10), the estate was first granted under a *sanad* to Raghuraj Singh and was entered in List No. III in 1869 at the passing of the Act. The estate in dispute here is held under precisely the same conditions as the Rajpur Keotana estate. The plaintiff's learned Counsel would attach no importance to *Debi Bakhsh case* (10) as both parties there agreed that the reversion opened on the death of the widow Rani Baijnath Kunwar and the Court was not called upon to discuss the point. This view of the case overlooks the fact that if there had been earlier vesting, the plaintiff Chandrabhan would have put that forward as another basis of his claim, urging that the property vested in his father on the death of Raghuraj Singh, the Rani's husband, that the reversion fell into possession on the Rani's death and that the question of Debi Bakhsh being senior in birth to him at the time of the Rani's death did not arise. We must presume in favour of a proper prosecution of a suit and if such a claim had been open to the plaintiff, he would have put it forward.

Looking at the Act itself, it would seem that cl. (11) does not come into operation until the death of the widow. Clause (7) makes the estate descend to the widow for her life, cl. (8) to an adopted son, if any, cl. (9) to junior widows in succession and their adopted sons, if any. Clause (10) comes into operation in default of any such widow or of any son adopted by her under the conditions laid down in the previous clauses and cl. (11) comes into operation in default of any heir under cl. (10). Clause (11) begins "or in default of any such descendant then" to persons described in cl. (11). Apparently under the scheme of the devolution of property laid down by the Act no estate devolves under cl. (11) until the previous clauses have exhausted themselves, that is, till after the death of the widow. It was said by their Lordships in one of the *Birwa Mehnon* cases already referred to [*Bhai Narindar Bahadur Singh* v. *Achal Ram* (8)] that the effect of cl. (11) was simply to refer the parties to the law which would govern the descent when the special provisions of the Act are exhausted. So long as the widow is alive those provisions would not be exhausted and no rights of any heir under cl. (11) would vest during the lifetime of the widow. The language of cl. (7) leads to the same conclusion. There is no mention of a life-estate such as to raise an inquiry as to what became of the remainder. The Act directs that such estate shall descend to the widow, the qualification being that it shall be for her life. She is not an heir but she does inherit the property (see definition of "heir" in s. 2). Not being an heir she is debarred from transferring property during her life because the provisions of s. 11 will not apply to her but during that term she is vested with the full estate.

Though the appeal must fail on our finding already recorded we proceed to record our

(6) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447.

(7) 10 C. 511; 11 I. A. 51; 8 Ind. Jur. 272; 4 Sar. P. C. J. 507; Rafique and Jackson's P. C. No. 77; 5 Ind. Dec. (N. S.) 342.

(8) 20 C. 649; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.).

(9) 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 113; 8 Sar. P. C. J. 772 (P. C.).

(10) 7 Ind. Cas. 724; 13 O. C. 316; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; (1910) M. W. N. 643; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 20 M. L. J. 917; 32 A. 599; 37 I. A. 168 (P. C.).

finding on the other issues as we proposed doing at the outset.

The next question is whether the property would have vested in the plaintiff if there were a vesting of the remainder in addition to the life-interest of Taiyaba Begam. Admittedly the *sanad* will control the provisions of cl. (11) as laid down by their Lordships of the Privy Council in *Debi Bakhsh's case* (10) already referred to. The question then is whether under the grant printed in Appendix D at page 556 of Chhail Behari Lal's *taluqdari* law, a female is excluded only for herself or for her entire line of descent. The question arose in the *Maniarpur case*, *Ghulam Abbas Khan* v. *Bibi Ummatul-Fatima* (11) and two learned Judges of this Court differed in opinion. Before the Privy Council the appeal was dismissed on the ground that the provisions of s. 22 did not apply to the parties to that suit, so the further question of the exclusion under the *sanad* was not discussed [*Ghulam Abbas Khan* v. *Amatul Fatima* (12)]. The question is of considerable difficulty and it will not be possible to pronounce an opinion with confidence. The words used are that the estate shall descend to the "nearest male heir according to the rule of primogeniture." The words "male heir" are not terms of art. The expression in use in 1869 in English Law to exclude a female line was "heir male." In 1914 the House of Lords interpreted the term "nearest male heir" in an appeal in the case of *Lightfoot* v. *Maybery* (13). The words were interpreted as meaning the testator's nearest male relative and not in a technical sense as meaning the testator's heir being a male. The words will, therefore, exclude a female but not a male descendant of a female. In *Ghulam Abbas Khan* v. *Ummatul Fatima* (12), their Lordships were of opinion (see page 121 of the report) that the estate prescribed by the *sanad* was something remotely akin to an estate in tail male according to the English Law, but the kinship was not close because a power of alienation, unknown to an English estate tail, unless the entail is destroyed, was an essential part of the document. We shall not be justified in presuming from those words that their Lordships decided that the descendants of a female were excluded under the *sanad*. We think that the words should be interpreted with reference to the circumstances of the year 1869 and not with reference to any technical ideas and expressions used in English Law. The opinion of Mr. Justice Stuart at page 223* of the report in *Manairpur case*, *Ghulam Abbas* v. *Bibi Ummatul Fatima* (11) appears to be based on a sound principle. He said: "I am unable to see how the principles of English Law with regard to succession can afford any assistance in the determination of the person who has a right to succeed under the terms of the *sanad*, for, as has already been stated, the estate created under the terms of the *sanad* is not an estate known to the law of England and I can find no general principles in the law of England which can be applied to an estate unknown to that Law. The general principles governing succession to an estate known to the law of England are based upon convention and in some instances upon legal fictions peculiar to each form of estate and there is no general principle of succession in the English law which, according to my view, could have been in the minds of the framers of the *sanad*." The learned Judge, however, went on to examine English cases for an interpretation of the words "nearest male heir" and it seems that those cases cannot be quoted as an authority after the decision of the House of Lords mentioned above. The learned Counsel for defendants has quoted the English cases examined by the learned Judge, in support of his view. The expressions used in all the cases were different from the one used in the *sanad*, they were "eldest male lineal descendant," "male descendant" and "issue male." One more case quoted by him was *Doe* v. *Angell* (14), where the words "male heir" were held to mean male heirs connected through males. The words were in that case interpreted in their technical sense as if they were "heir male" and the House of Lords after discussing the reasoning of this judgment has explained in 1914 Appeal Cases [*Lightfoot* v. *Maybery* (13)] that this interpretation depended on the context of

(11) 31 Ind. Cas. 748; 18 O. C. 188; 2 O. L. J. 636.

(12) 60 Ind. Cas. 937; 24 O. C. 118; 19 A. L. J. 433; 40 M. L. J. 577; 8 O. L. J. 225; (1921) M. W. N. 349; 43 A. 297; 29 M. L. T. 409; 34 C. L. J. 113; 14 L. W. 680; 48 I. A. 135 (P. C.).

(13) (1914) A. C. 782; 83 L. J. Ch. 627; 111 L. T. 300; 58 S. J. 609.

(14) (1846) 115 E. R. 1299; 9 Q. B. 328; 15 L. J. Q. B. 193; 10 Jur. 705; 72 R. R. 270.

*Page of 18 O. C.—[*Ed.*]

the Will in that case. In the *sanad* the only other words in the context are "according to the rule of primogeniture." These words only mean seniority of line and not of birth. They do not help to explain the words "nearest male heir." Just as in Wills, the House of Lords based the interpretation on the other clauses of a Will, we are of opinion that in discovering the meaning of the words used in the *sanad*, we should be guided by the known intention of the grantor, the circumstances of the year 1869 and Indian conditions and habits of thought.

The other learned Judge Mr. Justice Kanhaiya Lal (report page 255) was of opinion that the disability attached to the sex and the exclusion did not cover every male descended from a female line. The learned Judge is a great authority on *taluqdari* law, so, it is with great respect, that we give our opinion that the exclusion was not confined to sex but to family. The Government which granted the *sanad* desired that family dignity should be preserved, that property should remain in the possession of one man of the family and that the other members should look for support to the *taluqdar*. The family will not be preserved if the *taluqdari* estate goes to another family to which a daughter is married and a male of that family succeeds to the *taluqa* in preference to agnates of the *taluqdar*. The *taluqa* will pass to a family other than the one for whose preservation and dignity the grant was made and the members of the family of the original *taluqdar* would be left without means of maintenance. We may also point out that Government did not desire military service from the grantee, which may be a valid reason for the exclusion of a female. In fact, certain estates were actually granted to ladies and *sanads* issued to them. Each of such ladies became a fresh stock of descent. If the exclusion of a female was desired by the grantor and not of a line descended from a female, a *sanad* would not have been granted to a female. We agree with another reason given by the learned Judge for his view that if the male descendants of famale line are excluded there will be a greater likelihood of escheat or forfeiture to the grantor, that is Government, which cannot be supposed to have contemplated such a result, when it is well-known that after confiscation it chose to exercise grace to the fullest extent and make forfeiture of escheat as remote as possible. This consideration, however, cannot have greater force than the consideration of the dignity and well-being of the family of the original *taluqdar*. It is significant that where a daughter's son is declared to be a successor of the *taluqdar* under cl. (4) of s. 22 the condition laid down is that this son must be one who has been treated by the *taluqdar* in all respects as his own son. Where this happens the successor will be considered a member of the family of the *taluqdar* and not of the family of his real father. In some of the correspondence which passed between the Chief Commissioner of Oudh and the Governor-General relating to the wording of the *sanad*, expression was given to the view that the succession should be confined to the *nearest male line*.—see Oudh Papers 1865, page 97 and page 111 of Chhail Behari Lal's Book).

When the Act of 1869 was amended in 1910, cl. (4) regarding the succession of a daughter's son was omitted and the Select Committee did not approve of the suggestion that special provision should be made for the case of a daughter on the ground that the intention of Government at the time of making the grant was to preserve the family of the original *taluqdar*. They observed: "Apart from the fact that in a large number of families the daughter is excluded by custom it appears to the Committee that any special provision which would result in the passing of an estate into another line of succession is undesirable as being inconsistent with the scheme of the Act" (See Chhail Behari Lal, page 456, bottom of the page.)

Ordinarily in a Muhammadan family, where a custom of exclusion of females prevails, the entire female line is excluded and not only the female on account of her sex, admitting her male issue to succession.

As we have already stated the matter is not free from doubt and no purpose will be served by multiplying references to rulings which do not definitely decide the point. On a balance of reasoning our opinion is that not only a female but her whole line is excluded under the *sanad*.

Coming to the Will its genuineness is admitted by the appellant in this Court. The contention is that it is not valid or operative. The Will is printed at page 44 of Part III of the Printed Record, and the office is directed to get the registration endorsement printed also in case there should be an appeal from the decision of this Court. The registration endorsement on this document

is of importance and it is hoped that in future the office and Counsel of parties will use their discretion in getting important registration endorsements printed, though such endorsements do not require to be printed as a general rule. The Will is signed by Syed Kazim Husain with his own hand and dated Saturday the 12th May 1877. After signature it was deposited with the Sub-Resgistrar of Lucknow. Neither the envelope containing the Will at the time of the deposit nor an entry in the particular official's register is on the record, so it is not possible to say when the deposit was made. On 15th January 1887 Kazim Husain took the document out and presented it for registration in the office of the Sub-Registrar of Lucknow City. This fact is noted on the Will and the signatures of Kazim Husain and the Sub-Registrar are appended below. Below this, the Sub-Registrar or his clerk made the following entry:

"Execution and completion of this deed, contents whereof were read over, was admitted by Syed Kazim Husain, occupation *taluqdari*, son of Syed Muzaffar Husain caste Syed, resident of Waira Qazi, Pargana Hisampur, District Bahraich, age about 50 years, face pitted with small-pox marks, stout body, tall in stature. The said Kazim Husain was identified by Syed Shafi Haider (whose description is given) and by Chandi Prasad (whose description is given). The said witnesses are known to Dost Mohammade Khan, occupation service, son of Imam Khan (and further description) and the said Dost Mohammad Khan is known to me, the registration officer." The date is 15th January 1887 and then follow the signatures of:

Syed Kazim Husain.
Syed Shafi Haider.
Chandi Prasad.
Dost Mohammad Khan Daftri.
Bankey Lal, English Clerk of the Registered Department at Lucknow.

To come to a decision on the question of the validity of the Will, we must first settle the requirements of a Will made by a *taluqdar* under the Oudh Estates Act under the circumstances of the present case. The lady was a privileged person as the next successor to the *taluqdar* under cl. (7) of s. 22, so in her case the directions of s. 13 need not be carried out in making a Will. Section 19 of the Act applies to all Wills made by a *taluqdar* so the persent Will must conform to the provisions of s. 50, of the Indian Succession Act, X of 1865. Registration of the Will was not necessary. Under s. 50 of the Indian Succession Act every testator must execute his Will according to the following rules:—

(1) The testator shall sign...

(2) The signature...shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(3) The Will shall be attested by two or more witnesses each of whom must have seen the testator sign...or had received from the testator a personal acknowledgment of his signature... and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

In the present case all these provisions appear to us to have been complied with. The testator did sign the Will in 1877 which is admitted. In 1887 he personally acknowledged his signature in the presence of four witnesses who put down their signatures on the document. It is admitted by the appellant that document is more than 30 years old, that it was produced from proper custody and that all the witnesses are dead, so the presumption must be made under s. 90 of the Evidence Act that the attestation was duly made, that is, that the witnesses signed in the presence of the testator.

The Will was held by two learned Judges of this Court (who are now Justices Piggott and Lindsay) to have been duly executed and attested. One Syed Hasan sued Taiyaba Begam for possession on the ground that he was a brother of Syed Ali, an adopted son of the last *taluqdar* and subsequently deceased. One of the defences of the lady was that the Will gave her an absolute right to the property and that even if the adoption were proved, an adopted son would have no property left to succeed to under cl. (5) of s. 22 of the Act of 1869. The plaintiff in the present suit was a party to that litigation but as he and Taiyaba Begam were arrayed on the same side as defendants, the decision in that suit that the Will was operative does not bind the plaintiff in this suit.

At the same time, the opinion of two such eminent Judges deserves respect and should be followed unless we find cause to disagree with their reasoning. Mr. Justice Lindsay

correctly pointed out (page 677 of the report) that execution under s. 50 included the testator's signature and the attestation by witnesses and as there was no attestation in 1877, the Will was not executed till 1887. Mr. Justice Piggott observed (page 607 of the report): "On 12th May 1877 within 3 years of his coming into possession of the Waira Qazi estate Mir Kazim Husain, being then about 45 years of age, executed this Will in favour of his wife *Musammat* Taiyaba, then a young woman of 17 and deposited it in a sealed cover at the office of the Sub-Registrar of Lucknow. The Will as thus executed had not been signed by any attesting witness. More than 9 years later the fact that an unattested Will thus deposited would not satisfy the requirements of the law must have been brought to the notice of the testator, and we find that on the 15th January 1887, Mir Kazim Husain went to the Sub-Registrar's Office at Lucknow took out the Will in question from the sealed cover and formally presented it for registration.....Mir Kazim Husain presented the document to the Sub-Registrar for registration as a Will and admitted its execution in the presence of 3 attesting witnesses and these witnesses as well as Mir Kazim Husain himself proceeded to sign the document at the back in the proper places below the registration endorsement. According to the view repeatedly expressed by various Judges of the Calcutta High Court.....these proceedings amounted to an attestation of the Will sufficient to satisfy the requirements of s. 50 of the Indian Succession Act (Act X of 1865). This view seems to me both good law and good sense, as there cannot be the shadow of a doubt regarding the purpose and intention of Mir Kazim Husain in thus getting the Will registered. He deliberately re-affirmed after an interval of more than 9½ years his intention of making *Musammat* Taiyaba Begam his legatee. If he did not copy out the Will on to a fresh piece of paper and sign it over again in the presence of the Sub-Registrar and the identifying witnesses, the only possible reason for this was that he did not think it necessary to take the trouble to do so. He undoubtedly signed the paper in two places on the back and at the foot of the registration endorsement in the presence of the Sub-Registrar and of the attesting witnesses."

We have omitted from the above quotation the learned Judge's reference to three places where the Will has been signed in the body of the document to verify thickening of letters or correction. The matter, in our opinion, is not of any importance in either case, whether these signatures were made by the testator in 1877 or 1887. The testator's signature may be taken to have been appended in 1877 but the document was completely executed in 1887 when attestation was obtained.

The appellant's learned Counsel has criticized this view on the ground that the Will was taken out with the object of getting it registered and not with the object of getting it attested. Why this should be was not explained. In fact, registration was not necessary even if the provisions of s. 13 of the Oudh Estates Act applied because according to the definition of the word 'registered' in Act I of 1869 as amended by Act X of 1885, the deposit of a Will with a Registrar amounted to registration. Act X of 1885 was made retrospective except with respect to certain Wills which were declared to be invalid for want of registration by a judicial decision pronounced before the passing of the Act. This Will did not come within the saving clause. The greater probability, therefore, is that the defect, of which the *taluqdar* was appraised, was one of attestation and not of registration.

The appellant's learned Counsel referred us to Jarman on Wills and to an English case reported in *Dunn* v. *Dunn* (15). The case does not agree on facts because in the English case the Will had already been executed, that is signed and attested and the question was whether a subsequent signing and attesting amounted to a re-execution or not. In the present case we have seen that in 1877 there was no execution of the Will. In the two cases, different considerations will prevail. It should also be noted that in the English case a decision in favour of re-execution would have deprived a legatee of the Will of his legacy because he happened to be a witness to the alleged re-execution. The testatrix, therefore, had no intention of re-executing the Will and deprive a legatee of his legacy, while in the present case we have come to the conclusion that the purpose of the testator in taking the Will out of deposit and producing it publicly before the Sub-Registrar was to remedy the defect of the previous want of attestation. Reliance was placed on behalf of the appellant on the

(15) (1866) 1 P. & D. 277.

principle enunciated in Jarman at page 117 last para that in every case the Court must satisfy itself that the names were written *animo atestandi*. Such an intention is to be concluded from the general circumstances which vary in every case. Indian Courts have held for a long number of years that registration proceedings like those connected with the present Will disclose an intention of attestation on the part of the witnesses who signed the registration endorsement.

Three cases of the Calcutta High Court are in point here and may be examined in detail: *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (16), *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (17) and *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (18).

In the case reported as *Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee* (16) the Will prior to registration was not properly attested and the Bench proceeded to consider how far the registration proceedings would amount to attestation.

The learned Judges observed:—

"When the testatrix admitted before the Registrar her execution of the Will, she was identified on that occasion by one of the same persons who profess to have witnessed her signature to the Will. Upon her admitting before the Registrar that the signature to the Will was hers, the Registrar signed his name as attesting her admission and apparently the other witness did the same. Now, if these persons signed their names in the presence of the testatrix as attesting her own admission that she had signed the Will, we think that would be sufficient, as an attestation, to satisfy the requirements of the 50th section" of the Indian Succession Act).

Here the witness and Registrar had not the special purpose of testifying that the lady executed the Will: one signed because he identified the lady to the Sub-Registrar and the other in the discharge of his duty to certify to his endorsement. At the same time they received from the testatrix a personal acknowledgment of her signature as required by cl. (3) of s. 50 and this fact was considered sufficient to constitute them attesting witnesses.

The Judges relied here on a ruling of 1876, indicating the length of time for which this opinion has been held by the Calcutta High Court.

In this case witnesses were alive and the case was remanded for evidence to prove that the acknowledgment was made by the testatrix in the presence of the Sub-Registrar and the witness and that they signed in her presence. These points we shall consider presently.

In *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (17) the attestation was defective as the witnesses had put their marks and not signed. The defect was held to have been remedied by the registration endorsement. The same principle was followed as in *Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee* (16) and remand was similarly made.

In *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (18) the registration endorsement and signatures below it were accepted as attestation of the Will and no remand was made. The Judges presumed that the Sub-Registrar and witnesses must have been present when the testator acknowledged execution and that they must have signed in his presence.

In a Bombay case [*Manickbai* v. *Hormasji Bomanji* (19)], it was considered sufficient compliance with the provisions of cl. (3) of s. 50 if the testator made the witnesses understand that the paper which they attested was his Will, though they did not see him sign it or see his signature on the paper.

In the present case the testator acknowledged in the presence of all the persons who signed below the endorsement that the paper was his Will. The Statute Law in India is no doubt based on the principles of English Law but in its application, we should follow the opinion of Indian Courts acquainted with Indian ways of life and thought and not of English Courts, which deal with people widely different from Indians in their social habits and intellectual development.

There can be no doubt that according to Indian authority, the witnesses in the Sub-Registrar's office would be attesting witnesses, if acknowledgment was made by the testator in their presence and they signed in the presence of the testator at the same time or separately. We are of opinion that under s. 90, these presumptions should be drawn with respect to a document more

(16) 6 C. 17; 6 C. L. R. 303; 3 Ind. Dec. (N. S) 12.
(17) 11 C. 429; 5 Ind. Dec. (N. S.) 1016.
(18) 27 C. 169; 14 Ind. Dec. (N. S.) 111.
(19) 1 B. 547; 1 Ind. Jur. 630; 1 Ind. Dec. (N. S.) 362.

than 30 years old. In addition to this, it is certain that, in any event, the Sub-Registrar Mr. Lincoln and the witness Shafi Haider satisfied both these requirements. By presenting the document the testator acknowledged the Will to be his own and Mr. Lincoln signed this endorsement of presentation. A lot more had to be done and the testator could not have disappeared from the office when Mr. Lincoln signed. Shafi Haider is a brother of Taiyaba Begam, so he must have accompanied the testator to the office and arrived and left with him. It may be taken as certain that he heard the admission of the testator and signed in his presence. Plaintiff sued Taiyaba Begam when the witnesses of the office of the Sub-Registrar were alive and the question of attestation of the Will was brought into issue there. As the Will was accepted by this Court as duly executed in another case, the plaintiff absented himself and let his suit go against him in default, knowing the hopelessness of his contention. Though the Subordinate Judge in that suit purported to act under O. XVII, r. 3 and to decide on the merits, we are of opinion that the provisions of r. 2 applied and the dismissal was one under O. IX, r. 3. The decision is, therefore, not a bar under s. 11, C. P. C. At the same time, the plaintiff's conduct at the time entitles the defence to indulgence here when we consider the question of attestation.

We do not think that the Oudh case [*Bhaiya Tribhuwan Dat Ram* v. *Bhaiya Shambhu Dat Ram* (20)] quoted on behalf of the plaintiff appellant, is applicable. In that case the Will was completely executed before it was taken to the office of the Sub-Registrar and the contention was that there was a re-execution at the time of registration so as to satisfy the requirements of s. 13 of the Act of 1869 that the Will must be registered within one month of its execution. This contention was repelled by a Bench of this Court only so far that such a re-execution, if any, was not the execution intended by s. 13 because to hold otherwise would be to render the provisions of that section, requiring registration to take place within one month, entirely nugatory since, whenever the testator might choose to register or deposit his Will, he could always bring himself within time (page 25 of the report). In the Will before us there was no execution prior to registration and the only execution of the Will took place on 15th January 1887, when the Will was registered.

This case was specially relied on, in case registration of Kazim Husain's Will be considered necessary under s. 13. It was argued that according to this ruling there was no registration within one month. We do not agree. The Will was executed on 15th January 1887 and registered on the same date so it was properly registered under s. 13 if the provisions of that section applied. We hold that the Will is valid and operative.

We have already indicated our opinion that the decisions in the previous suits brought by Syed Hasan and by the plaintiff do not operate as *res judicata*. We are in disagreement with the opinion of the learned Judge of the lower Court where he held that dismissal of the plaintiff's previous suit was a bar to the present suit. We may add here one more reason why the dismissal of the plaintiff's previous suit is not a bar to the present suit. That suit related to a non-*taluqdari* property and the provisions of s. 19 of the Oudh Estates Act would not apply to a bequest by a *taluqdar* of non-*taluqdari* property. The formality of attestation was not necessary for a Will to be valid in the previous suit.

Estoppel is urged by some of the defendants, who are designated by the numbers given to them in the plaint in Issus No. 20 of the lower Court. Ali Haider himself has not raised such a plea in the hope, possibly, of suing for the recovery of the property transferred by the lady to the plaintiff in 1913. He alleged that the deed of transfer was obtained by the plaintiff by fraud. Such an attitude of his, however, does not close this defence to the transferees of the lady.

This part of the case was argued with skill before us on behalf of the respondents concerned. It was conceded by the appellant that an estoppel available to the lady will be available to her transferees [*Rajkumar Jagannath Prashad Singh* v. *Syed Abdullah* (21).]

We must, therefore, consider whether the plaintiff is estopped from denying the

(20) Select Case No. 222.

(21) 45 Ind. Cas. 770; 45 I. A. 97; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 C. 909 (P. C.).

lady's full ownership of the property in suit.

On the death of Kazim Husain, there were five claimants to his property, the widow under his Will, the plaintiff, two cousins Karamat Husain and Fida Husain and Syed Ali on the basis of adoption. There was contest between all of them in the Revenue Court as is apparent from copies of various papers on the record (Exs. D-4, 37, D-2 and D-3 pages 112, 125, 108 and 110 of the printed record). Mutation was ordered in favour of the lady on 2nd November 1894 (page 131). Syed Ali died after this. His brother Syed Hasan and the plaintiff took proceedings in the Civil Court by separate suits. We have already seen how both these suits were dismissed in 1913. Later in the same year, on 8th November 1913, the lady transferred 5 annas 6 pies share to the plaintiff by a deed (page 77). It mentions at the commencement how Syed Hasan's suit was dismissed up to the Court of the Judicial Commissioner. The transferor asserts that she was owner and in full possession of the *taluqa* and was making the transfer after mutual consent and settlement. An encumbrance of over Rs. 21,000 on the estate is recited and the obligee is made liable to pay a little over Rs. 7,000 of this burden. Finally, it is stated that the obligee, his heirs and successors have got no claim against the transferor, her heris and successors.

The plaintiff's plea was that he had nothing to do with the transfer and was not bound by a unilateral contract. This is not correct. When the plaintiff's sister *Musammat* Askari Begam executed a deed of relinquishment in favour of Taiyaba Begam (page 81), the plaintiff was fully identified with that transaction. This deed was executed 19 days later, on 27th November, but both were registered the same day and at the same place, the house of Taiyaba Begam. The deed is signed by the plaintiff on behalf of his sister. The registration endorsement on this deed shows that the deed was read over by the Sub-Registrar to *Musammat* Askari Begam in the presence of the plaintiff, who signed below the registration endorsement on behalf of his sister. In this deed is recited the fact of the transfer in favour of the plaintiff and of *Musammat* Taiyaba Begam being owner and in possession of the *taluqa*. Another recital is "The said aunt is welcome to enjoy proprietary rights of every sort in the property left by Mir Kazim Husain deceased." After this, there cannot be a shadow of a doubt that the recitals in the deed of transfer were made with the knowledge and consent of the plaintiff and that in lieu of immediate possession of 5 annas 6 pies share he acknowledged the lady to be full proprietor of the rest of the estate When the lady applied for mutation in favour of the plaintiff, he made a statement in the Revenue Court on 11th May 1914 (page 180) to the following effect: "It is, therefore, prayed that mutation of names be effected in favour of the deponent according to the application of *Musammat* Taiyaba Begam and on the basis of the registered deed of transfer." The plaintiff, therefore, in explicit words admitted the binding character of the terms of the transfer as stated by the lady in the deed and his ownership and possession on those terms. After the lady's death, the plaintiff did not claim a falling in of a vested remainder. When Ali Haider applied for mutation of names with respect to the entire *taluqa*, the plaintiff objected with respect to 5 annas 6 pies share only and based his title on the lady's title and deed of transfer in his favour and not on any claim of a reversioner (page 202).

The lady received the plaintiff's representation that he admitted the validity and operative nature of the Will in her favour and her to be full owner of the Waira Qazi estate. Upon such representation she was induced to change her position and part with 1/3rd of the property during her lifetime. The plaintiff cannot now be allowed to deny the truth of that representation in a suit between himself and the representatives of the lady. This is exactly the kind of estoppel defined in s. 115, Evidence Act.

It was argued on behalf of the plaintiff that the transfer was only an acceleration of a portion of the plaintiff's vested interest. He, however, did not make any such statement on oath in the present suit nor are there any papers on the record to induce the Court to hold that such were the terms of the agreement between him and the lady, which resulted in the transfer.

The suit must in any case fail against these particular defendants Nos. 12 to 17 and 19 to 23.

The case of defendants Nos. 3 and 9, who raised a similar plea is different. They are transferees of the defendant No. 1 Ali

Haider, who denied the effective nature of the transfer in favour of the plaintiff. The plea is, therefore, not open to them and is disallowed so far as they are concerned.

The appeal must fail and is dismissed with costs. Eight Pleaders have been allowed fees in the Trial Court. This is not excessive when the number of defendants was 26. When parties are different they are not bound to engage the same Pleaders. The legal fee for one Pleader according to the valuation of the suit would be Rs. 1,600. The total amount of fees allowed to different Pleaders by the Trial Court comes to only Rs. 2,327, which is less than the fee due to two defendants, defending a suit separately. We, therefore, maintain the lower Court's decree as to costs.

In this Court Pleader's fee shall be allowed to the clients of Mr. Shahinshah Husain, Mr. Zahur Ahmad, and Mr. Mojiz Husain according to certificates filed by these Pleaders. No other Pleaders' fees shall be allowed.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 478 OF 1924.

August 28, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chakravarti.

NIRMAL KUMAR SINGH NOWLAKSHA —PETITIONER

versus

THE COMMISSIONER OF INCOME-TAX, BENGAL—OPPOSITE PARTY.

Income Tax Act (XI of 1922), ss. 23 (2), 66 (2), (3) --Return, doubt as to correctness of--Failure to give assessee notice—Reference to High Court.

An Income Tax Officer not being satisfied as to the correctness of the return submitted by the assessee, assessed the tax payable without serving upon him a notice under s. 23 (2) of the Income Tax Act and without giving him an opportunity to produce evidence in support of the return. The assessee's appeal to the Assistant Commissioner having been rejected, he applied to the Commissioner, praying that the question be referred to the High Court. The Commissioner refused to do so and the petitioner obtained a Rule:

Held, that the question challenged the very foundation of the assessment and arose upon the proceedings adopted in the case and should, therefore, have been referred to the High Court. [p. 521, col. 1.]

Rule against an order of the Commissioner Income Tax, Bengal.

Babu *Tarak Chandra Chakravarti* and *Profulla Chandra Chakravarti*, for the Petitioner.

Babus *Surendra Nath Guha*, Senior Government Pleader, for the Opposite Party.

JUDGMENT.

Chakravarti, J.—This Rule arises out of an application under s. 66, cl. (3) of the Indian Income Tax Act, XI of 1922, by an assessee under that Act.

The assessee was assessed by the Income Tax Officer on the 13th October 1923.

There was an appeal by him to the Assistant Commissioner of the Range Burdwan and this appeal was dismissed on the 31st January 1924.

The assessee then made an application, after the required deposit, to the Commissioner under cl. (3) of s. 66 of the Act praying that he might refer to the High Court a question of law which he submitted arose out of the proceedings but the Commissioner refused the application on the 14th March 1924.

The petitioner then moved this Court under cl. (3) of s. 66 of the Act praying that this Court might require the Commissioner to state the case and refer it to the High Court and this Court issued the Rule which has now come up for decision before us. The Government have appeared through the Senior Government Pleader to show cause against this Rule.

The question of law which, the petitioner urges, arose in the case was that after the return required under s. 22 of the Act was filed by the Assessee, the Income Tax Officer might either accept the return and assess him accordingly or if he had reason to believe that the return made under s. 22 was incorrect he was bound to serve upon the person who made the return a notice under cl. (2) of s. 23 requiring him, on a date specified, to produce any evidence on which such person may rely in support of the return. In the present case, although the Income Tax Officer refused to accept the return filed on the 11th October 1923 as correct, he assessed the tax without serving any notice as provided for by s. 23, cl. (2) and gave no opportunity to the petitioner to produce evidence in support of his case. The procedure followed by the Income Tax Officer was contrary to

law and that the assessment made was illegal. The facts shortly stated are these :—

That the petitioner, a resident of Azimganj in the District of Murshidabad, carries on business in jute and other commodities in various districts and also in Calcutta.

That the petitioner was served with a notice under s. 22 of the Act to file a return which he eventually filed on the 11th October 1923 together with his accounts.

That the Income Tax Officer was not satisfied with the correctness of the return but assessed Rs. 12,919-1-1 as the tax payable by him on the 15th October but it appears no notice under s. 23, cl. (2) was served nor any formal evidence was called for or taken.

Then the various proceedings to which I have referred took place and eventually this petition under s. 66, cl. (3) of the Act was filed before this Court.

It is quite clear from the record and indeed it is also frankly admitted by the Senior Government Pleader that no notice as contemplated by s. 23, cl. (2), was served before the assessment was made on the 15th October 1923. It was submitted by the learned Vakil that this point was not taken in the Courts below and that the question now raised was not "a question of law arising out of such orders" as contemplated by s. 66, cl. (2), inasmuch as this question is not found referred to, in the judgment of the Assistant Commissioner.

We think this would be too narrow a view to take of the provision of that section.

The question raised is a question which challenges the very foundation of the assessment and we think, it arises upon the proceedings adopted in the case.

We are of opinion, therefore, that "we are not satisfied of the correctness of the Commissioner's decision refusing to refer the case under cl. (2) of s. 66 of the Act and, therefore, we direct that the Commissioner do state the case as prayed for and refer it to this Court."

At this stage of the proceedings we do not wish to say more than is absolutely necessary to state for the matters now before us. All that we intend to say is that the decision of the Commissioner dated the 19th March 1924 is not correct in that he refused to refer the case to this Court under s. 66, cl. (2) of the Act.

The costs of this Rule will abide the result and we assess them at five gold *mohurs*.

Suhrawardy, J.—I agree.

K. S. D. *Rule confirmed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 593 OF 1922.

September 12, 1924.

Present :—Mr. Justice Devadoss.

KANCHINADHAM SURYANARAYANAMURTHI—PLAINTIFF—APPELLANT

versus

BANDI SATYANARAYANAMURTHI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Specific performance—Contract for sale of land—Time, whether of essence of contract—Condition, impossible, put forward by plaintiff, effect of.

In cases of contracts for the sale of land, time as a rule is not of the essence of the contract, but it is open to the parties to make time of the essence of the contract. To have this effect, however, the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limit prescribed in a fashion which is unmistakeable. [p. 522, col. 2.]

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai*, 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.), referred to.

In a contract for the sale of land a certain period was fixed for completion of the contract and a penalty was provided for non-performance. A day before the expiry of the period the purchaser, without tendering the purchase-money, put forward a demand which was not contained in the contract and which was impossible of fulfilment within the period prescribed. A further opportunity given by the vendor to the purchaser to complete the sale was not availed of by the latter. In a suit by the purchaser for specific performance of the contract :

Held, that the parties had attached importance to the completion of the contract within the period prescribed and that such completion having been made impossible by the plaintiff and that he having failed to complete the contract within the further opportunity allowed by the defendant, he was responsible for the default and was not entitled to any remedy. [p. 522, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 52 of 1921 (A. S. No. 24 of 1921, District Court Godavari), preferred against that of the Court of the District Munsif, Amalapuram, in O. S. No. 909 of 1919.

Mr. *K. Ramamurthi*, for the Appellant.

Messrs. *P. Somasundaram* and *Satyanarayana*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for specific performance by the plaintiff. The first point urged in this second appeal is that the lower Court was wrong in finding that there was default on the part of the plaintiff. The appellant's contention is that he was ready and willing to perform his part of the contract and that the default was on the part of the first defendant. The contract was entered into, on the 20th August 1919, and an advance of Rs. 100 was paid on that day, the contract was that the balance was to be paid by 31st August 1919. On the 30th August 1919, plaintiff sent a registered notice through his Vakil to the defendant imposing certain conditions, which were not in the contract of sale, Ex. A. In that, he said that the property should be divided by metes and bounds before the expiry of 24 hours from that date. The notice was sent on the 30th August 1919 and it was not humanly possible to have the property divided by metes and bounds, within 24 hours from the receipt of the notice and that before the end of August 1919. The object of the plaintiff was evidently to get out of the contract by imposing condition not possible to comply with, and that was why he insisted upon the first defendant doing something, which he was not only not bound to do but which was not possible to do within the time allotted to him. Plaintiff knew at the time he entered into the agreement for sale that the first defendant agreed to sell only his share of the property and that he and the second defendant were jointly interested in the property and that the property agreed to be sold was in possession of a tenant. That being so, it is quite clear that the object of the plaintiff in imposing an impossible condition was to back out of the contract. The Subordinate Judge has given reasons for coming to that conclusion and I do not think that he has arrived at a wrong conclusion on that point.

It is now urged on the authority of the decision of the Privy Council in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1) that time was not of the essence of the contract and the plaintiff was, therefore, entitled to succeed in this action. No doubt in cases of contracts of sale of land, time as a rule is not of the essence of the contract; but it is open to the parties to make time of the essence of the contract. As observed by Lord Haldane in delivering the judgment of their Lordships of the Privy Council:

"But to have this effect, the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakeable."

Here, as found by the learned Subordinate Judge, the parties did attach importance to the completion of the contract on the 31st August 1919, and that is the reason why a penalty of Rs. 100 was fixed for non-performance. Granting for arguments' sake that the first defendant was not entitled to consider the contract as broken, on account of the plaintiff's failure to tender the amount of Rs. 500, on or before the 31st, Ex. C clearly shows that the first defendant was willing to perform his part of the contract ... provided the plaintiff was willing to perform his part. He gave him reasonable time, as is seen from Ex. C, a registered letter, dated 1st September 1919, and the plaintiff did not choose to avail himself of that opportunity. In these circumstances, I think the learned Judge was perfectly right in holding that the default lay on the part of the plaintiff and, therefore, he is not entitled to any remedy.

The second appeal fails and is dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

(1) 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.).

CALCUTTA HIGH COURT.

CIVIL SUIT No. 3106 OF 1923.

August 25, 1924.

Present:—Mr. Justice C. C. Ghose.

KIRAN CHANDRA BOSE—PLAINTIFF

versus

DUTT & Co.—DEFENDANT.

Mortgage—Mortgagor, power of, to grant lease—Suit on mortgage—Payment of rent, when valid—Mortgagee, whether bound.

The powers of a mortgagor to grant leases after the execution of a mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management, for instance, he may

create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses; but it is well-settled that a mortgagor cannot after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the mortgagee, create except as stated above a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant. [p. 524, col. 1.]

Doe d. Robey v. *Maisey*, (1828) 8 B. & C. 767; 3 M. & Ry. 107; 7 L. J. (o. s.) K. B. 85; 32 R. R. 548; 108 E. R. 1228 and *Gibbs* v. *Cruikshank*, (1873) 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 21 W. R. 734, referred to.

A payment of rent in advance after the institution of a suit on a mortgage and indeed by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding upon the mortgagee. [*ibid.*]

De Nicols v. *Saunders*, (1870) 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106, relied on.

Payments made by tenants to a mortgagor after a mortgage, but before notice of it, must in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage. [*ibid.*]

Cook v. *Guerra*, (1872) 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367, referred to.

Where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lessee, who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease. [*ibid.*]

Green v. *Rheinberg*, (1911) 104 L. T. 149, referred to.

Messrs. *S. N. Banerjea* and *H. C. Mozumdar*, for the Plaintiff.

Messrs. *S. C. Bose* and *J. C. Hazra*, for the Defendant.

JUDGMENT.—The plaintiff, who is the Receiver appointed in Suit No. 1199 of 1921, is in possession of premises No. 3, Schalch Street in the town of Calcutta, whereof the defendant firm are the tenants occupying a portion at a monthly rent of Rs. 175. The present suit is one for arrears of rent from the month of *Jaistha* 1329 B. S. up to the end of *Kartik* 1330 B. S., both inclusive, amounting to Rs. 3,150.

In their written statement the defendant firm state that the demised portion of the said premises is held by them under a registered lease, dated the 7th December 1921, granted by one Nalin Chandra Shaw, who is the mortgagor, of whose properties the plaintiff is the Receiver, for a period of five years, commencing from the 17th November 1921, with a further option of two years, at a monthly rental of Rs. 175, and that as a condition precedent for the execution of the said lease, the said mortgagor took an advance of 17 months' rent, *viz.*, Rs. 2,975. The defendant firm further state that under the said lease the landlord was to pay all Municipal taxes but that there having been failure to pay the same they had been obliged to pay a sum of Rs. 816-14-0 on account of Municipal taxes, for which they are entitled to get credit. They state further that they are willing to pay whatever may be due and owing to the plaintiff after deducting from his calim the said two sums and a further sum of Rs. 198 referred to in para. 3 of the written statement.

It appears from the evidence adduced in this case that, on the 25th August 1919, one Nalin Chandra Shaw executed a mortgage of certain properties, including premises No. 3, Schalch Street, in favour of one Gopiram Bhotica for Rs. 2,00,000. The mortgagee instituted a suit, being Suit No. 1109 of 1921, to enforce his mortgage. In that suit the plaintiff was appointed on the 21st September 1921 Receiver of the mortgaged properties. The Receiver was not to take possession till the end of November 1921. On the 7th December 1921, there was the registered lease granted by Nalin Chandra Shaw, which has been referred to above, and also as indicated above there was an alleged payment of 17 months' advance rent from *Aghrayan* 1328 to *Chaitra* 1329 B S. On the 16th May 1922 the Receiver served a notice upon the defendant firm asking them to pay the arrears of rent. This demand was followed by a further demand on the 14th September 1923. On the 10th October 1923, the defendant firm wrote a letter to the plaintiff alleging the payment of the said advance rent. On the 11th October 1923, the plaintiff's Solicitor wrote to the defendant firm claiming payment of the arrears of rent and denying the right of Nalin Chandra Shaw to receive the said advance rent or any portion of the same.

Although oral evidence was taken in this case, the matter has been argued before me by the plaintiff's Counsel on the footing that it may be taken as admitted that on the 7th December 1921, the defenddant firm had paid to the mortgagor, Nalin Chandra Shaw, 17 months' rent in advance and that it was not till the 17th May 1922, that notice of the appointment of the plaintiff as Receiver of the mortgaged properties was served on the defendant firm. Now the lease in the present case relied upon by the defendant firm is affected by the doctrine of *lis pendens*

embodied in s. 52 of the Transfer of Property Act. In the second place the powers of a mortgagor to grant leases after the execution of a mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses ; but it is well-settled that a mortgagor cannot after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the mortgagee, create except as stated above a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant [see in this connection *Doed Robey* v. *Maisey* (1) and *Gibbs* v. *Cruikshank* (2)]. If that is so, the payment of rent in advance after the institution of the suit on the mortgage and indeed by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding upon the mortgagee or on the plaintiff as Receiver of the mortgaged properties. The matter is concluded by authority [see in this connection *De Nicols* v. *Saunders* (3)]. Payments made by tenants to a mortgagor after a mortgage, but before notice of it, must, in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage [*Cook* v. *Guerra* (4)]; but where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lesseee, who is in possession, the mortgagee cannot recover any part of the rent reserved by the lease] [see *Green* v. *Rheinberg* (5)]. This is so because under the doctrine of *Daniels* v. *Davision* (6), the subsequent mortgagee is affected with notice of the interest which the tenant had in the land [see in this connection *Ashburton* v. *Nocton* (7)]. In view of these principles, I must come to the conclusion that the lease referred to above is not binding upon the plaintiff and that the payment of rent in advance is likewise not binding on the plaintiff.

The result, therefore, is that the plaintiff is entitled to judgment for Rs. 3,150 less the sum which the defendant firm have paid on account of owners' share of the Municipal rates and taxes. The defendant firm is legally entitled to credit only for the payments made by them on account of the owner's share of the Municipal rates and taxes and for nothing else, but as the plaintiff has chosen to state before me that he is willing to allow to the defendant firm credit for payments made for the owner's as well as the occupier's shares of the rates and taxes, the decree will be for a sum of Rs. 3,150 less the sum of Rs. 816-14-0 mentioned in para. 3 of the written statement, *i.e.*, Rs. 2, 333-2-0 with costs on Scale No. 2 and interest on judgment-debt at 6 per cent. until realization.

K. S. D. *Order accordingly.*

(1) (1828) 8 B. & C. 767; 3 M. & Ry. 107; 7 L. J. (o. s.) K. B. 85; 32 R. R. 548; 108 E. R. 1228.
(2) (1873) 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 21 W. R. 734.
(3) (1870) 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.
(4) (1872) 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.
(5) (1911) 104 L. T. 149.
(6) (1809) 16 Ves. 249; 10 R. R. 171; 33 E. R. 978.
(7) (1915) 1 Ch. 274 at pp. 290, 291; 84 L. J. Ch. 193; 111 L. T. 895; 59 S. J. 145; 31 T. L. R. 122.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1922.
September 18, 1924.
Present:—Mr. Justice Devadoss.

THELIKICHERLA KANDALAI APPALUCHARJULU VENKATACHARYULU—PLAINTIFF—APPELLANT

versus

THELIKICHERLA KANDALA VENCATA RAMANIACHARYULY, MINOR, BY GUARDIAN RANGANAYAKAMMA AND OTHERS—DEFENDANTS Nos. 3, 1 AND 2—RESPONDENTS.

Evidence Act (I of 1872), s. 65—Loss of document—Hearsay evidence.

Where direct evidence is available, hearsay evidence is inadmissible for the purpose of proving the loss of a document. [p. 525, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 101 of 1921 (A. S. No. 164 of 1921 on the file of the District Court, Godavari), preferred against a decree of the Court of the Principal District

Munsif, Rajahmundry, in O. S. No. 5 of 1919.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *P. V. Vallabhacharyulu*, for the Respondents.

JUDGMENT.—The only point argued in this second appeal is that the Subordinate Judge erred in relying upon hearsay evidence for the proof of the loss of the original Ex. XIII. Plaintiff claims as reversioner of one Ramanujachari. Third defendant is the son of the alleged adopted son of Ramanujachari and the adoption is said to have been made after his death by his widow. The Will is said to have been executed by the testator in 1873 and was registered five months after his death in 1874 and the plaintiff contended that the Will was a forgery. The defendant produced a registration copy of the Will and relied upon a statement of his 3rd witness that Doddayacharlu has stated that the Will had been lost during a fire some years before. Upon this evidence, he relied for the purpose of adducing secondary evidence of the Will. The District Munsif held that the evidence adduced for the loss of the document was only hearsay evidence, and rejected Ex. XIII on the ground that the loss of the original had not been sufficiently accounted for. On appeal, the Subordinate Judge held that in a case like this, hearsay evidence would be admissible for the purpose of proving the loss of the original and Exhibited Ex. XIII and dismissed the plaintiff's suit. If the original of Ex. XIII was proved, no doubt it would have shown that the adoption was made under the authority of the testator. But that fact having been directly challenged, it was the duty of the 3rd defendant to have adduced satisfactory evidence that the original of Ex. XIII was lost. He contented himself by examining a witness who stated that they heard Doddayacharlu say that the Will was lost. Doddayacharlu was actually present in Court but he was not examained by the 3rd defendant. It is now argued before me that as he was an adverse witness he could not have been examined to prove the loss of the document. It is very difficult to follow this argument, for Doddaryacharlu was the father of the adopted boy and 3rd defendant is the son of the adopted boy. That being so, it is very difficult to see how the paternal grandfather could have refused to speak the truth in favour of his grandson. But apart from that, whether his evidence is reliable or unreliable, the question is whether hearsay evidence can be adduced for the purpose of proving the loss of a document. The Subordinate Judge relies upon a passage in Taylor on Evidence which has no application to the present case. Doddayacharlu was in possession of the document according to the 3rd defendant and he was alive on the date when the case was tried before the District Munsif and there is no reason why hearsay evidence should have been admitted. No doubt the statement of a deceased person is admissible under s. 32 of the Evidence Act, if it fulfills the conditions therein laid down. It does not permit any hearsay evidence to prove a thing which could be proved by a person who is cognisant of it or in other words, where direct evidence is available, hearsay evidence is not at all to be admitted. That being so, Ex. XIII cannot be received in evidence and if Ex. XIII is expunged from the records there is no proof that the adoption was made under the authority of Ramanjacharlu.

The judgment of the Subordinate Judge which is based entirely on documents inadmissible in evidence cannot be supported. I reverse the judgment of the Subordinate Judge and restore that of the principal District Munsif with costs in this Court and the lower Appellate Court.

V. N. V.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 13 OF 1922.

April 8, 1924.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Chakravarti.

AMBIKA CHARAN BARUA—PETITIONER—APPELLANT

versus

NARESWARI DASI AND ANOTHER—OBJECTORS—RESPONDENTS.

Appeal—Court, duty of—Judgment without considering evidence—Handwriting, comparison of.

An Appellate Court is not justified in setting aside a judgment without considering the entire evidence adduced in the case. [p. 526, col. 2.]

A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived

from the arguments of Counsel and the evidence of experts." [p. 526, col. 2.]

Sarojini Dasi v. *Haridas Ghosh*, 66 Ind Cas. 774; 49 C. 235; 26 C. W. N. 113; 34 C. L. J. 373; (1922) A. I. R. (C.) 12, followed.

Appeal against a decree of the Additional District Judge, Assam Valley Districts, dated the 2nd August 1921, reversing that of the Munsif, Gauhati, dated the 24th February 1921.

Babu *Narendra Kumar Bose*, for the Appellant.

Dr. *Jadhunath Kanjilal*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is a second appeal against a judgment of the learned District Judge of the Assam Valley Districts, setting aside the judgment of the learned Munsif who by his judgment granted Probate to the petitioner who is the appellant before us.

The petitioner's case was that one Juddharam Kakoti executed a Will on the 23rd of June 1919 which is marked Ex. A in these proceedings and then on the 28th of June in the same year executed another Will which is marked Ex. I in the present proceedings; and the petitioner asked for Probate of the last Will of the testator who died on the 3rd of July 1919. The present proceedings were instituted on the 29th of November 1919.

The proceedings were contested by Nareswari, the testator's widow, and Someswari, one of his daughters.

The learned Munsif who tried this case in the first instance, as it was possible under the rules prevailing in Assam, went fully into the evidence adduced in the case, and pointed out that the Will under consideration was merely a supplement to the earlier Will, and under the circumstances of the testator, was a reasonable one in that it provided maintenance for all the dependent members of his family and made a fair division of the properties between the daughters, and the learned Munsif also relied upon the testimony of the witnesses who supported the Will.

On appeal, the learned District Judge set aside the judgment of the learned Munsif.

It appears that the learned District Judge did not discuss either the oral evidence or the probabilities of the case, but simply relied upon what appeared to him to be a signature on the Will as a mere "tracing forgery" of some other signature of the testator.

On appeal, it was contended by the learned Vakil who appeared for the appellant that the judgment of the learned District Judge was erroneous in law in that it set aside the judgment of the Munsif which was, as I have already indicated, based on the entire evidence in the case without considering the evidence adduced in the case.

It seems to me that the contention of the appellant is well-founded.

It has been pointed out in several cases that a "comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts." "A comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution." The observations which I have quoted are to be found in the case of *Sarojini Dasi* v. *Haridas Ghosh* (1). The learned District Judge here had not the advantage of any expert evidence on the subject. He merely relied upon his impression as to the nature of the signature. Then again the learned District Judge gave entirely the go-by to the oral evidence adduced in the case.

Under these circumstances I think that the case has not been properly tried on the evidence and that the learned District Judge was not justified in setting aside the judgment of the Munsif without even referring to the points upon which the learned Munsif's judgment was based.

Dr. Kanjilal who appeared for the respondents pointed out that if we did not accept the judgment of the learned District Judge as correct the result would be that the case should be sent back to the District Judge for re-trial. I think that this is the right course to be followed in the present case.

The result, therefore, is that the appeal is allowed, the judgment of the lower Appellate Court is set aside, and the case is sent back for re-trial of the appeal in view of the observations made by me in this connection.

The appellant is entitled to his costs in this appeal—hearing fee, two gold *mohurs*.

(1) 66 Ind. Cas. 774; 49 C. 235; 26 C. W. N. 113; 3 L. J. 373; (1922) A. I. R(C)12.

It is needless to point out that the criminal proceedings fall through.

Sanderson, C. J.—I agree.

K. S. D. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 61 OF 1923.

December 2, 1924.

Present :—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

MAHABIR PARSHAD—PLAINTIFF—APPELLANT

versus

UMAN SHANKAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grove—Abandonment of portion—Landlord, whether can recover possession.

According to the usual custom prevailing in the Province of Oudh, when a grove is held by a tenant who is not the owner thereof, it reverts to the landlord when it is abandoned by the tenant. [p. 528, col. 1.]

A tenant of a grove is not entitled to sell the grove or any portion thereof. [*ibid.*]

Where a tenant of a grove sells a portion of the grove, the landlord is entitled to recover possession of that portion from the transferee on the ground that the tenant has abandoned that portion of the grove and that it has reverted to him. [*ibid.*]

Ali Muhammad Khan v. *Chhedan*, 15 Ind. Cas. 385; 15 O. C. 91, *Jagmohan* v. *Deputy Commissioner, Partabgarh*, 61 Ind. Cas. 945; 8 O. L. J. 124 and *Azmat-un-nissa* v. *Ganesh Parshad* 83 Ind. Cas. 51; 1 O. W. N. 515; 10 O. & A. L. R. 1305; 11 O. L. J. 750, referred to.

Appeal against the judgment and decree of the Sub-Judge, Partabgarh, dated the 11th November 1922, in Civil Appeal No. 83 of 1922, reversing that of the Munsif, Kunda at Partabgarh, dated the 23rd December 1921, in Regular Suit No. 184 of 1921.

ORDER OF REFERENCE.

Wazir Hasan, A. J. C.—(*September 3, 1924*).—In this case Ramadhin has sold half of his grove by a sale-deed dated the 19th June 1906 to the defendant No. 1 and the father of the defendant No. 2. The vendees entered into possession in pursuance of the deed of sale. The appellant is the landlord. He brought the suit out of which this appeal has arisen for the recovery of the one-half of the grove which was sold by Ramadhin in favour of the defendant No. 1 and the father of defendant No. 2. The chief ground of the claim is that Ramadhin was debarred by force of a custom obtaining in the village to make a transfer of the grove or any portion of it, that the sale of one-half of the grove amounted to an entire abandonment of the grove to that extent and that consequently the plaintiff landlord was entitled to enter into the possession of the portion sold and thereby abandoned.

The Court of first instance decreed the suit. On appeal by the defendants the learned Subordinate Judge of Partabgarh has taken a different view and has dismissed the suit. This is a second appeal by the plaintiff from the decree of the learned Subordinate Judge.

The argument advanced on behalf of the appellant is that the one-half share transferred must be taken to have been abandoned in its entirety and, therefore, a right of re-entry accrued to the landlord. The argument on behalf of the respondents is that the grove-holder still being in joint possession with his transferees there has been no abandonment of the grove holding. The latter view has been accepted by the learned Subordinate Judge. As the decisions of this Court stand to-day there is no direct authority in favour of either of the two contentions. Both sides rely on the reasoning in the case of *Ali Muhammad Khan* v. *Chhedan* (1) and *Jagmohan* v. *Deputy Commissioner, Partabgarh* (2). In this state of authorities I think it is desirable that the case be decided by a Bench of two Judges. I accordingly make the Reference.

Mr. *Radha Kishen*, for the Appellant.

Mr. *Manohar Lal Tewari*, for the Respondent.

JUDGMENT.—The facts of the case are narrated in the Order of Reference made by one of us. One Ram Adhin, who was not a party to the suit in the Court of first instance or in the subsequent proceedings, sold half his grove by a sale-deed of 19th June, 1906 to the defendant No. 1 Uma Shankar and to the father of defendant No. 2 a minor Ram Kumar. The defendants entered into possession in conformity with the deed. The plaintiff is the landlord and sued for recovery of this half of the grove on the

(1) 15 Ind. Cas. 385; 15 O. C. 91.
(2) 61 Ind. Cas. 945; 8 O. L. J. 124.

ground that the tenant had abandoned it and that in consequence it had reverted to him. The suit was dscreed by the Trial Court, but on appeal by the defendants the Appellate Court of the Subordinate Judge took a different view and dismissed the suit. This is a second appeal from the decree of the lower Appellate Court.

The question at issue is whether there has been an abandonment such as to entitle the landlord to enter into possession. It was admitted before us that according to the usual custom prevailing in the Province of Oudh when a grove is held by a tenant, who is not the owner thereof, it reverts to the landlord when it is abandoned by the tenant. What was contended on behalf of the respondents was that the sale of half of the grove did not amount to an abandonment because the tenant was still in possession of the entire grove jointly with the defendants to the extent of one-half. We are of opinion that there has been abandonment of half the grove. Whether the landlord will treat the sale as an abandonment of the entire grove or not is not a question before us for decision, because the tenant is not a party to these proceedings. We shall follow the reasoning of a decision by one of us in the case of *Azmat-un-nissa* v. *Ganesh Parshad* (3). The title of the defendant purchaser depends upon the validity of the deed of sale, and admittedly that deed of sale is invalid because a tenant is not entitled to sell his grove or any portion thereof. When the defendants have no title they are trespassers and the landlord to whom the right to possession reverts on a transfer is entitled to eject the trespassers. The other rulings quoted before us of *Ali Muhammad Khan* v. *Chhedan* (1) and *Jagmohan* v. *Deputy Commissioner, Partabgarh* (2) do not help in deciding the issue raised before us. As we have already said a question, whether the tenant may, without the consent of the landlord, abandon half a grove and retain the other half, does not arise here because by bringing this suit against the trespasser the landlord has accepted the abandonment of one-half only and desires to seek possession of that half. We do not see how a trespasser can resist the right of re-entry of the landlord.

For these reasons we set aside the decree of the lower Appellate Court, restore the decree of the Trial Court and decree the plaintiff's suit with costs of all the Courts.

Z. K. *Decree set aside.*

(3) 83 Ind. Cas. 51; 1 O. W. N. 515; 10 O. & A. L. R. 1305; 11 O. L. J. 750.

OUDH JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 139 OF 1924.

September 19, 1924.

Present:—Mr. Neave, A. J. C.

PUTTU LAL—PLAINTIFF—APPLICANT

versus

Musammat CHHUTKO—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, rr. 2, 3—Adjournment of case—Default in appearance—Procedure.

Where one of the parties to a suit fails to appear on the date to which the case is adjourned, the case falls under O XVII, r. 2 and not under O. XVII, r. 3 of the C. P. C., and must be disposed of under one of the modes laid down in O. IX of the Code and cannot be considered to have been disposed of on the merits.

Application against an order of the District Judge, Sitapur, dated the 25th July 1924, preferred against an order of the Sub-Judge, Sitapur, dated the 14th April 1924.

Mr. *Ishwari Prasad*, for the Applicant.

ORDER.—In this case the defendant did not appear on the adjourned date fixed for the hearing of the case. The defendant then applied to have the decree set aside under O. IX, r. 13. The Trial Court, holding that in spite of the absence of the defendant it had really decided the case on the merits, and presumably, though it did not say so, that its action was taken under O. XVII, r. 3, rejected the application.

On appeal the District Judge held that O. XVII, r. 3 did not apply, and has remanded the case for decision on the merits.

The learned Pleader for the appellant says that O. XVII, r. 3 does apply, and that the case should not be restored.

It is clear that a case in which one of the parties fails to appear on the date to which the case is adjourned falls under O. XVII, r. 2 and not O. XVII, r. 3 and, therefore, that such a case must be disposed of under one of the modes laid down in O. IX, and cannot be considered to have been disposed of on the merits.

The application is accordingly rejected.

Z. K. *Application rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 107 OF 1924.
September 18, 1924.
Present:—Mr. Dalal, J. C.
Musammat DEOKI—DEFENDANT—APPLICANT
versus
JUGUL KISHORE—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 50, 146, O. IX, r. 13—Ex parte *decree—Death of defendant after decree—Legal representative, whether entitled to make application to set aside decree—Procedure.*

Where a defendant dies after an *ex parte* decree has been passed against him, his legal representative is entitled to make an application to set aside the *ex parte* decree under O. IX, r. 13 of the C. P. C., and is not bound to wait till he is actually brought on the record as legal representative under s. 50 of the Code.

Revision under s. 115, C. P. C., against an order of the Subordinate Judge, Sitapur, dated the 10th April 1924, in an appeal preferred against an order of the Munsif, Sitapur, dated the 28th April 1923.

Mr. *S. M. Ahmad*, for the Applicant.

Mr. *Hyder Husain*, for the Opposite Party.

ORDER.—*Musammat* Deoki, the legal representative of a deceased defendant applied for re-hearing under O. IX, r. 13, of the C. P. C. She averred that she came to know of the decree when a notice was served on her under s. 50 of the C. P. C. why she should not be brought on the record as a legal representative of the deceased defendant and the decree executed against her. The Trial Court very properly put before itself two issues (1) whether Puran Chand had notice of the date of hearing or not, that is whether Puran Chand would have been entitled to obtain a re-hearing and whether the applicant woman had come within 30 days of her knowledge of the decree, as she was required to, under Art. 164 of the Limitation Act. On both those issues it held against the applicant and dismissed the application. The Appellate Court of the Subordinate Judge of Sitapur has written a very confused judgment. There is no finding of the two issues of fact though in one place the Court vaguely states: "It is true that her late husband was not duly served with summons in the case in which the decree was passed against him *ex parte*." This cannot be taken to be a finding to the effect that the applicant's husband would have been entitled to apply for re-hearing. I take it, therefore, that neither issue decided by the Trial Court was touched by the Appellate Court.

I disagree with the Appellate Court's view of law. It held that the applicant was not entitled to file this application until she was actually brought on the record as a legal representative under s. 50 of the C. P. C. This may put a legal representative on the horns of a dilemma. It has been held by the Madras High Court in *Venkatasubbier* v. *Krishnamurthi* (1) that the legal representative must come within 30 days of her knowledge of the decree under Art. 164 of the Limitation Act so if the legal representative waits till proceedings are completed under s. 50, his application for re-hearing would be time-barred. On the other hand if he hastens to Court before the usual dilatory proceedings in Court are completed, he is told that he must wait outside. This cannot possibly be the law. The provisions of s. 146 are very wide. If any proceedings may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. There is no reason why an application under O. IX, r. 13 should be exempted from this general provision relating to procedure. I hold that the applicant was entitled to be heard when she went to the Trial Court. I set aside the decree of the lower Appellate Court and remand the appeal to it for trial in the light of the issues framed and decided by the Trial Court. Costs here shall abide the result.

Z. K. *Case remanded.*

(1) 21 Ind. Cas. 268; 38 M. 442; 14 M. L. T. 396; (1913) M. W. N. 899.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1147 OF 1922.
July 31, 1924.
Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.
BHUPENDRA NATH LASKAR AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAI CHARAN PURKAIT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, proceeding to set aside—Sale, whether can be set aside by compromise.

The procedure for setting aside an execution sale is prescribed in O. XXI, r. 90 of the Civil Procedure Code and it is not open to the parties to adopt any other method of having the sale set aside.

Jagneswar Sikdar v. *Kailash Mandal*, 78 Ind. Cas. 126; 28 C. W. N. 821, followed.

An execution sale cannot be set aside by a compromise between some of the parties to the proceeding in which the sale took place in the absence of the remaining parties.

Appeal against a decree of the Subordinate Judge, Third Court, 24-Perganahs, dated the 23rd of January 1922, affirming that of the Munsif, Second Court at Diamond Harbour, dated the 18th of May 1920.

Mr. *B. Chuckerbutty* and Babu *Girija Prosanna Ray Choudhury*, for the Appellants.

Mr. *S. C. Maity* and Babu *Apurba Charan Mookerjee*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The plaintiff-respondent brought a suit for confirmation of possession on declaration of his title to the land in suit and for cancellation of the defendant's auction-purchase. The facts are that the property in suit is a non-transferable occupancy holding held by Haripada Haldar and Bistupada Haldar under defendants Nos. 3 to 6. On the 20th February 1917, the plaintiff purchased this holding from the Haldars by a private sale. The landlords brought a suit for rent against the original tenant and the holding was eventually sold on the 27th November 1917 and purchased by the present appellants who are defendants Nos. 1 and 2. On the 17th January 1918, the plaintiff filed an application under O. XXI, r. 90 to have the same set aside. On the 9th March this application of the plaintiff was dismissed for default and the sale was confirmed. On the 18th March 1918, the plaintiff applied under O. IX, r. 5 for the revival of his application under O. XXI, r. 90. On the same day the petitions were filed, one in the revival case and the other in the case O. XXI, r. 90. By these two petitions the plaintiff and the defendants Nos. 1 and 2 are alleged to have compromised the dispute between them on the following terms: "The auction-purchasers opposite parties having ageeed to give up the sale on taking money, this petition is filed with their consent praying that the re-hearing asked for may be allowed, that the original case for setting aside of the sale may be restored to file and that suitable orders may be passed for setting aside the sale". No order could be passed on these petitions because the landlord decree-holders were not parties to them. The cases were accordingly adjourned from time to time for the purpose of enabling the plaintiff to prove his case under O. XXI, r. 90 and were ultimately dismissed on the 30th April 1918 on account of the plaintiff's absence. On the 7th June 1918, the sale certificate was issued and on the 11th June possession was delivered to the appellants under the sale certificate. Thereafter the present suit was filed by the plaintiff for recovery of possession of the property in suit on a declaration of his title and for a declaration that the purchase by the appellants was liable to be set aside. The Courts below have given the plaintiff a decree. The learned Munsif has found that the plaintiff's cause of action was the petition of compromise and the decree he passed was that the plaintiff's right to the possession of the land by virtue of his private purchase be declared as against defendants Nos. 1 and 2 whose right to the possession of the same under their auction-purchase be declared to have been lost as against the plaintiff. On appeal the learned Subordinate Judge has confirmed that decree on the view that "the plaintiff is entitled to get possesion of the property by right of his purchase as the sale cannot stand on account of the compromise notices above." As I understand, the effect of the decree of the lower Appellate Court is that by the petition of compromise filed on the 18th March 1918, the sale became cancelled and the plaintiff's right to obtain possession of the property from the defendants accrued from that date. I think the view taken by the Courts below is wrong in law. The plaintiff as purchaser of a non-transferable occupancy holding has acquired no title against the landlord nor did he acquire any title against the auction-purchasers in a sale pursuant to the decree obtained by the landlords for arrears of rent. The only question that calls for decision is whether by the petition of compromise the appellants lost their right which they had obtained under the sale. The sale, as has been noticed, was confirmed on the 9th March 1918 before the petition of compromise was filed. That petition only mentioned that the appellants had agreed to give up the sale after the petition was filed by the plaintiff and it was consented

to by the Pleader on their behalf. There was no legal transfer of the interest of the defendants to the plaintiff; nor was the sale actually set aside. There can be no question that the compromise which the plaintiff wanted to effect was made under O. XXIII ,r. 3. That provision of the law requires that such compromise or satisfaction must be recorded by the Court and a decree in accordance with it passed by it. In this case no effect was given to this petition for the obvious reason that the case could not be decided in the absence of the landlord. The agreement between the plaintiff and the auction-purchasers to let the sale stand cancelled was not binding on the landlord and, therefore, the case was adjourned from time to time until it was dismissed for plaintiff's default. I do not think that this petition of compromise has conferred any title upon the plaintiff. The view taken by the Courts below is that by this petition of compromise the appellants gave up their right as auction-purchasers. I fail to see how this interpretation can be put upon that petition. Their right as auction-purchasers had accrued before that petition was filed and the most that can be said of the petition of compromise is that it was filed before the Court asking it to record the terms on which the parties had settled their differences. No effect was given to it by the Court and, therefore, it remained in an inchoate state. Besides the sale in a proceeding in which all the parties interested were not parties to the compromise could not be set aside by an agreement between some of the parties. The procedure for setting aside a sale has been prescribed under O. XXI, r. 90, C. P. C., and it is not open to the parties to adopt any other method of having the sale set aside. The question would have been different if the landlord had also joined as it would have amounted to an admission by them that there was an irregularity in the sale which vitiated it. An authority for this simple proposition may be found in the case of *Janeswar Sikdar* v. *Kailash Mandal* (1).

Then it has been argued that the equity is on the side of the plaintiff and the defendants should not be allowed to take advantage of their dishonest conduct. It has been found by both the Courts below that the defendants have received the money which was paid as the price of the property. But if there is any equity on the side of the plaintiff, there is also equity available by the defendants in view of the result which has been brought about by the plaintiff due to his conduct. The present position which the appellants occupy is that as auction-purchasers of the property they are liable for rent to the landlord whereas the property remains in the possession and enjoyment of the plaintiff. This position has been brought about by the default of the plaintiff. On the whole I think that the plaintiff has not been able to make out any valid and legal cause of action as against the defendants Nos 1 and 2 for recovery of possession of the property in suit and that the suit is not maintainable. In this view this appeal must be allowed, the decree of the lower Appellate Court set aside and the suit dismissed with costs in all the Courts.

Duval, J.—I agree, whatever right the plaintiff might have got as against the previous tenants by his purchase in February 1917 of the non-transferable holding, appears to have disappeared after the sale by the landlord's rent-decree. The sale has been confirmed. He certainly could get no title by virtue of anything which had been done after possession was taken in confirmation of the sale or by his making a petition in Court to which the landlord was not a party and did not consent. In this view I hold that the plaintiff is not entitled in this suit to raise the question whether he is entitled to any damages or recover the money which he might have paid to the defendants at the time when he put in the petition with the consent by some of the defendants. I think that the suit should be dismissed with costs in all the Courts.

Z. K. *Appeal allowed.*

(1) 78 Ind. Cas. 126; 28 C. W. N. 821.

BOMBAY HIGH COURT.

LAND ACQUISITION REFERENCE No. 25 OF 1923.

December 17, 1923.

Present :—Mr. Justice Mulla.

GOVERNMENT OF BOMBAY—ACQUIRER

versus

ISMAIL AHMED HAFIZ MOOSA—CLAIMANT.

Land Acquisition Act (I of 1894), s. 23—Market value, determination of—Sale, recent, effect of—Market, fluctuations of.

Where the property under acquisition has been recently purchased, the price paid is *prima facie* the market-value thereof [p. 532, col. 2.]

Frenchman v. *Assistant Collector, Haveli*, 68 Ind. Cas. 521; 24 Bom. L. R. 782; (1922) A. I. R. (B.) 399, followed.

The claimant may claim more than the price paid, and it is open to him to contend that he bought the property at less than its market-value, or that there has been a general rise in the value of property between the date of purchase and the date of declaration. On the other hand, it is open to Government to show that the price paid by the claimant was so high that no prudent purchaser would have paid it, and also that there has been a general fall in the value of property in the neighbourhood between the date of agreement and the date of declaration. [*ibid.*]

Reference by the Land Acquisition Officer under s. 18, Land Acquisition Act.

Mr. *Jinnah* (with him Mr. *Taraporevala*), for the Claimant.

Mr. *Coltman*, (with him Mr. *Kanga*, Advocate-General), for the Government.

JUDGMENT.—[After reciting the facts of the case His Lordship proceeded :—]

Before me the claimant's Surveyor put in a valuation on a rental basis. He estimated the rents at Rs. 608 per month and valued the vacant land as Rs. 50 per square yard. Mr. Kanga also adopted the same basis. Mr. Patel, Surveyor for claimant, sought to support his value of vacant land by capitalising the ground rent of three plots of land situated at Varli Point. As regards rents he relied upon the rents derived from the building built on one of the said three plots. Counsel for Government contended that having regard to the situation of the said three plots and the character of the said building, it was impossible to compare the property in reference with those plots either as regards rents or the value of vacant land. I inspected the property in the company of Counsel and the Surveyors for Government and claimant, and I entirely agree that the said three plots situated as they are in a superior locality can hardly afford any basis for determining either the rents of the property in reference or the value of the vacant land attached to it.

The property in reference consisted originally of a ground floor structure. The upper floors were added about fifteen years ago. The whole property was let out prior to the date of declaration, which is April 21, 1921, to the Bombay Municipality at a monthly rent of Rs. 165. The property was subject to the provisions of the Bombay Rent (War Restrictions) Act.

Government relied for their estimate of rents on the rents of an adjoining bungalow which was acquired and demolished about a year ago. But the rents of that bungalow also were subject to the provisions of the Rent Act. There is, therefore, no basis in the present case for determining what rents the property would realise after the repeal of the Rent Act. Nor are there any materials for ascertaining the value of the vacant land. Such being the facts, this is pre-eminently a case in which the property should be valued according to the principle laid down by Sir Norman Macleod in *Frenchman* v. *Assistant Collector, Haveli* (1) that principle being that where the property under acquisition has been recently purchased, the price paid is *prima facie* the market-value thereof. In the present case the agreement for sale was made on January 29, 1920. The property was notified for acquisition on April 21, 1921. The claimant paid Rs. 91,000 for the property and that *prima facie* is the market-value thereof. The claimant may claim more than the price paid, and it is open to him to contend that he bought the property at less than its market-value, or that there has been a general rise in the value of property between the date of purchase and the date of declaration. On the other hand, it is open to Government to show that the price paid by the claimant was so high that no prudent purchaser would have paid it, and also that there has been a general fall in the value of property in the neighbourhood between the date of agreement and the date of declaration.

It was argued on behalf of Government that the purchase by the claimant at the price paid by him was a bad bargain, and that he did not get a return of more than one and-a-half per cent. on his investment. But the obvious answer to that is that the rents of the property were controlled by the Rent Act, and the return is not to be measured by restricted rents.

It was also contended on behalf of Government that there was a general fall in the value of landed property in Bombay between the date of purchase and the date of declaration. The evidence on record shows that the claimant bought the property at the top of the market. The claimant's Surveyor, Mr. Patel, said in his evidence:—

"I heard of the boom in land in Bombay.

(1) 68 Ind. Cas. 521; 24 Bom. L. R. 782; (1922) A. I. R. (B.) 399.

January 1920 was about the height of the boom and the high level continued till July-August 1920. The prices fell generally all over Bombay. What I mean by 'generally' is that in some localities there was no decline in prices. I do not know of any locality in which by the actual sales it could be said that there was no decline. Generally there was a fall of from 15 to 20 per cent."

In his re-examination he said that he did not know of any instance of sale in the locality which showed that there was a fall in the price of land in the locality.

Mr. Kanga, Surveyor for Government, stated in his evidence as follows :—

"When the claimant bought the property, the market was at its height in Bombay. The high water-mark continued till July-August 1920. Then there was a fall. In April 1921, there was no demand for landed property in Bombay. As a result the market was going down. Generally the percentage of fall was 25 per cent."

In his cross-examination he said that he could not say that there was a decline in this locality but that generally there was a fall. He added that he could not give any instance of sale in this locality which showed either a rise or fall. He further said that there had been no sale at all in this locality since 1919.

Mr. Dadachanji, a Civil Engineer who was called to prove the leases of the three plots of land referred to above, stated in his evidence as follows :—

"We endeavoured to find lessees for other plots. Since we took the lease the demand for land has decreased considerably and prices have fallen. I cannot say by how much they have fallen between April 1920 and April 1921. The above remarks are confined to our land. All over Bombay there was a fall."

He further said that there had been no property market in Bombay since the beginning of 1921. He added that he was unable to say what the percentage of fall was between April 1920 and April 1921.

It is clear from the evidence of these three witnesses that the height of the boom was reached in January-February 1920, that the maximum prices were maintained until July-August 1920, and there was then a fall, according to Mr. Kanga, of 25 per cent. and according to Mr. Patel, of from 15 to 25 per cent. The rise and fall have been of such a marked character that they cannot be ignored though there is no specific sale in this neighbourhood showing either a rise or fall. Such being the case, I take the percentage of fall in this locality at 15 per cent., and I hold that the market-value of the land in reference at the date of declaration was the price paid by the claimant less 15 per cent., and award Rs. 91,000 being the price paid by the claimant *less* 15 per cent. *plus* 15 per cent. for compulsory acquisition. The Collector to deposit the excess, namely, Rs. 498, in Court, or to pay the same to the claimant or to his Attorneys.

No order as to costs.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 2131 OF 1923.

February 15, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

NRIPENDRA KUMAR DUTTA—RECEIVER—PLAINTIFF—APPELLANT

versus

CHAIRMAN OF HABIGUNJ MUNICIPALITY—DEFENDANT—RESPONDENT.

Bengal Municipal Act (III of 1884), ss. 6 (11), 339, 340—Market—Part-proprietor, whether can apply for license—"Owner," meaning of—Refusal to grant license—Declaration, suit for, whether maintainable.

A part-proprietor of a market is entitled to apply for a license under Ch. X of the Bengal Municipal Act. [p. 536, col. 1.]

The word "owner" in s. 340 of the Bengal Municipal Act means any owner or part-owner and is not to be confined as meaning the entire body of owners. [p. 535, col. 1.]

Narendra Nath Sinha v. *Nagendra Nath Biswas*, 10 Ind. Cas. 43; 38 C. 501; 13 C. L. J. 471; 15 C. W. N. 586 and *Amrita Lal Bose* v. *Corporation of Calcutta*, 42 Ind. Cas. 305; 21 C. W. N. 1016; 26 C. L. J. 1015; 44 C. 1055; 18 Cr. L. J. 945, referred to.

Where a Municipality refuses to grant a license to a part-proprietor on the ground that a part-proprietor is not entitled to apply for a license, the unsuccessful applicant is entitled to get a declaration from the Civil Court that the view taken by the Municipality is wrong and that he is a person who is legally entitled to apply for a license. [p. 536, col. 2; 537, col. 1.]

Appeal against a decree of the Additional District Judge, Sylhet, dated the 21st of May 1923, affirming that of the Subordinate Judge, Second Court of that District, dated the 23rd of November 1921.

Arguments.—Dr. *Sarat Chandra Basak* (with him Babu *Gopal Chandra Das*), for the Appellant.—I submit that the Courts below are wrong in holding that a part-owner of a market is not

entitled to get a license. A part-owner is entitled in law to get a license. One of the co-owners of this market objected to the granting of the license because he has got a rival market and he wants one market to be closed down. The expression "owner" in s. 340 of the Bengal Municipal Act means and includes a co owner. If the interpretations of the lower Courts are to be held correct thus the owner of a very small share, may, by wilfully refusing to join in the application for license, prevent all the other co-owners from getting a license with the result that the market would necessarily be closed down. I refer to ss. 6 (11), 103, and 344 of the Bengal Municipal Act, and also *Narendra Nath Sinha* v. *Nagendra Nath Biswas* (1). In this case the Municipality refused to grant a license to a co-owner but my client was nevertheless served with a notice under s. 344 to show cause why he should not be prosecuted for not having taken out a license. If one is liable to be so prosecuted he must also be entitled to get a license.

Babu *Birendra Kumar Dey*, for the Respondent.—The view taken by the lower Court is correct. See s. 14 of the General Clauses Act (X of 1899). The expression "owner," means "owners," *i e.*, to say the entire body of owners. The use of the definite article shows that the intention of the Legislature was that the application must be made by all the owners jointly. Section 6 only contains a definition of the word "owner" and sets out a list of persons who are owners within the meaning of the Bengal Municipal Act. This definition has no bearing on the present case. *Narendra Nath Sinha* v. *Nagendra Nath Biswas* (1) has no application. Sections 340 and 344 do not also help the appellant: *Amrita Lal Bose* v. *Corporation of Calcutta* (2). In every case of criminal prosecution the liability is individual. The Municipal Commissioner acted *bona fide* after taking competent legal advice. As regards the cross-objection the final market cannot exist. The Commissioners have full discretion: *Moran* v. *Chairman of Motihari Municipality* (3).

JUDGMENT.—The facts giving rise to the suit out of which this appeal has arisen are that there is a market within the Municipality of Habigunj called Puranbazar. The appellant is the Receiver of an estate called the *masulia* estate which owns a small fractional share in the market. This market, as alleged by the plaintiff, is an old one. On the other hand the defendants say that the sale of fish and vegetables has been started in this market lately. For the purposes of this appeal it is not necessary for us to enquire whether the market is old or new. The plaintiff applied to the defendant Municipality for a license under s. 339 of the Bengal Municipal Act III of 1884 to use the market for the sale of fish and vegetables; but license was refused. On the 29th March 1920, the Commissioners of the Municipality resolved that they did not see their way to grant the license to the plaintiff who was a part-proprietor. By this resolution they intended to convey that the plaintiff had no right to apply for a license under Ch. X of the Act because he was a part-proprietor and represented only a fractional share in the market. The plaintiff has thereupon brought this suit for declaration that he is entitled to get license even though he is a part-proprietor. The learned Subordinate Judge before whom the suit was tried held that a part-proprietor was not entitled to apply for a license and dismissed the suit so far as it related to the use of the market for the sale of vegetable, etc. The claim for license for the sale of fish was granted subject to the plaintiff's carrying out certain improvements suggested by the defendant Municipality. Both parties appealed against portions of the decree affecting them adversely and both the appeal and the cross-appeal were dismissed by the Additional District Judge.

The plaintiff has appealed to this Court and the defendant has taken a cross-objection with regard to the decree relating to the fish market.

The one point that arises in this case is whether the plaintiff as a part-proprietor or a co-sharer in the market is entitled in law to apply for a license under Ch. X of the Bengal Municipal Act. Various other matters have been brought to our notice, but it is not necessary for us to consider them. We propose to confine our decision to the question of law that has been raised in this case, as to whether

(1) 10 Ind. as. 43; 38 C. 501; 13 C. L. J. 471; 15 C. W. N. 586.
(2) 42 Ind. Cas. 305; 21 C. W. N. 1016; 26 C. L. J. 1015; 44 C. 1025; 18 Cr. L. J. 915.
(3) 17 C. 329; 8 Ind. Dec. (N. s.) 758.

a part-proprietor of a market is entitled to apply for a license under Ch. X of the Act or must it be the entire body of owners who may apply for such license. It is conceded that there is no provision in Ch. X for submission of an application for license. But the learned Subordinate Judge was of opinion that in s. 340 'owner' means the entire body of owners, who only can apply for a license under s. 339. This view has been accepted by the Additional District Judge. Now the question as to whether the plaintiff is entitled to apply for a license is one that depends upon the meaning of the word 'owner' as used in s. 340. Section 339 does not make mention of any application or of the person by whom it may be made. It simply lays down that in the case of a new market the Commissioners may grant such license year by year on the certificate in writing under the hand of the Chairman. It no doubt contemplates that the Commissioners must be moved for license by some one Section 340 says that the Chairman upon the application in writing of 'the owner of any land' shall grant such certificate unless the land be unfit for the purposes of the market. It is contended by the respondent that the word 'owner' as used in s. 340 must mean the entire body of owners; and it is further contended that when an application is made by the entire body of owners the Chairman shall give the necessary certificate; and such certificate being given an application must be made for the issue of license. We do not find any ground for holding that the word 'owner' as used in s. 340 means the entire body of owners. The learned Judge in his judgment says that after perusing the appropriate sections of the Act he is of opinion that the interpretation put upon the word 'owner' by the Trial Court is the correct one. He has not referred to the appropriate section so that we are unable to follow his reasonings. The term 'owner' has been defined in s. 6 (11) of the Act. It includes (*a*) "every person," I quote so much only as is necessary for the determination of the question raised before us, "who is entitled for the time being to receive any rent in respect of the land with regard to which the word is used; (*b*) a manager on behalf of *any* such person; (*c*) an agent for *any* such person; (*d*) a trustee for any such person." The interpretation put upon the word 'owner' by this clause enlarges its ordinary significance and is not intended to restrict it. On a careful reading of this definition it would appear that it is intended to include, and not exclude, any person who may be termed owner of the land; and indications, as supplied by the wording of this clause, are to be found in the use of such expression as "any rent" which signifies that any person who is entitled to any rent or any portion of the rent or any kind of rent is an 'owner.'

Then again in the sub-cls. (*b*), (*c*) and (*d*) the expression used is "*any* such person." If the word 'owner' was intended to connote the entire body of owners, the use of the expression '*any* such person' will be incompatible with this sense. The meaning of the term 'owner' in connection with s. 103 of the Act came up for consideration in the case of *Narendra Nath Sinha* v. *Nagendra Nath Biswas* (1). The point that was raised in that case is whether a person who is not actually in receipt of any rent is a person who may be called an 'owner.' The point now before us was not exactly considered in that case, but the observations at page 509* of the report are of the greatest help in interpreting the word 'owner' in the way suggested by the appellant. There the learned Judges say as follows: "The term 'owner' is defined in cl. (11) of s. 6 to include every person who is entitled for the time being to receive any rent in respect of the land with regard to which the word is used . . . the term 'owner' also includes a manager or agent or trustee for any such person. This clearly is not an exhaustive definition of the term 'owner' because . . . the word "include" is generally used in interpretation clauses to enlarge the meaning of words so as to make them comprehend not only such things as they signify according to their natural import but also the things they are declared to include...This definition, it must be remembered, however, was framed not so much with a view to confer rights as to impose liabilities." We think that this is the correct view of the interpretation of the word "owner" as used in the Act. It is, however, contended by the respondent that that might be the meaning of the s. 103 where the word 'owner' is used. But the words used in s. 340 are "the owner" and the article prefixed to the word "owner" signifies that the expression

*Page of 38 C.—[*Ed.*]

is intended to mean the entire body of owners. We are unable to follow this reading and we are of opinion that the article is used more for the sake of language than for restricting its meaning.

Reference has been made to s. 344 by the learned Vakil for the appellant where the word 'owner' is again used and it is argued that if the contention of the respondent is correct, the word 'owner' in that section must also mean the entire body of owners. It is not necessary to consider that point, because as is submitted by the respondent, the liability for criminal prosecution may be individual. But it is significant that though the Municipality refused to grant license to the appellant on the ground that he was a part-proprietor, he was served with notice under s. 344 to show cause why he should not be prosecuted for running a market without a license. If the law authorises the Muncipality to prosecute any person who has failed to take out a license, be he a part-proprietor or a full owner, it is clear that such person must be entitled to obey the order for the disobedience of which he is prosecuted. If the restricted interpretation that is sought to be put on the word, as accepted by the Courts below is correct, the result will be that a man may be prosecuted for not taking out a license because he happens to be a co-sharer—owner though the Municipality has refused his application for license because he is a part-proprietor. It is not to be supposed that the Legislature intended to bring about such an anomalous position. Another impracticable result may accrue from this restricted interpretation of the word 'owner.' If there are 100 proprietors owning a market, it is necessary according to this view, that all of them must join in applying for a license. If any of them, owning an infinitesimally small share, refuses to join in the application, or if any one of them dies without leaving any immediate legal representative, no license can be granted and the market must be closed though it may be of 100 year's standing.

We are, therefore, of opinion that the interpretation put upon the word 'owner' by the Courts below is wrong. The plaintiff as part-proprietor of the market has the right under the law to apply for a license. At the same time we wish it to be understood that we do not want to fetter the discretion of the Chairman vested in him under ss. 339 and 340 of the Act. We only decide that the plaintiff is a person who is legally entitled to make an application for a license. Whether such application should be granted or not is a matter for the consideration of the Municipality. In the view that we take this appeal ought to succeed.

There is a cross-objection by the respondent with reference to the decree passed by the Subordinate Judge which has been affirmed by the Court of Appeal below, *viz.*, "that the plaintiff be declared entitled to get license from the defendant for the fish market only on payment of reasonable fees and on effecting improvements of the market as the defendant requires to be done for its fitness." It appears that after the plaintiff's application for license was dismissed on the ground that he was a part-proprietor, one Rai Mohan Das (alleged to be the general agent of all the proprieters) applied for necessary license on the 29th May 1920. The Chairman thereupon visited the locality and granted the certificate to the effect that the place was fit for the sale of vegetables and that the place for selling fish required improvements and extension. The Courts below have found that the place where the sale of fish is intended to be held belongs exclusively to the appellant and, therefore, they have given a decree in the term quoted above. It appears from the judgments of both the Courts that the only point raised before them was as to whether the place where the fish market was to be held was within the exclusive 'Chandiani' right of the plaintiff. In the cross-objection, however, the ground taken is that the suit is not maintainable in its present form. It is submitted that the market having come into existence in 1918 after the extension of Ch. X of the Act to the Habigunj Municipality, the Municipality had the fullest discretion in the matter of granting or refusing license under s. 339 of the Act. Such being the case suit in the Civil Court to compel, the Municipality to grant a license does not lie. We do not think that there is any substance in this contention. If the Municipality had refused to grant license on any of the grounds mentioned in s. 339, probably the contention of the learned Vakil for the respondent would have had some force. But the ground upon which the ap-

plication has been rejected is that as part-proprietor the plaintiff had no right to apply. He is entitled to get a declaration from the Civil Court if the view taken by the Commissioner is wrong, that he is a person who is legally entitled to apply.

The result is that this appeal is allowed and the cross-objection dismissed. The decree of the lower Courts in so far as it refuses license to the plaintiff for the sale of butter, *ghee*, fruits and vegetables is set aside and declaration made in favour of the plaintiff that he is entitled to apply for license for the use of the market for the sale of those articles. The decree of the Courts below in so far as it relates to the use of the market for the sale of fish will stand. The plaintiff is entitled to his costs in all the Courts. There will be no order for costs in the cross-objection which is dismissed.

Z. K. *Appeal allowed; Cross-objection dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1760 OF 1924.
May 13, 1924.
Present :—Mr. Justice Neave.
LACHMI NARAIN—DEFENDANT—APPELLANT
versus
MOOLI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 65 (2)—Jurisdiction of Civil and Revenue Courts—Suit for injunction restricting tenants from using water of well for particular purpose, nature of—Ex-proprietary tenant, whether entitled to use water of well in one part of holding for irrigating other parts.

A suit for an injunction restricting a tenant from irrigating certain plots of land from a particular well, does not fall within the purview of s. 65 (2) of the Agra Tenancy Act and is not excluded from the jurisdiction of a Civil Court. [p. 537, col. 2.]

An ex-proprietary tenant is not prohibited from using the water of a well situated in one plot of his holding for the irrigation of other plots in that holding merely because the latter plots belong to a different landlord from the owner of the plot in which the well is situated. [*ibid.*]

Second appeal against a decree of the Subordinate Judge, Muttra, dated the 11th of October 1922.

Mr. *S. C. Dass*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—The defendant appellant transferred to the respondent plot No. 922 in December 1906. This plot was his *sir* land, and he accordingly became an ex-proprietary tenant of it. There is a *pakka* well in the plot, and the defendant has been using the water from this well to irrigate adjacent fields which he holds as sub-tenant from another landlord. The plaintiff brought this suit for an injunction prohibiting the defendant from using the water to irrigate any land other than plot No. 922 and for damages.

The defence was, first, that the suit was not maintainable in a Civil Court, but should have been brought in the Revenue Court under s. 65 (2) of the Tenancy Act, and, secondly, that the defendant was entitled to use the water of the well for any purpose he might desire. Both the Courts below have found against the defendant on both points.

With regard to the question of jurisdiction, there can be no doubt that the suit is triable by a Civil Court. Section 65 of the Tenancy Act prescribes in its first paragraph the procedure to be followed in ejectment for forfeiture and in the second paragraph now referred to allows a landlord to sue for compensation in addition to, or in lieu of suing for ejectment, or to sue for an injunction with or without compensation. This paragraph admittedly refers back to s. 57 (*b*) of the same Act, which permits the ejectment of a tenant on the ground of any act or omission detrimental to the land in the holding, or inconsistent with the purpose for which it was let. Now it cannot by any straining of language be held that the use of the water of a well situated in the holding of a tenant for the irrigation of other plots of land is detrimental to that holding or inconsistent with the purpose for which it was let. It is clear, therefore, that the suit was not cognizable by the Revenue Court but was properly brought in the Civil Court.

Turning to the second plea. I have not been shown any provision of any Statute or any ruling of any Court in which it has been laid down that a tenant is not permitted to use the water of a well situated in one plot of his holding for the irrigation of other plots in that holding merely because the latter plots belong to a different *zemindar* from the owner of the plot in which the well is situated. The learned Advocate for the respondent contends that as his client purchased the well along with the plot from the appellant he is entitled to prescribe the use to which the water shall be put. Such a

doctrine seems to me to be inconsistent with the whole of the spirit of the tenancy legislation. Section 89 of the Tenancy Act allows even a non-occupancy tenant to make a Will for the purpose of the irrigation of his holding without the consent or even against the wishes of his *zemindar*; *a fortiori* an ex-proprietary tenant who had himself constructed the well on his ex-proprietary holding must be entitled to use the water from it for the purposes of irrigation. It has not been pleaded here that the tenant's use of the water has in any way resulted in injury or loss of any kind to the *zemindar* nor has any custom been alleged by which the *zemindar* is entitled to limit the use of well in the plots occupied by tenants.

The appeal is allowed with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 196 OF 1924.
August 7, 1924.
Present:—Mr. Justice Adami and Mr. Justice Macpherson.

KANHAYA LAL—DEFENDANT—PETITIONER
versus
BALDEO LALL AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Court Fees Act (VII of 1870), Sch. II, Art. 17 (6) —Partition suit—Declaration of title and possession —Court-fee payable—Order declaring Court-fee sufficient—Appeal—Revision.

If in a partition suit, in the forefront of his prayer in the plaint, the plaintiff asks for a declaration of title and possession, he is claiming in the guise of a partition suit a declaration of his title and must pay an *ad valorem* Court-fee. [p. 539, col. 1.]

Rachhya Raut v. *Chando*, 65 Ind. Cas. 294; 6 P. L. J. 662; (1921) Pat. 65; 3 P. L. T. 293; (1923) A. I. R. (Pat.) 113, followed.

The mere fact that a petitioner is too poor to pay Court-fees or there are other circumstances justifying leniency, furnishes no ground to the Court for neglecting an express decision of the High Court and the provisions of the Court Fees Act, or for depriving of its dues the Government Revenue in the interest of which the Court Fees Act was passed. [p. 539, col. 2.]

An order declaring that the Court-fee paid on a plaint is sufficient is not open to appeal or revision. [*ibid.*]

Appeal from an order of the Subordinate Judge, Gaya, dated the 16th April 1924.

Mr. *Nawal Kishore Prasad II*, for the Petitioner.

Mr. *Rai Guru Saran Prasad*, for the Opposite Party.

JUDGMENT.

Adami, J.—The petitioner and the plaintiffs Nos. 1-4 opposite party are brothers, being the sons of Babu Garib Chand, deceased, who had a brother, Babu Saheb Lal a Pleader. The latter died on the 25th December 1911, leaving a Will dated the 19th December 1911, by which he bequeathed all his property to the petitioner, who took out Probate of the Will on the 17th May 1912. Subsequently during the Survey Settlement proceedings the petitioner's name was entered in the Record of Rights and in the Municipal Register with respect to all the properties which he took under the Will of Babu Saheb Lal. It appears that the opposite party did not contest either the grant of Probate to the petitioner or the record of his name in the Record of Rights. This year, however ,they have instituted the suit out of which this application arises, seeking partition of the properties coming down both from their father and from Saheb Lal.

In their plaint they asserted that Garib Chand and Saheb Lal were joint in mess and property, and that Saheb Lal died while still joint with his brother. They claimed that all the said properties were ancestral and that they were in joint possession of them all; and that Saheb Lal had been educated to become a Pleader out of the joint funds. The plaint, while not denying that Saheb Lal had made a Will in favour of the petitioner and that Probate had been granted to him or that the petitioner's name was recorded in respect of Saheb Lal's properties in the Record of Rights, alleged that the petitioner had obtained Probate of Saheb Lal's Will by fraud, and had procured the entry of his name in the Survey and Settlement Record and in the Municipal Register while he was *karta* of the family, without the knowledge of his brothers and in collusion with others. The plaintiffs in the suit stated in the plaint that they did not admit the genuineness of the Will and they denied Saheb Lal's right to execute the Will bequeathing property which they claimed to be joint property. The reliefs claimed in the plaint were a declaration that all the properties including those covered by

Saheb Lal's Will, were joint family properties and that they were entitled to a four-fifths share on partition of all this property and the delivery to them of their partitioned share and costs.

They valued their four-fifths share at Rs. 15,107 for the purpose of jurisdiction and paid Rs. 15 as Court-fees claiming that the suit was a partition suit pure and simple.

The petitioner as defendant to the suit at once put in an objection that the Court-fee of Rs. 15 was insufficient and that an *advalorem* fee must be paid before the plaint could be accepted seeing that the plaintiffs sought for a declaration of title, and for partition and possession.

The learned Subordinate Judge in his order on the objection admitted that the suit is for a declaration of title and possession as well as for partition and that the decision of Dawson Miller, C. J., and Coutts, J., in the case of *Rachhya Raut* v. *Chando* (1) to the effect that if in a partition suit in the forefront of their prayer in the plaint the plaintiffs ask for a declaration of title and possession they are claiming under the guise of a partition suit a declaration of their title and they must pay an *ad valorem* Court-fee, applies in the present case. But giving it as his reason that some of the properties in suit were admittedly joint, and the fact that the plaintiff's Pleader took upon himself the responsibility of having the suit dismissed respecting the other properties which are the subject-matter of dispute as having been held adversely by the defendant if complete ouster were established as well as the fact that the plaintiffs were not in a position to pay the *advalorem* fee, the learned Subordinate Judge held that under the peculiar circumstances of the case the Court Fees Act had to be construed leniently and that the decision in *Rachhya Raut* v. *Chando* (1) did not entirely apply. He, therefore, held that the Court-fee of Rs. 15 was sufficient and overruled the objection.

It is against this order that the present application is made. If an appeal lay against this interlocutory order there is no doubt what the result would be. The plaint clearly asks for a declaration of title and possession as well as for partition, and the learned Subordinate Judge was bound by the decision in *Rachhya Raut* v. *Chando* (1). The mere facts that a Pleader gives an undertaking or that no declaration is necessary with regard to a partition of some of the property or that the petitioner is too poor to pay Court-fees give no good ground for neglecting an express decision of the High Court, and the provisions of the Court Fees Act or for depriving of its dues the Government Revenue in the interest of which the Court-Fees Act was passed.

No appeal, however, lies and we have to consider whether this Court can interfere in revision. I think it is clear that it cannot. No question of jurisdiction arises, for the Subordinate Judge had jurisdiction to decide whether the suit was one in which an *ad valorem* fee should be paid, he may have decided the question wrongly, but jurisdiction is not affected. Order VII, r. 11 (*c*) cannot be invoked by the petitioner for that rule requires the rejection of a plaint where "the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so."

In the present case the Subordinate Judge accepted the Court-fee of Rs. 15 as sufficient and, therefore, there was no direction to the plaintiffs which was disobeyed. This is not a case either in which the decision of the category within which a suit lies affects the jurisdiction and competence of the Court to try the case.

It must be decided, I think, that this Court cannot interfere at the present stage. At the same time I think it should be made clear to the learned Subordinate Judge that as he has by his order circumscribed the scope of the plaintiff's suit the plaintiff should not be allowed to again extend its scope unless he consents to pay the further Court-fee required by law.

Subject to this remark, I would reject the application.

Macpherson, J.—I agree.

Z. K. *Application rejected.*

(1) 65 Ind. Cas. 294; 6 P. L. J. 662; (1921) Pat. 65; 3 P. L. T. 293; (1923) A. I. R. (Pat.) 113.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 37 OF 1922.

March 24, 1924.

Present:—Mr. Justice Mukerji.

UMARAM GOGOI—PLAINTIFF—APPELLANT

versus

PURUK CHAND OSWAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41, principle of, applicability of.

Section 41 of the Transfer of Property Act, provided its conditions are thoroughly satisfied, affords a protection to *bona fide* purchasers from ostensible owners and lays down an exception to what may be said to be the general rule that a person cannot convey a better title than he himself has in the property. [p. 541, col. 2.]

The section is based on the principle that if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done with his previous license. [p 542, col. 1]

If, however, any one of the essential elements mentioned in s. 41 of the Transfer of Property Act be wanting, the transferee is not entitled to the protection provided by that section [*ibid.*]

Rajendro Nath Holdar v. *Jogendro Nath Banerjee*, 14 M. I. A. 67 at p. 77; 15 W. R. P. C. 41; 7 B L. R. 216; 2 Suth. P. C. J. 422; 2 Sar. P. C. J. 666: 20 E. R. 711, *Lala Parbhu Lal* v. *Mylne*, 14 C. 401 at p. 413; 7 Ind. Dec. (N. S.) 267, *Cairncross* v. *Lorimer*, (1860) 3 Macq. H. L. C. 827; 7 Jur. (N. S.) 149; 3 L. T. 130; 123 R. R. 906, *Sarat Chunder Dey* v. *Gopal Chunder Laha*, 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.), *Bhimappa* v. *Basawa*, 29 B. 400; 7 Bom. L. R. 405 and *Ballu Mal* v. *Ram Kishen*, 64 Ind. Cas. 14; 43 A. 263; 19 A. L. J. 11, referred to.

Appeal against a decree of the Subordinate Judge, Assam Valley Districts at Jorhat, dated the 9th of July 1921, reversing that of the Munsif, Golahat, dated the 23rd of June 1920.

Babu *Amarendra Nath Bose* and Mr. *Mahommed Nurul Haq Choudhuri* for Mr. *Syed Mahommed Saadulla*, for the Appellant.

Mr. *A. S. M. Akram*, for the Respondents.

JUDGMENT.—Some of the questions which arose for consideration upon the facts proved or sought to be proved on behalf of the parties in this suit are these:—

1st:—Is the defendant No. 3 the adopted son of Bhadoi?

2nd:—Is the plaintiff estopped from questioning the adoption, if any, of Bhadoi?

3rd:—Was there a separation between the defendant No. 1 and the defendant No. 3 after Bhadoi's death?

4th:—Is the plaintiff entitled to any relief in view of the provisions of s. 41 of the Transfer of Property Act?

The first question the Court of first instance answered in the affirmative. This finding was based on the following:—1. The direct evidence of adoption; 2. the fact that the defendant No. 3 left his father's house and came to live with Bhadoi and lived with the latter till his death; 3. the fact that the defendant No. 3 lived with Bhadoi and then with defendant No. I till the latter separated from him about a year after Bhadoi's death and that the defendant No. 3 was still living in Bhadoi's house; 4. the fact that the defendant No. 3 possessed Bhadoi's land, though he had some paternal land which was in the occupation of his nephews; and 5. the fact that the explanation offered by the defendent No. 1 to the effect that the defendant No. 3 occupied Bhadoi's land as his ploughman was false. The lower Appellate Court observes in its judgment: "My finding, therefore, is that there was no adoption at all". I have been asked to treat this finding as a finding of fact. I regret, I am unable to do so. The grounds upon which this ultimate finding is based in the words of that judgment are these:—1. "The evidence is meagre and even if there was an adoption it was not valid. It was said that the defendant No. 3 was given in adoption by his mother. The mother had no power to give him in adoption." 2. "I am, however, not satisfied that defendant No. 3 was always recognised as Bhadoi's son or that he is in possession of all properties of Bhadoi" rejecting the argument to that effect put forward on behalf of the plaintiff-appellant before him. The finding based on these two grounds might mean either that there was no adoption in fact or that the adoption was not valid in law. The view that it was not valid in law cannot be supported in view of the ruling in the case of *Jogesh Chandra Banerjee* v. *Nritya Kali Debi* (1). I am, therefore, asked to hold that the finding means that there was no adoption in fact. I do not know why I should take upon myself to say that it is the one and not the other. In second appeals we are precluded from interfering with findings of fact arrived at by the lower Appellate Court; but what is relied upon in this case is, in my judgment, not a finding of fact at all. It

(1) 30 C. 965; 7 C. W. N. 871.

might mean either and it is not for this Court to say that the lower Court must have meant something for no other reason than that it was its duty to say the same. I, therefore, think that this is not a finding of fact. Moreover if the Court meant to reverse the finding of the primary Court on this point, should it not have considered all the important materials on which that finding was based? I am not unmindful of the fact that it would be intolerable if a Court were required to give all its reasonings in its judgment or notice all the evidence which influences its decision. But the position is wholly different where a Court takes upon itself to reverse a finding of the Trial Court on a question of facts. Now let us examine the five grounds given by the Trial Court on this point and see how they have been dealt with by the lower Appellate Court. No. 1 may be said to have been disposed of for in the opinion of the lower Appellate Court the direct evidence was meagre. Nos. 2 and 5 have been disposed of by the finding that the plaintiff was in possession and as soon as he was dispossessed he filed a possessory suit under s. 9 of the Specific Relief Act and recovered possession. But what about the admitted fact that the defendant No. 3 was in occupation of the lands, the explanation for which ocoupation was not accepted by the Trial Court? What about the separation of defendant No. 1 from the defendant? What about the defendant No. 3 still living in Bhadoi's house? What about the inference that may be drawn from the fact that defendant No. 3 had left his paternal properties such as he had and that his nephews were occupying them? Ignoring these facts and circumstances altogether if the lower Appellate Court means to suggest that its finding was that there was no adoption in fact, I am not prepared to accept that finding as a finding of fact.

Then as to the second question, the question arises if it be found that there was an adoption in fact but that the same was invalid for some reason or another, or that the defendant No. 3 was treated by Bhadoi in such a way as led him to believe that he was Bhadoi's adopted son, and on that footing and on account of such acquiescence and by reason of such encouragement, he severed his connexion with his natural family or underwent a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it. This principle of estoppel has been recognised in *Rajendro Nath Holdar* v. *Jogendra Nath Benerjee* (2). This question would arise, if the finding of the learned Munsif to the effect that defendant No. 3 left his paternal home and properties and came to live in Bhadoi's family and lived there since then till the suit, is not reversed on appeal, provided that it be found that Bhadoi acquiesced in or encouraged the defendant No. 3 in regarding himself as his adopted son and the change of circumstance took place in consequence of such acquiescence or encouragement. It will, however, have to be remembered that estoppel is purely personal and it will not affect the defendant No. 1 in so far as he claims a title otherwise than through Bhadoi [*Lala Parbhu Lal* v. *Mylne* (3)]. This matter does not appear to have been dealt with by the lower Appellate Court.

On the findings of the learned Munsif and upon the uncertain finding of the learned Subordinate Judge on the question of possession which I have referred to above, arises the third question, and if it be answered in the affirmative, a question of limitation may also arise.

The fourth question arises upon the finding that the defendant No. 1 though served with notices of registration of the names of the defendant No. 3 and also of the defendant No. 2 raised no protest or took no steps to cancel the same. The omission to do so, so far as the registration of the name of the defendant No. 3 is concerned may be condoned on the ground that he was a minor at the time; but the continuance of the said omission when he became major and also the omission so far as the registration of the name of the defendant No. 2 is concerned may not create an estoppel unless it was the duty of the defendant No. 1 to speak and in that sense there may be no estoppel so far as the defendant No. 1 is concerned. But s. 41 of the Transfer of Property Act, provided its conditions are fully satisfied, affords a protection to *bond fide* purchasers from ostensible owners; and lays down an exception to what may be said to be the general rule that a person cannot convey a better title than he himself has in the pro-

(2) 14 M. I. A. 67 at p. 77; 15 W. R. P. C. 41; 7 B. L. R. 214; 2 Suth. P. C. J. 422; 2 Sar. P. C. J. 666; 20 E. R. 711.

(3) 14 C. 401 at p. 413; 7 Ind. Dec. (N. s.) 267.

perty. The principle has been thus enunciated by the House of Lords in the case of *Cairncross* v. *Lorimer* (4): "If a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." Generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done with his previous license.

The same principle has been adopted in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (5) and *Bhimappa* v. *Basawa* (6). In the latter case Sir Lawrence Jenkins, C J., at pages 403 and 404 laid down that mere acquiescence is not equivalent to consent; consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act, it is clear that acquiescence may, under certain circumstances, be taken to be consent. If, however, any one of the essential elements mentioned in s. 41 be wanting the transferee is not entitled to the protection provided by that section [*Ballu Mal* v. *Ram Kishan* (7)]. In any event, this question has got to be considered, but has not been considered.

I, therefore, think that the decree of the learned Subordinate Judge cannot stand. It is hereby set aside and the case sent back to his Court so that the appeal may be dealt with afresh in the light of the observations made above and necessary findings being arrived at, the appeal may be disposed of. Costs of this Court to abide the result.

Z. K. *Decree set aside.*

(4) (1860) 3 Macq. H. L. C. 827; 7 Jur. (N. S.) 149; 3 L. T. 130; 123 R. R. 906.
(5) 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.).
(6) 29 B. 400; 7 Bom. L. R. 405.
(7) 64 Ind. Cas. 14; 43 A, 263; 19 A. L. J. 11.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 881 OF 1924.
November 15, 1924.
Present:—Mr. Justice Martineau.

FEROZE DIN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MULA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will—Probate—Revocation—Disappearance of Will—Presumption.

It is not always to be presumed from the disappearance of a Will that the testator had revoked it. [p. 543, col. 1.]

Shib Sabitri Prasad v. *The Collector of Meerut*, 29 A. 82; 3 A. L. J. 747; A. W. N. (1906) 295 and *Padman* v. *Hanwanta*, 29 Ind. Cas. 807; 93 P. R. 1915; 18 M. L. T. 54; 19 C. W. N. 929; 13 A. L. J. 801; 17 Bom. L. R. 609; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 110 P. W. R. 1915; 29 M. L. J. 307; 11 P. L. R. 1916 (P. C.), relied upon.

Where it appeared from the certified copy of a Will which could not be found that the Will had been executed in favour of the beneficiaries because they had been brought up by the testator, who was their great uncle; and the caveators were related to the testator in the same degree as the beneficiaries:

Held, that from the mere fact that the Will had disappeared, it could not be presumed that the testator had revoked it. [p. 542, col. 2.]

Second appeal from a decree of the District Judge, Amritsar, dated the 5th January 1924.

Mr. *Sagar Chand*, for the Appellants.

Lala *Ishwar Das*, for the Respondents.

JUDGMENT.—This is an appeal from an order dismissing an application for Probate of the Will of one Sundar Singh, who died in February 1923.

The Will is not forthcoming, but a certified copy of it has been produced, and the learned District Judge has found that it was duly executed, but he has dismissed the application on the ground that the disappearance of the Will has not been explained and that a presumption arises that the testator revoked it.

Sardha Ram, the writer of the Will, has proved that it was duly executed by Sundar Singh, producing an entry in his register in support of his statement.

On the question of revocation I differ from the view taken by the learned District Judge. The appellants cannot be expected to know what has become of the Will, which was executed in 1911. The learned District Judge has relied on *Uttam Das* v. *Chanan Das* (1) but that was a case in which a man had, while he was a bachelor, made a Will in favour of his *chela* which would have entirely dis-

(1) 20 Ind. Cas. 462; 51 P. R. 1913; 283 P. L. R. 1913; 200 P. W. R. 1913.

inherited his wife and children, and it was held that the Court was justified in assuming that the testator had revoked the Will, which was not to be found and left everything to a comparative stranger. This is clearly distinguishable from the present case. The certified copy of the Will shows that the Will was executed in favour of the appellants because they had been brought up by the testator who was their great uncle. The respondents are related to the testator in the same degree as the appellants, being the sons of one of his brothers, while the appellants are the grandsons of another brother. It is pointed out that the appellants are Muhammadans but when this fact did not prevent Sundar Singh from making a Will in their favour, it is also not a reason for his afterwards revoking the Will. It is not always to be presumed from the disappearance of a Will that the testator revoked it. See *Shib Sabitri Prasad* v. *The Collector of Meerut* (2) and *Padman* v. *Hanwanta* (3) and it appears to me that no such presumption can be drawn in the present case.

No executor was appointed in the Will either expressly or by implication, but the testator left the whole of his property to the appellants.

I accept the appeal and direct that Letters of Administration be granted to the appellants with a copy of the Will annexed. The respondents will pay the appellants' costs in both Courts.

Z. K. *Appeal accepted.*

(2) 29 A. 82; 3 A. L. J. 747; A. W. N. (1906) 295.

(3) 29 Ind. Cas. 807; 93 P. R. 1915; 18 M. L. T. 54; 19 C. W. N. 929; 13 A. L. J. 801; 17 Bom. L. R. 609; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 110 P. W. R. 1915; 29 M. L. J. 307; 11 P. L. R. 1916 (P C).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 241 OF 1923.

August 4, 1924.

Present: —Sir Jwala Prasad, KT., Acting Chief Justice, and Mr. Justice Kulwant Sahai.

BABU LAL SAHU—INSOLVENT—APPELLANT

versus

KRISHNA PRASHAD—CREDITOR—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 24, 44—Provincial Insolvency Act (V of 1920), ss. 33 (3), 41, 42, 47, 64—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Proof of debt after conditional discharge, whether permissible—Debt barred after date of adjudication, whether can be proved—Secured creditor—Realisation of security—Balance of debt, whether can be proved in absence of personal decree.

The discharge contemplated by s. 24 (3) of the Provincial Insolvency Act of 1907, which corresponds to s. 33 (3) of the Provincial Insolvency Act of 1920, is the final discharge and not a conditional discharge of the insolvent. The effect of a conditional discharge is not to terminate the insolvency proceedings. [p. 544, col. 2; p. 545, col. 1.]

A conditional discharge of the insolvent does not debar a creditor from proving his debt in insolvency. [p. 544, col. 2.]

A creditor is entitled to render proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties. [*ibid.*]

A debt which was alive and not barred at the date of adjudication can be proved at any time during the continuance of the insolvency proceedings. [p. 545, col. 2.]

Sivasubramania Pillai v. *Theethiappa Pillai*, 75 Ind. Cas. 572, relied on.

A decree under O. XXXIV, r. 6 of the C. P. C., does not create a debt but merely authorises the decree-holder to realise it by means of execution in the ordinary way. The absence of such a decree, therefore, does not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt. [*ibid.*]

Under s. 47 of the Provincial Insolvency Act of 1920, a secured creditor who realises his security may prove for the balance due to him after deducting the net amount realised. The fact that he had got his name removed from the list of scheduled creditors and had proceeded to realise his security will not debar him of his statutory right to prove for the balance due to him in the insolvency proceedings. [p. 545, col. 2; p. 546, col. 1.]

Appeal from an order of the District Judge, Monghyr, dated the 27th August 1923.

Mr. *Manohar Lal*, for the Appellant.

Mr. *Shiva Narayan Bose*, for the Respondent.

JUDGMENT.

Kulwant Sahai, J.—The appellant Babu Lal Sahu, was adjudged an insolvent by an order dated the 11th December 1913. In the schedule attached to the insolvency petition filed by the appellant he had included a mortgage debt due to the respondent Krishna Prashad under a mortgage-deed dated November 1911. The respondent, however, instituted a suit on the 18th December 1913 in the Court of the Subordinate Judge to enforce his mortgage. A preliminary mortgage-decree was passed in his favour on the 23rd January 1914 and a final decree for sale was made on the 7th September 1914. On the 3rd September 1917 he applied before the District Judge in the insolvency proceedings for expunging his name from the schedule of creditors and on the 17th September 1917 the

District Judge ordered that the name of the respondent Krishna Prashed be removed from the schedule. The respondent thereupon executed his mortgage-decree and brought the mortgage property to sale. The sale was held on the 24th April 1918 and a sum of Rs. 560 was realised thereby. On the 23rd August 1919 the District Judge made a conditional order of discharge in favour of the appellant in these words: "Pleader heard. No objection filed. Insolvent discharged on condition that his subsequent earnings or income or after-acquired property will still be subject to proceedings in this Court at the instance of the creditors. On the 4th of June 1923 the respondent Krishna Prashad filed a petition before the District Judge in the insolvency proceedings stating that a sum of Rs. 1,767-13-0 on account of principal and interest was still due to him under the mortgage-decree after the sale of the mortgaged property and that he was informed that since the order of discharge, the insolvent had acquired properties set out in Schedule I attached to his petition and praying that the insolvent may be ordered to make over the said properties to the Court and the same may be applied towards the liquidation of the debt and that the petitioner, namely the respondent, may be permitted to prove his debt. Notice of this application was given to the insolvent who filed a petition of objection on various grounds. Those objections have been disallowed by the District Judge who by his order dated the 27th of August 1923 has allowed the application of the respondent and permitted him to prove the balance of his debt.

Against this order of the District Judge the insolvent has come up in appeal to his Court.

The points argued by the learned Counsel for the appellant are first, that the respondent could not be allowed to prove his debt after the order of discharge made by the District Judge on 23rd August 1919; secondly, that the debt is not provable under the Act inasmuch as it is barred by limitation, thirdly, that before proving the debt it was necessary for the respondent to obtain a decree under O. XXXIV, r. 6 of the C. P. C. and fourthly, that having got his name removed from the schedule of creditors in the Insolvency Court the respondent could only look to the security and could not claim any dividend.

It is necessary to state at the outset that the insolvency proceedings were commenced and the order of discharge was made in the present case under the Provincial Insolvency Act III of 1907, but at the time the present application was made by the respondent in June 1923 the Act of 1907 had been repealed and Act V of 1920 was in force. In order to consider the effect of the discharge made on the 23rd of August 1919 we have to look to the provisions in the Act of 1907 whereas in considering the present application of the respondent for leave to prove his debt, it is contended that we are to be guided by the Act of 1920. There is, however, no difference in the provisions of the two Acts as regards the effect of a conditional order of discharge.

The provision for discharge in the Act of 1907 is contained in s. 44 of the Act, which section corresponds with ss. 41 and 42 of the Act of 1920. Section 44, sub-s. 2 (*c*) of the Act of 1907 prescribes that the Court may grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property, which exactly corresponds with the provisions of s. 41 sub-s. 2 (*c*) of the Act of 1920. Now, the effect of a discharge is to release the insolvent from all debts entered in the schedule (s. 45 of the Act of 1907 and section 44 of the Act of 1920) but a conditional discharge does not release the insolvent. Section 24 (3) of the Act of 1907 which materially corresponds with s. 33 (3) of the Act of 1920 provides that any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule and the Court after causing notice to be served on the insolvent and the other creditors, and hearing their objections (if any), shall comply with or reject the application. Therefore, under the provisions of the Act it was open to the respondent to apply to the Insolvency Court for leave to prove his debt at any time before the discharge of the insolvent. The discharge contemplated by s. 24 (3) of the old Act (s. 33 (3) of the new Act) means the final discharge and not the conditional discharge of the insolvent, the effect of such conditional discharge

being that the insolvency proceedings are not terminated. Section 39 (4) of the Act of 1907 which corresponds with s. 64 of the Act of 1920 authorises certain creditors to prove their debt before the declaration of the final dividend by the Receiver and this shows that debts can be proved even after the order of discharge in certain cases and in the present case no final dividend appears to have been made up to the date when the application was made by the respondent in June 1923, and it does not appear from the proceedings in the insolvency proceedings that any final dividend has yet been declared. In the decision of the Madras High Court in the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1), their Lordships after an elaborate consideration of all the authorities on the point have come to the conclusion that the conditional order of discharge, like the one in the present case does not debar the creditor from proving his debt in insolvency and that a creditor is entitled to tender proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third perties. I am, therefore, of opinion that the first contention raised by the learned Counsel for the appellant cannot be sustained.

The second contention of the learned Counsel for the appellant is that the debt is barred by limitation and is not provable under the Act. His contention is that the sale of the mortgaged property in execution of the mortgage-decree having taken place on the 24th April 1918 the respondent could proceed against the person and other properties of the insolvent only after obtaining a decree under O. XXXIV, r. 6 of the C. P. C., and that an application for a decree under O. XXXIV, r. 6 could be made only within three years from the date of sale of the mortgaged properties, and this not having been done his debt is barred by limitation and that he could not be allowed to prove a barred debt. The answer to this contention is contained in s. 28 of the Act of 1907 which corresponds with s. 34 of the Act of 1920. This section provides that "all debts and liabilities present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act," the only limitation in sub-s. 2 of s. 28 in the Act of 1907 being that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or breach of trust shall not be provable under this Act, while the limitation in cl. (1) of s. 34 of the Act of 1920 is that debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be provable under this Act. Therefore if the debt was alive and not barred at the time when the order adjudging the appellant an insolvent was made it can be proved at any time during the continuance of the insolvency proceedings. This view is also supported by the case of *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) referred to above. This contention of the learned Counsel for the appellant must also be overruled.

The third objection taken on behalf of the appellant is that the respondent could not be allowed to prove the debt before obtaining a decree under O. XXXIV, r. 6 of the C. P. C. Now, the necessity of obtaining a decree under O. XXXIV, r. 6 of the C. P. C. is to realise the debt by means of execution proceedings. A decree under O. XXXIV, r. 6 does not create a debt but merely authorises the decree-holder to realise it by means of execution in the ordinary way. The absence of a decree under O. XXXIV, r. 6 will not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt and, therefore, the absence of decree under O. XXXIV, r. 6 of the C. P. C. will not debar the respondent from proving his debt in the present proceedings.

The last objection taken by the appellant is equally unsustainable. Under s. 31, cl. (1) of the Act of 1907 which corresponds with s. 47, cl. (1) of the Act of 1920 where a secured creditor realises his security he may prove for the balance due to him after deducting the net amount realised. The fact of his getting his name removed from the list of scheduled creditors and proceeding to realise his security will not debar

(1) 75 Ind. Cas. 572.

him of the statutory right to prove for the balance due to him in the insolvency proceedings. I am, therefore, of opinion that the order made by the learned District Judge is correct and the grounds taken by the learned Counsel for the appellant are unsound and cannot prevail.

The appeal must be dismissed with costs.

Jwala Prasad, Actg. C. J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 214 OF 1921.
February 14, 1924.
Present:—Mr. Justice Wallace.

KEEZHANTHI JANAKI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PATHIAPURAYIKEEZHANTHI GOVINDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Donee, whether can question right of ostensible donor to make gift — Malabar Law — Tarwad*—Gift of property described as* jenm, *nature of—Suit to set aside gift—Limitation.*

A person who takes property under a gift from several ostensible donors, is estopped from asserting that some of the donors had no right to make the gift. [p. 546, col. 2.]

Bijraj Nopani v. *Pura Sundary Dasee*, 24 Ind. Cas. 296; 42 C. 56; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368; 41 I. A. 189 (P. C.), distinguished.

A mere recital in a deed of gift executed by the members of a Malabar *tarwad*, that the property gifted is *jenm* property of the donors, does not lead to any presumption or inference in law that the property is in the hands of the donors as *tarwad* property. [*ibid.*]

Obiter dictum.—A gift of *tarwad* property by the *karnavan* is not void *ab initio* and the adult members of the *tarwad* are bound to sue to set aside the gift within limitation. [p. 647, col. 1.]

Moidin Kutti v. *Beevi Kutti Ummah*, 18 M. 38; 6 Ind. Dec. (N. S.) 377, referred to.

Second appeal against a decree of the District Court, North Malabar, in A. S. No. 398 of 1919, preferred against that of the Court of the Principal District Munsif, Tellicherry, in O. S. No. 870 of 1915.

Mr. *Me Soidharan*, for the Appellants.

Messrs. *K. P. M. Menon* and *B. Pocker*, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued as members of a Malabar *tarwad* on behalf of the *tarwad* for a declaration that a deed of gift, Ex. I, executed by the third defendant then *karnavan* of their *tarwad* and now dead, and by other members of the *tarwad* including the plaintiffs Nos. 1 to 5 in favour of defendants Nos. 1 and 2 is not valid and binding on the *tarwad*, and for the recovery of the property gifted and incidental reliefs. Plaintiffs Nos. 1 to 5 were then minors and in the deed of gift were represented by the third defendant as their guardian.

The lower Courts both held that, at the time of the gift, the property belonged to the third defendant absolutely, and to none of the other donors and certainly not to the *tarwad*, and that, therefore, the plaintiffs are not entitled to question its validity on the ground that it was *tarwad* property. The plaintiffs appeal.

The first ground urged is that it was not open to the donees, defendants Nos. 1 and 2 to assert that none of the donors except the third defendant had any right to the property at the time of the gift, they having taken the property under the gift from all the ostensible donors, that they are thus estopped from asserting that some of those donors had no right to gift. I think that contention is sound. The case in *Bijraj Nopani* v. *Pura Sundary Dasee* (1) relied on by both the lower Courts, has really no application. The question is not what rights the donors had *inter se*, but what rights the donees acknowledged they had by virtue of which the gift became operative to pass such rights to themselves. But this by no means disposes of the case. The lower Courts have clearly concurred in finding that the property at the time of the gift was not *tarwad* property. This is a finding of fact binding in second appeal. There is no recital in Ex. A-I which will estop the donees from relying on that finding. Exhibit I only recites that the property belongs in *jenm* to the donors and is in the possession of the third defendant. I am unable to hold that the mere recital that the property is *jenm* property of the donors leads to any presumption or inference in law, that the property was in the hands of the donors as *tarwad* property. I must accept the concurrent finding that the property was not *tarwad* property.

(1) 24 Ind. Cas. 296; 42 C. 56; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R 796; 20 C. L. J. 368; 41 I. A. 189 (P. C.).

Now the plaint makes it quite clear that the plaintiffs are suing to recover this property as *tarwad* property for the *tarwadi*; and their prayer is that the property should be decreed to them on behalf of their *tarwad*. It appears to me that, this being so, the plaintiff's suit to recover this property on the footing that it was and is *tarwad* property cannot be maintained in view of the finding that it is not and was not *tarwad* property. It may be that plaintiffs Nos. 1 to 5, signatories to the document, had or have a cause of action to recover their shares of the property on the footing that their guardian, the third defendant, had no authority to give away their property, but that is not the frame of the present suit.

Since the deed of gift was in 1910, questions of limitation would obviously arise. These have incidentally been considered by the First Court but the lower Appellate Court has not thought it necessary to go into them; and it appears to me unnecessary to go into them here. If the plaintiffs were suing, as they are, as members of *tarwad* on behalf of the *tarwad* to set aside a gift by the *tarwad* of *tarwad* property, it is clear that, on the grounds set out in the First Court's judgment, they would be barred by limitation, *Moidin Kutti* v. *Beevi Kutti Ummah* (2), since the document *prima facie* would bind the *tarwad* and could not, therefore, be treated as *void ab initio*, and since the adult members of the *tarwad* have not chosen to sue within time to set it aside. But if the plaintiffs were suing as individual persons whose guardian, when they were minors, gifted away their property, which gift is in law *prima facie* void, it would not be necessary for them to have the document formally set aside by decree. They could avoid it and sue on the footing of their title or possession or both. But that, unfortunately for them, is not their present suit. It is not a suit by minors to set aside a gift by their guardian, but a suit by the *tarwad* to set aside a gift of *tarwad* property. Different considerations would arise in such a suit and different issues would fall to be tried. I am not prepared to permit the plaintiffs to open such a case in this suit at this stage.

I, therefore, agree with the lower Court that the plaintiff's suit is not maintainable.

(2) 18 M. 38; 6 Ind. Dec. (N. S.) 377.

The second appeal is dismissed with costs of first and second respondents.

Appeal dismissed.

V. N. V.
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2395 OF 1921.

January 21, 1924.

Present:—Mr. Justice Rankin and Mr. Justice Mukerji.

SUDHANYA KUMAR BOSE RAY CHAUDHURY—DEFENDANT—APPELLANT

versus

Sreemutty SUSHILABALA BOSE RAY CHAUDHURY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXIII, r. 1—Mortgage—Redemption, suit for—Money paid into Court—Mesne profits, whether can be claimed in suit—Withdrawal of claim—Separate suit, whether maintainable.

Where in pursuance of a decree in a redemption suit the mortgage-money is paid into Court by the plaintiff, mesne profits from the date of the payment cannot be claimed in the suit itself. [p. 548, col. 1.]

Sakari Datta v. *Sheikh Ainuddy*, 6 Ind. Cas. 336; 14 C. W. N. 1001; 12 C. L. J. 620, followed.

A Court will not pass a hypothetical decree with reference to a cause of action that may never accrue for one or other of several reasons. [*ibid.*]

Where a claim for mesne profits is made in a redemption suit, but is subsequently withdrawn, a separate suit to recover mesne profits from the date of payment up to the date of delivery of possession would not be barred by the provisions of s. 11 or O. XXIII, r. 1 of the C. P. C. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Court, Dacca, dated the 22nd of August 1921, modifying that of the Munsif, Fourth Court at Munshigunj, dated the 8th of March 1920.

Babu *Subodh Chandra Ray Chaudhury*, for the Appellant.

Babus *Surendra Nath Guha* and *Ramendra Mohan Mazumdar*, for the Respondent.

JUDGMENT.

Rankin, J.—In this case, I am of opinion that the appeal fails and must be dismissed. It appears that the present plaintiff who was the second mortgagee in respect of certain plots of land brought a suit for redemption claiming that prior to the institution of the suit she had made a sufficient tender. She accordingly claimed not merely possession of the mortgaged property but claimed also mesne profits from the institution of the suit until such date as she could get delivery of possession. The Trial Court as regards the question of mesne profits allowed her to withdraw that claim with permission to sue again. But the ultimate effect of the suit was this that it

was held that there had been no sufficient tender before the suit and a preliminary decree was made under which a certain sum was fixed and that sum was after the decree paid into Court in pursuance of the decree. Thereupon, of course, the first mortgagee was obliged to take that sum in full discharge and to reconvey and to re-deliver the property and in the present case the date on which the sum ultimately found to be sufficient was paid into Court was the 20th June 1917. An appeal was then taken from that decree but the ultimate effect of that appeal was not to render the sum so paid insufficient. It is now contended on behalf of the defendant-appellant that, in a subsequent suit for mesne profits for the period beginning from the 20th June 1917 and ending on the 25th December 1918 when possession was actually given, the plaintiff's claim is barred because she had claimed mesne profits in the redemption suit and had withdrawn that claim without the advantage of getting leave to sue again for it. The case cited and relied upon by the lower Appellate Court in *Sakari Datta* v. *Sheikh Ainuddy* (1) says that mesne profits from the date subsequent to the decree when the money is paid into Court by the mortgagor could not be claimed in the redemption suit and it does not appear to me that the learned Vakil for the appellant in his careful analysis of the various statutory provisions has succeeded in showing that there is any relevant difference on this point between the present law under the new Code and the old law under the Transfer of Property Act. In any view, to pass a decree for mesne profits which will not arise unless the mortgagee fails to obey the order of the Court is a very doubtful order to make. One could understand an order granting liberty to apply as to mesne profits in the event of a failure; but no Court would regard it as obligatory to pass a hypothetical decree with reference to a cause of action that may never accrue for one or other of several reasons. It seems to me that it would be straining O. XXIII, r. 1, O. VI, r. 1 and s. 11 of the C. P. C. to apply it as we are invited to do to a wholly future cause of action. I can find no authority for such a course and, in the absence of very strong authority I have a clear opinion that it was never intended by the Legislature.

(1) 6 Ind. Cas. 336; 14 C. W. N. 1001; 12 C. L. J. 620.

The question with regard to the standing crops appears to be very simple because it does not appear that the decree appealed from has, in fact, failed to give to the prior mortgagee credit for any actual expenditure made upon the land, having regard to the fact that the land was in the cultivation of *burgadar* and the said mortgagee has only been charged with half of the produce which he would obtain leaving to the *burgadar* the other half in consideration of his going to the *taluk* and expenses of the actual work of cultivation.

On the whole, the decree appealed from appears to be fair and just and this appeal fails and is dismissed with costs.

Mukerji, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 92 OF 1924.

July 28, 1924.

Present:—Mr. Justice Boys.

NATHJI AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

LANGURIA AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Application for leave to withdraw suit with liberty to bring fresh suit, disposal of—Procedure.

Where an application is made for leave to withdraw a suit with liberty to bring a fresh suit, but the Court sees no reason to grant such leave, it should simply refuse the application and proceed with the suit, or give the plaintiff an opportunity of accepting or refusing an unconditional withdrawal. It has no jurisdiction to pass an order on such application granting leave to withdraw the suit but refusing leave to bring a fresh suit.

Revision against an order of the Munsif, Muttra, dated the 15th March 1924.

Mr. *N. P. Asthana*, for the Applicants.

Mr. *Shambhu Nath Chaube*, for the Opposite Party.

JUDGMENT.—The facts here are practically admitted and certainly they cannot be denied. The plaintiffs asked to be allowed to withdraw their suit in terms of O. XXIII, r. 1 (2), C. P. C. The learned Munsif refused to allow them to withdraw the suit with permission to bring a fresh suit and apparently was quite justified in that refusal. But then instead of merely refusing the plaintiffs' request or giving them any further option in the matter the learned Munsif treated the application as if it were alternatively under r. 1, sub-s. (1) and granting the application as if it had been an unconditional or un-

qualified application to withdraw, ordered that the suit be allowed to be withdrawn, coupled with refusal of permission to file a fresh suit. It is clear that there is no justification for this. If the learned Munsif saw no reason for allowing the withdrawal in terms of O XXIII, r. 1, sub-s. (2), he should simply have refused the application and proceeded with the suit; or give the plaintiff an opportunity of accepting or refusing an unconditional withdrawal. I set aside the order of the Munsif dated the 15th of March 1924 and remand the case to his Court with the direction that he should proceed to decide the case on the merits. Costs will abide the result.

Z. K. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 126 OF 1924.

October 2, 1924.

Present:—Mr. Neave, A. J. C.

MAULA BUX AND ANOTHER—DEFENDANTS—APPLICANTS

versus

AHBARAN AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Contract Act (IX of 1872), ss. 70, 72—Revenue paid by plaintiff for defendant by mistake—Suit to recover amount paid, nature of—Contribution, suit for—Jurisdiction of Small Cause Court.

The word "contribution" as used in Art. 41 of Sch. II to the Provincial Small Cause Courts Act signifies a payment by each of the parties in respect of his share in any common liability.

Plaintiff filed a suit for recovery of a sum of money from defendant which he alleged had been paid by him by mistake on account of land revenue due from the defendant:

Held, that the suit was one to recover money under the provisions of s. 70 or s. 72 of the Contract Act and was not a suit for contribution within the meaning of Art. 41 of Sch. II to the Provincial Small Cause Courts Act and was not, therefore, excluded from the jurisdiction of a Small Cause Court.

Nath Prasad v. *Baij Nath*, 3 A. 66; 2 Ind. Dec. (N. S.) 43 (F. B.), relied on.

Revision against a decree of the Sub-Judge, Small Cause Court, Bara Banki, dated the 31st May 1924.

Mr. *S. M. Ahmad*, for the Applicants.

Mr. *Hyder Husein*, for the Opposite Party.

ORDER.—This is an application for the revision of an order of the Sub-Judge of Bara Banki sitting as Judge of the Court of Small Causes. The plaintiff-respondent filed a suit for recovery of a sum of money which he alleged had been paid by a mistake by him on account of land revenue due from the defendants-applicants. The facts found by the Court are that the parties were joint co-sharers of property in certain villages. Imperfect partition was effected and a *jamaphant* of the revenue was prepared in the course of these proceedings, under which the liability for the payment of revenue was separately distributed to the co-sharers. The plaintiff was not certain what the exact amount due from him was for the years in suit, and apparently to be on the safe side paid more than was necessary. He now seeks for re-imbursement of the excess paid by him which has been credited to the applicants.

The only ground pressed before this Court for interference in revision is that the jurisdiction of the Court of Small Causes was barred under Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act of 1887. This runs: "a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer." It is contended that this is precisely such a suit as is described in that Article. The question was discussed by the learned Sub-Judge in his finding on the preliminary issue, and he came to the conclusion that the suit was not really one for contribution, but, in fact, a suit to recover money under the provisions of either s. 72 or s. 70 of the Indian Contract Act. This view appears to be the correct one. Contribution has been defined as signifying payment by each of the parties in respect of his share in any common liability. In the present case, the plaintiff was no longer liable, after the proceedings in the partition case, for the defendant's share of what had been the joint land revenue, and any payment made by him on behalf of the defendant was clearly a payment lawfully made, and not intended to be made gratuitously, of which the benefit was enjoyed by the defendant, who is, therefore, bound under s. 70 of the Indian Contract Act to make compensation. The case is similar to that decided by a Full Bench of the Allahabad High Court in *Nath Prasad* v. *Baij Nath* (1). The application fails and is dismissed with costs.

Z. K. *Application dismissed.*

(1) 3 A. 66; 2 Ind. Dec. (N. S.) 43 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 654 OF 1923.
November 19, 1924.
Present:—Mr. Justice Mukerji.
Chaudhri DALMIR SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
JOTI PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 139, 144 --Landlord and tenant—Tenant holding over after expiry of lease--Adverse possession--Ejectment suit—Limitation—Co-sharer holding under lease—Failure to pay rent for long period, effect of.

A tenant who holds on to the land after the expiry of the term of his lease cannot be said to be holding "adversely" to the landlord. As long as he is in possession he cannot deny that it was from the lessor that he got the land. [p. 551, col. 1.]

Jai Chand Bahadur v. *Girwar Singh*, 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669, referred to.

Where, however, a tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease under Art. 139 of Sch. I of the Limitation Act and after the expiry of 12 years the title of the landlord must cease by the application of s. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Article 144 of Sch. I of the Limitation Act has nothing to do with such a case. [*ibid.*]

Bisheshar Nath v. *Kundan*, 75 Ind. Cas. 454; 20 A. L. J. 593; 44 A. 583; (1922) A. I. R. (A.) 318, referred to.

Where a co-sharer who obtains a lease of the joint property from the other co-sharers continues in possession of the property after the expiry of the lease, without payment of rent or a share in the profits to the other co-sharers for a very long period of time, the only inference possible is that he holds adversely to the other co-sharers and not as a co-sharer. [p 551, col. 2.]

Second appeal against the decree of the District Judge, Saharanpur, dated the 20th February, 1923.

Messrs. *Bhagwati Shankar* and *Durga Prasad*, for the Appellants.

Mr. *Baleshwari Prasad* for Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal must succeed. The plaintiff in the Court of first instance is the respondent No. 1 here. He purchased from the respondent No. 2 *Musammat* Kartari and his sister *Musammat* Jeoni a half share in what was once their father Kalyan Singh's property. The appellants, who were the defendants Nos. 1 to 4 in the Court of first instance, are admittedly in possession of this property. The other half was sold by Kalyan Singh himself. There was a litigation relating to that half, between the purchasers and the present appellants and in that litigation the present appellants were successful. We have, however, nothing to do with that case. The plaintiff said in the plaint that there was an arrangement made between Kalyan Singh and the defendants, who also had shares in the same *khewats*, that the defendants should manage the property and pay Kalyan Singh a certain amount of profits year by year. He further alleged that this arrangement continued up to 1911. It was clearly the idea to show that the plaintiffs's predecessors-in-interest and the plaintiff had been in possession within 12 years of the suit. The claim was for recovery of possession.

The defendants pleaded that they had been in adverse proprietary possession for more than 12 years and the title of the plaintiff's predecessors was extinguished.

The learned Subordinate Judge found that in 1860 there was a lease granted by Kalyan Singh in favour of the predecessors-in-title of the appellants and the term of the lease was for 15 years. The rent fixed was Rs. 30 per annum. Since the expiry of the lease no rent was paid. In the view of the learned Subordinate Judge, on these facts, the suit was time-barred. The learned Subordinate Judge also considered the question whether the fact that the defendants were co-sharers of Kalyan Singh, in any way favoured the plaintiffs' case. He found that even if the defendants' position be considered as co-sharers, they had definitely proved an ouster by the fact that they had never paid any rent or profit since 1870. On these facts the suit was dismissed.

The learned District Judge took the facts as found by the learned Subordinate Judge. He said that the facts were tolerably clear and that the only question was the legal inference to be drawn from them. He held that the mere fact that after the expiry of the lease the defendants' predecessor-in-interest did not pay any rent, did not make their possession adverse to Kalyan Singh or his estate. He relied on the case of *Jai Chand Bahadur* v. *Girwar Singh* (1) and decreed the suit.

Two points have been urged on behalf of the respondents. First, the learned Counsel appearing for the respondents has tried to support the judgment as it stands. He has further urged that the fact that the parties were co-sharers has not been considered adequately by the learned District

(1) 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669.

Judge. He argued that the suit could not be time-barred, being as between co-sharers.

On the question of adverse possession, there can be no doubt that a tenant who holds on to the land after the expiry of the term of the lease, cannot be said to be holding "adversely" to the landlord. Indeed, so long as he is in possession, he cannot deny that it was from the lessor that he got the land. But this is not conclusive of the matter. Where the tenant holds on after the expiry of the lease, whatever name may be given to him, whether we may call him a 'tenant' by sufferance or not, time begins to run against the landlord from the date of the expiry of the lease, under Art. 139 of the Limitation Act. After the expiry of 12 years, the title of the landlord must cease by the application of s. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Thus, whether the possession of the appellant's predecessors was adverse or not, in the strict sense of the word, is immaterial. Article 144 of the Limitation Act has nothing to do with the case. On this point I may mention the case of *Bisheshar Nath* v. *Kundan* (2). The learned Judge's opinion cannot be upheld.

Coming to the question of the plaintiff's position as a co-sharer, the matter seems to stand thus. In the plaint the plaintiff, no doubt, alleged that the present appellants were his co-sharers in the *mahal*. He ignored the fact that a lease had been granted by Kalyan Singh. He made the wrong allegation that the appellants had been paying the share in the profit, harvest by harvest, up to June 1911. The learned Subordinate Judge considered the abstract question as to whether from the fact that the appellants were co-sharers of the plaintiff, the plaintiff could derive any benefit. The definite finding is that the appellants paid nothing to the plaintiffs' predecessors-in-title in 1870 and on-wards. The learned Judge drew the inference that in the circumstances there was a complete ouster of the plaintiff's predecessors by the appellants. This petition has not been considered by the learned District Judge. But from the fact that he has mentioned that he accepts the finding of the learned Subordinate Judge as correct, I will take it that he was also of opinion that originally the appellants were co-sharers of Kalyan Singh. Now, the question is whether in spite of the expiry of the lease and in spite of the fact that after 1870 the appellants or their ancestors never paid any rent or share in profit, it can be said that their possession continued *as co-sharers*. There can be only one inference possible in the circumstances, *viz.*, they held adversely and not as co-sharers.

The appeal succeeds The decree of the Court below is set aside and the decree of the Court of first instance is restored. The appellants will have their costs throughout and the costs in this Court will include Counsel's fees on the higher scale.

Z. K. *Appeal allowed.*

(2) 75 Ind. Cas. 454; 20 A. L. J. 593; 44 A. 583; (1922) A. I. R. (A.) 318.

PATNA HIGH COURT.

In the matter of MISCELLANEOUS CIVIL APPEAL No. 108 OF 1924.

July 29, 1924.

Present:—Mr. Justice Das and Mr. Justice Foster.

AMAR KUMAR MUKHERJEE AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MR. B. COVENTRY AND OTHERS— DEFENDANTS—RESPONDENTS.

Batwara *proceedings—Injunction restraining party to civil suit from proceeding with* batwara *proceedings, whether can be granted—High Court, power of.*

The High Court has no jurisdiction over the *Batwara* Court, but it has complete jurisdiction over the parties to a civil suit pending in a Court subordinate to it, and will always assert its right to act *in personam*. In a proper case it will grant an injunction restraining any party to a civil suit from proceeding with *batwara* proceedings until the determination of the civil suit. In such a case it will not assume that the *Batwara* Court will take any step which is unfair to the party thus restrained or which will compel the latter to act in any way inconsistently with its duty of obedience to the High Court.

Mungle Chand v. *Gopal Ram*, 34 C. 101, referred to.

Application.

Mr. *S. N. Bose*, for the Appellant.

Mr. *Baikuntha Nath Mitter* representing Defendants 1st Party and 3rd Party and Mr. *Lachmi Narain Singh*, representing Defendant 2nd Party, for the Respondents.

JUDGMENT.—By consent of the parties the order in this application will be treated as deciding the Miscellaneous Appeal No. 108 of 1924. The application itself is for an injunction upon the respondents third party restraining them from pro-

ceeding with certain *batwara* proceedings. The facts are these:—The appellants who are the plaintiffs in the suit now pending in the Court of the Subordinate Judge of Monghyr are ten-annas proprietors of *Touzi* No 1002 which is under Collectorate partition. The defendants third party are the six-annas proprietors of *Touzi* No. 1002. The defendant second party is the sixteen-annas proprietor of *Touzi* No. 1001 and we are informed that the lands of *Touzi* No. 1001 are mixed up with the lands of *Touzi* No. 1002. The defendants first party are the *thikadars* of *Touzi* No. 1002 and the question between the plaintiffs-appellants and the defendants first party in the suit is in substance whether the disputed lands in the suit are the *bakasht* lands of the proprietors of *Touzi* No. 1002 or the tenancy lands of defendants first party. The defendants first party are not parties to the *batwara*, although they made an application for being added as parties thereto. The plaintiffs applied for an injunction in the Court below restraining the defendants third party from proceeding with the *batwara* proceedings. A petition was filed by most of the defendants who have been cited as defendants third party in this action submitting to the injunction prayed for; it appears that defendants Nos. 15, 22, 24 and 67 amongst some others did not join in that application. Mr. B. N. Mitter appears for the defendants first party who are the *thikadars* of *Touzi* No. 1002 and for defendants Nos. 15, 22, 24 and 67 who have been cited as defendants third party. As against the order of the learned Subordinate Judge refusing to grant an injunction the plaintiffs have presented an appeal to this Court which is Miscellaneous Appeal No. 108 of 1924. The present application has been made in Miscellaneous Appeal No. 108 of 1924 and the application in substance invites this Court to pass an order upon the defendants third party restraining them from proceeding with the *batwara* proceedings.

Mr. Lachmi Narain Singh appearing on behalf of the defendant second party says that he is only interested in the suit being disposed of as soon as possible as his lands are mixed up with *Touzi* No. 1002 and he contends that the *batwara* proceedings should be carried on with all convenient speed.

Mr. Baikuntha Nath Mitter appears on behalf of the defendants first party and defendants Nos. 15, 22, 24 and 67 who are in the category of defendants third party. So far as he represents the defendants first party, obviously he has nothing to do with the application, because his clients are not parties to the *batwara* proceedings So far as he represents defendants Nos. 15, 22, 24 and 67 it is to be remembered that it is to the interest of the defendants third party as a whole that the question whether the disputed lands are the *bakasht* of the *maliks* or the tenancy of the defendant first party should be disposed of before the *batwara* proceedings are proceeded with. Mr. Baikuntha Nath Mitter on behalf of defendants Nos. 15, 22, 24 and 67 is prepared to admit the claim of the defendants first party but we are not concerned with that in this appeal. The important point to be remembered is that most of the defendants constituting the defendants third party did file an application to the Court below submitting to the injunction prayed for.

It is pointed out by Mr. S. N. Bose on behalf of the plaintiffs that his clients will suffer an irreparable injury if the *batwara* proceedings are proceeded with. It is doubtful whether the plaintiffs will have any remedy at all if they succeed in the suit which they have filed in the Court of the Subordinate Judge of Monghyr.

Mr. Baikuntha Nath Mitter points out that we have no jurisdiction over the Batwara Court; that is true enough; but we have complete jurisdiction over the parties to the suit and this Court will always assert its right to act *in personam*. It is contended by Mr. Baikuntha Nath Mitter that his clients will be placed in great difficulty if the Batwara Court should decide to proceed with the *batwara* proceedings. But we have no right to assume that the Batwara Court will, to quote the words of Sale, J., in *Mungle Chand* v. *Gopal Ram* (1), take any step unfair to those defendants or compel them to act in any way inconsistent with their duty of obedience to this Court. On the whole we are satisfied that the learned Subordinate Judge should have granted the injunction prayed for. That being our opinion we allow Miscellaneous Appeal No. 108 of 1924 and set aside the order passed in the Court below and we restrain the defendants third party from proceeding with the *batwara* proceedings until the determination of the suit pending

(1) 34 C. 101.

in the Court of the Subordinate Judge of Monghyr.

It is desirable that the suit pending in the Court of the Subordinate Judge of Monghyr should be disposed of with all convenient speed and we direct the learned Subordinate Judge to proceed with the suit so that decision in the suit may be arrived at before the end of this year. The costs of this appeal will be costs in the suit itself and will be dealt with by the learned Subordinate Judge.

Z. K *Order set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 295 OF 1924.

May 26, 1924.

Present:—Mr. Justice Martineau.

SAAD ULLAH—PLAINTIFF—APPELLANT

versus

IBRAHIM—DEFENDANT—RESPONDENT.

Shamilat *land—Sale by co-sharer—Purchaser, rights of.*

A co-sharer in *shamilat* land is not competent to sell full proprietary rights in a specific plot out of the *shamilat* land, but a sale by him nevertheless holds good to the extent of conveying the rights which he can sell, including the right to retain possession till partition. [p. 553, col. 2.]

Where a co-sharer has been long in possession of a portion of the *shamilat* land no other co-sharer can oust him therefrom or even get joint possession with him, so long as a partition of the *shamilat* does not take place. A transferee from such a co-sharer has the same rights in the land as his transferor had. He is entitled to undisturbed possession of the land as long as the *shamilat* is not partitioned, and the other co-sharers have no right to prevent him from building on the land. [*ibid.*]

Muhammad Amin v. *Karm Das*, 69 Ind. Cas. 671; (1924) A. I. R. (L) 293, followed.

Second appeal against the order of the District Judge, Karnal, dated the 4th January 1924, reversing that of the Sub-Judge, Fourth Class, Karnal, dated the 28th March 1923.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Gullu Ram* for Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—The plaintiff bought a plot of *shamilat* land in the village *abadi* in 1916 from Tulsi Ram, who had bought it in the preceding year from two of the village proprietors named Allahdiya and Kimun. He is prevented by the defendants, who are village proprietors, from building a wall on the land, so he sues them for an injunction. The Trial Court, granted an injunction but the District Judge on appeal has dismissed the suit on the ground that Allahdiya and Kimun were not competent to sell a specific plot out of the common land. The plaintiff has filed a second appeal.

Although Allahdiya and Kimun, not being the sole owners of the land, could not sell the full proprietary rights, the sale by them nevertheless holds good to the extent of conveying the rights which they could sell including the right to retain possession till partition. It has been held in *Muhammad Amin* v. *Karm Das* (1), in which various rulings on the point have been considered, that when a co-sharer has been long in possession of a portion of the *shamilat* land no other co-sharer can oust him therefrom or even get joint possession with him as long as a partition of the *shamilat* does not take place. The plaintiff has the same rights in the land that his predecessors-in-title had. He is entitled to undisturbed possession of the land as long as the *shamilat* is not partitioned, and the defendants have no right to prevent him from building on the land.

I accordingly accept the appeal, reverse the lower Appellate Court's decree, and restore the decree of the Court of first instance. The respondents will pay the appellant' costs in all the Courts.

Z. K. *Appeal accepted.*

(1) 69 Ind. Cas. 671; (1924) A. I. R. (L.) 293.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 730 OF 1921.

February 27, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

TARA PRASANNA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RANJIT LAL MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of some of several defendants—Abatement, extent of—Application to set aside abatement—Procedure.

Where some of the defendants to a suit die during the pendency of the suit and their legal representatives are not brought on the record within limitation, but an application is subsequently made for setting aside the abatement, it is desirable that the case of each of

the deceased defendants should be dealt with on its merits and that it should be held with regard to each of them whether the suit has abated and if so, whether there is no just cause for setting aside the abatement. [p. 555, col. 1.]

In a suit for ejectment against several tenants some of the defendants died during the pendency of the suit and their legal representatives were not brought on record within limitation. It was found that in their written statements the defendants had stated with precision exactly what plots they were individually and separately in possession of, so that it was possible to grant to the plaintiff, if he succeeded on the merits, a decree for ejectment with regard to specific plots against each set of tenants:

Held, that under the circumstaces the result of the death of some of the defendants was that the suit had abated with regard to the interests of the deceased defendants alone and could be proceeded with with respect to the interest of the surviving defendants. [p. 555, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 7th of October 1920, affirming that of the Subordinate Judge of that district, dated the 28th February 1910.

Babus *Dwarka Nath Chakravarty* and *Kali Kinkar Chakravarty*, for the Appellants.

Babus *Mohendra Nath Roy*, *Patit Paban Chatterjee* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

Mukerji, J.—The suit out of which this appeal arises was commenced in the year 1908. The plaintiffs as *darpatnidars* instituted this suit against the *zemindars*, the *patnidars* and certain tenants, for a declaration that they were entitled to obtain settlement of certain lands as being *chaukidar chakran* lands included within their *darpatni mehals* and for recovery of *khas* possession and *wasilat* on the ground that the said lands having been resumed by the Collector and assessed to rent had been settled with the *zemindar* who had wrongfully granted settlement thereof to the said tenants. The *zemindar* was the defendant No. 1, the tenants defendants Nos. 2 to 18 and the *patnidars* defendants Nos. 19 to 64 in the suit.

The Subordinate Judge dismissed the suit in its entirety. On appeal the District Judge made an order for remand, which, on a further appeal to this Court was varied, and the Subordinate Judge was directed to take evidence and record his findings on certain issues and send them up to the lower Appellate Court.

When the matter was pending before the Subordinate Judge a *solenama* was filed as between the plaintiffs and the defendant No. 1, whereby the plaintiffs' *darpatni* right to the lands and their rignt to *khas* possession was admitted and the plaintiffs gave up their claim to *wasilat* and costs as against him and also as against those tenant defendants who would not contest their claim. It is unnecessary to refer to the other terms of the *solenama*.

The Subordinate Judge found, (*a*) that the plaintiffs' title had been proved, (*b*) that the plaintiffs were entitled to *khas* possession, and (*c*) that as for *wasilat* and costs in view of the terms of the aforesaid *solenama* it would have to be decided by the lower Appellate Court as against which of the defendants the same would be decreed.

These findings were sent up to the learned District Judge, and before him two more *solenamas* were filed, one between the plaintiffs and the defendants Nos. 19 to 64 by which amongst other terms the plaintiffs' right was admitted, and the other between the plaintiffs and the heirs of defendants Nos. 13 and 15 and some of the heirs of defendant No. 18, the latter giving up possession of certain plots of lands which they were holding.

The learned District Judge at the hearing of the appeal came to the conclusion that applications for substitution had not been made in the case of the heirs of some of the defendants within the time allowed by law and the suit had abated as against them. He also held that the application which the plaintiffs made for setting aside the abatement should not succeed. He held further that inasmuch as the relief of ejectment had been claimed in the suit against the whole body of tenants as a whole, and there was nothing in the plaint to show what specific plots were in the occupation of each of the tenants, the whole suit must be dismissed. In that view of the matter he passed a decree disposing of the appeal on the basis of the two *solenamas* filed before him as above, and dismissing the appeal and the suit as against the rest of the defendants.

The plaintiffs have preferred this appeal against the aforesaid decree and the contentions put forward on their behalf are mainly three: *Firstly*, that the order for substitution had already been passed by the Court and the reasons given for setting aside the orders and declaring that the suit had abated were not based on

sufficient materials and that in making the said order the learned District Jubge did not discriminate between the individual cases in which different considerations arose; *secondly*, that in refusing the application to set aside the abatement, the learned District Judge was wrong in rejecting it wholesale, he himself found that out of a large number of cases there were only four in which unreasonable delay had taken place; and *lastly*, that the view taken by the learned District Judge that the whole suit must fail was wrong.

In support of the first two contentions, which may be taken together our attention has been drawn to some of the petitions, affidavits and orders relating thereto. It appears that the heirs of defendants Nos. 4, 7 and 9 were allowed to be brought on the record upon an affidavit filed on behalf of the plaintiffs in which the dates of the respective deaths were not mentioned. From an affidavit filed on behalf of the defendants it appears that defendant No.4 died in *Pous* 1312, No. 7 in *Aswin* 1318, and No. 9 in Pous 1325; and that certain other defendants *viz.*, No. 3 died in *Aughrayan* 1324 and No. 6 in *Chaitra* 1323. It appears again from an affidavit filed on behalf of the plaintiffs that the defendant No. 13 died in *Ashar* 1327 and defendant No. 18 died in *Jaista* 1327; while from a petition filed on behalf of the defendants it appears that defendant No. 18 died in *Augfrayan* 1324, and we find no challenge as to the date of the death of defendant No. 13 as given by the plaintiff. The applications for substitution were made on different dates, that is to say the period of delay is not the same in all cases, the intervals ranging from less than 3 months to more than 9 years.

On the whole it seems to us that each case has not been individually considered on its own merits. It may be that in the view that the learned District Judge took of the maintainability of the suit it was not necessary for him to do so; but having regard to what we think of the matter it is desirable that each of the cases should be dealt with on its merits and with regard to each of them it should be held whether the suit has abated and if so whether there is any just cause for setting aside the abatement.

As to the last contention put forward on behalf of the appellants, the rulings relied upon by the learned District Judge do not seem to be applicable to the present case. The case of *Narendra Nath Kuti* v. *Satyadhan Ghoshal* (1) was one in which it was held that in the absence of one of several joint tenants, the others could not proceed with an appeal against the landlords in which they were seeking to claim abatement of rent, and the decision proceeded upon the meaning to be attached to the word tenant in s. 52 of the Bengal Tenancy Act, namely, the entire body of tenants and not merely a co-sharer tenant. In the case of *Kali Dayal Bhattacharya* v. *Nagendra Nath* (2), the plaintiffs had jointly obtained a decree declaring certain lands as being included within their estate, the defendants preferred an appeal and challenged the decree in the absence of the heirs of one of the plaintiffs and it was held that the appeal was imperfectly constituted; the principle of that decision, as also of the authorities referred to therein being that if the decree of the Trial Court was reversed there will be two conflicting decrees in existence passed in the same litigation. In the present case the facts seem to be wholly different. It is true that the plaintiffs constituted the suit as against the tenant defendants as if they were joint tort feasors and asked for a decree for *khas* possession against them in a body; but it appears that the tenant defendants have filed written statements in which they have stated with precision exactly what plots they are individually and separately in possession of. The learned District Judge has observed in his judgment that " in the facts pointed out it is certainly possible to prepare a decree" but he thinks that that decree " would give effect to a relief which is not covered by and is different from the case of the plaintiff." I am unable to assent to this latter view. Should the plaintiffs succeed on the merits, they will be entitled to a decree against the respective tenants who may be found, either upon their own admission or otherwise to be in possession of specific plots of land provided they are not jointly interested therein with any against whom the suit may be held to have abated. This view is in accord with that taken by this Court in the case of *Sarat Kamini Dasi* [*Jamini Mohan*

(1) 54 Ind. Cas. 396; 30 C. L. J. 203.
(2) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217.

Sircar] v. *Chaitanya Chandra Prohoraj* (3).

I would, therefore, set aside the decree of the District Judge and remand the case to him to be dealt with in the light of the observations made above. No order is made as to costs.

Walmsley, J.—I agree.

Z. K. *Case remanded.*

(3) 67 Ind. Cas. 200; (1923) A. I. R. (C.) 289.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1346 OF 1919.

November 12, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

TEK CHAND—DEFENDANT—APPELLANT

versus

TARA CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 17—Pre-emption, suit for—Decree on payment of certain sum—Appeal by vendee claiming dismissal of suit or enhancement of decretal amount—Alternative reliefs—Court-fee payable.

In a suit to pre-empt the sale of a house the plaintiff asserted that the ostensible price mentioned in the sale-deed, *viz.*, Rs. 10,000, was fictitious and claimed a decree on payment of Rs. 5,100. The suit was decreed on payment of Rs. 6,800. The vendee appealed claiming that the suit should be dismissed or else that the plaintiff should be required to pay him an additional sum of Rs. 3,200. The appeal was valued at Rs. 6,800 and Court-fees were paid accordingly:

Held, that the reliefs claimed in appeal were alternative reliefs based on the same cause of action and only one of them could be granted, that they were not two distinct subjects within the meaning of s. 17 of the Court Fees Act, and that the correct fee, therefore, was one calculated not on the aggregate of the two values but on the higher of the two. [p. 557, col. 1.]

First appeal from the decree of the Subordinate Judge, First Class, Lahore, dated the 22nd March 1919.

Mr. *Gullu Ram*, for the Appellant.

Bakhshi *Tek Chand*, Messrs. *Tirath Ram* and *Kahan Chand*, for the Respondents.

JUDGMENT.—This judgment will dispose of two appeals Nos. 1283 and 1316 of 1919 against the decree of the Subordinate Judge, Lahore in a suit for pre-emption.

A certain house in Said Mitha Bazar, Lahore City, belonged to a family of Sardars of Killa Jiwan Singh. It was partitioned about the year 1894 and the northern half fell to the house share of Rajindar Singh, who in 1914 sold it to Tara Chand. The southern half went in equal shares to Kehr Singh and Dhian Singh and is the subject of the present suit.

Tara Chand is the plaintiff. He asserted that the whole of the southern half has been sold by Kehr Singh and Dhian Singh to Tek Chand ostensibly for Rs. 10,000 but really for Rs. 5,100 and that in the sale-deed registered on 18th June 1918 it was falsely stated in order to defeat his right of pre-emption that a strip including every portion of the southern half which touches the northern half has been reserved by the vendors.

It is convenient to describe this strip as part B, the portion ostensibly sold according to the sale-deed part A. and Tara Chand the pre-emptor's house as C.

Tara Chand claimed a right of pre-emption on the grounds both of dominance and contiguity. The vendors and vendee denied that B had been sold and pleaded that Tara Chand had no right of pre-emption in respect of A, because A neither touched his property nor was a servient tenement thereto.

The Trial Court has held that part B was sold along with part A, that the plaintiff, therefore, was an owner of immoveable property contiguous with the property sold and had a right to pre-empt, that Rs. 10,000 the ostensible price, was neither paid nor fixed in good faith, and that the market-value was the price actually paid, *viz.*, Rs. 6,800. The plaintiff was granted a decree for possession on payment of this amount, there being eventually no contest about the existence in the locality of a custom of pre emption.

Appeal No. 1283 is by the vendors contesting the decision that B was sold, and Appeal No. 1346 is by the vendee contesting this point and also the findings as to non-payment of the ostensible price and market-value.

We overruled a preliminary objection by Mr. Tek Chand, Advocate for the respondent, that the vendee's appeal is insufficiently stamped. The vendee has valued his appeal at Rs. 6,800, the figure at which the Court below has valued the property in suit and the suit itself which was originally valued by the plaintiff at Rs. 5,100. The vendee asks for a decree restoring that

property to him or else requiring the successful pre-emptor to pay him an additional sum of Rs. 3,200. These are two alternative reliefs based on exactly the same cause of action and only one of them can be granted. They are not two distinct subjects within the meaning of s. 17 of the Court Fees Act and the correct fee is one calculated not on the aggregate of the two values but on the higher of the two. The fact that this appellant himself asserts the value of the property to be Rs. 10,000 does not affect the question.

NOTE:—The rest of the judgment is not material for the purposes of this report—[*Ed.*]

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 42 OF 1924.
July 24, 1924.
Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

B. DWARKADHISH PRASAD SINGH—APPELLANT
versus
Maharaja KESHAVA PRASAD SINGH—RESPONDENT.

Compromise—Undue influence and coercion—Decree based on compromise challenged—Procedure.

The proper remedy in a case where a decree passed in accordance with a compromise is assailed on the ground of undue influence, coercion and compulsion is not by way of motion or application for review of judgment but by a regular suit to set aside the decree.

Shaminath Choudhri v. *Ramjas*, 13 Ind. Cas. 80; 9 A. L. J. 1; 34 A. 143, followed

Letters Patent Appeal against a judgment of the Mr. Justice Piggott, dated the 18th December 1923 and printed as 82 Ind. Cas. 1022.

Mr. *N. P. Asthana*, for the Appellant.

JUDGMENT. — This appeal arises under the following circumstances.

An original suit pending in the Court of the Subordinate Judge, Benares, was transferred to this Court to be tried originally. It was pending before Mr. Justice Piggott. An application was filed in the case purporting to be a compromise between the parties under which the suit was to be withdrawn under certain circumstances. Mr. Justice Piggott ordered that the plaintiff should appear in person and fixed a date for his appearance. On that date he did not appear but his Counsel, Mr. Sultan Ahmad, appeared and assured the learned Judge that he had been personally instructed by his client to press the application. Acting on this assurance of the learned Counsel and the affidavit before him, the learned Judge held that the suit had been properly adjusted, and ordered that it be decreed in terms of the compromise. A decree was accordingly drawn up.

Subsequently the plaintiff applied to the learned Judge to set aside that compromise decree. The application did not state whether it was made under s. 151, C. P. C., or under O. XLVII of the Code. No express allegations of fraud were contained in the affidavit filed in support of the application, but there were allegations of undue influence, coercion, criminal intimidation, wrongful confinement and compulsion.

The learned Judge came to the conclusion that this was not a case which called for the exercise of any inherent powers which he possessed. He also held that the application did not directly come under O. XLVII, and that even if it could be said to fall under that Order, he was not prepared to allow it as he was not prepared to believe the allegations made in the affidavit. He accordingly dismissed the application.

An appeal under the Letters Patent has been preferred from this order. Assuming that that order was a judgment and that an appeal under the Letters Patent lies from it, we are of opinion that it has no merits.

The allegations of the plaintiff merely amount to saying that the compromise filed in Court was a voidable document, having been executed under undue influence, coercion and compulsion, that is to say, at a time when he was not a free agent or a free consenting party. The document, therefore, on those allegations was a voidable document and was good so long as it had not been avoided. At the time when the compromise was filed before the learned Judge he was perfectly justified in passing a decree in terms of it.

If it is true that the undue influence, coercion or compulsion, have now been removed and the applicant wishes to avoid the compromise decree he is entitled to do so by a regular suit. The compromise decree stands on the same footing as the compromise itself and would be vitiated equally with the compromise. The proper

remedy in a case of this kind is by a regular suit. We may refer to the case of *Shami Nath Choudhri* v. *Ramjas* (1) where, it was held that even if there was a remedy by way of motion or application for review of judgment, nevertheless it was open to the plaintiff to proceed by suit in the matter of attacking a compromise decree which was voidable. We accordingly dismiss the appeal summarily.

K. S. D. *Appeal dismissed.*

(1) 13 Ind. Cas. 80; 9 A. L. J. 1; 34 A. 143.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 68 AND 69 OF 1923.
November 25, 1924.
Present:—Mr. Dalal, J C., and
Mr. Wazir Hasan, A. J. C.
Thakur SHIAM SUNDAR SINGH—
DEFENDANT—APPELLANT
versus
Thakur JAGANNATH SINGH—
PLAINTIFF—RESPONDENT.

Succession Act (X of 1865), ss. 50, 54—Evidence Act (I of 1872), s. 90—Will by taluqdar—*Attestation by devisee—Evidence that devisee did not sign as attesting witness, whether admissible—Will thirty years old—Execution—Attestation—Presumption.*

It is open to a party to rebut the presumption arising from the face of a document that persons who purported to be attesting witnesses were really not such. [p. 559, col. 1.]

A Will executed by a *taluqdar* contained the following clause :—"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will should be acted upon fully and they may not quarrel among themselves after my demise." The sons of the testator put their signatures to the Will, each signature being put under the word "witnses" :

Held, that the testator obtained the signatures of his sons for some special purpose of his own and that this was sufficient indication of a want of intention of attestation by them and that they were entitled to lead evidence to show that they did not sign the Will as attesting witnesses. [p. 560, col. 2.]

According to Indian ideas of dignity it would be derogatory to the sons of a *taluqdar* to sign a document after men of small circumstances, whatever may be the object for which the signatures of the sons of the *taluqdar* may have been obtained. [p. 561, col. 1.]

Where all the attesting witnesses to a Will which is more than thirty years old and is produced from proper custody are shown to have been dead, a presumption may be drawn as to its genuineness and proper attestation, under s. 90 of the Evidence Act. [p. 562, col. 1.]

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 27th August 1923.

Messrs. *E. R. Qudwai, Niamat Ullah, Awadh Behari Lal* and *Radhe Lal*, for the Appellant.

Messrs. *Bisheshar Nath, Wasi Hasan* and *Mohammad Sibtain*, for the Respondent.

JUDGMENT.—These are two connected appeals from decrees in two suits brought for the possession of under proprietary rights in two separate properties by two uncles of a *taluqdar*. The *taluqdar* is the defendant Shiam Sundar Singh. His two uncles Jagannath Singh and Ran Bahadur Singh brought the suits for possession and their suits were decreed. Shiam Sundar Singh has appealed in consequence.

The right to possession was based on a Will executed by Drigbijay Singh, father of the plaintiffs and grandfather of the defendant, on 17th of December, 1886. Shiam Sundar Singh's father, who was the eldest brother of the plaintiffs and *taluqdar* during his lifetime after the death of Drigbijay Singh, was Lal Bahadur Singh. The genuineness of the Will is not questioned here. Under the Will which was executed by the *taluqdar* as required by s. 13 of the Oudh Estates Act, 1869, he appointed his eldest son Lal Bahadur Singh *taluqdar* and made bequest of under-proprietary rights in different villages to his three other sons. Under s. 19 of the Act, ss. 50 and 54 of the Indian Succession Act X of 1865 are made applicable to all Wills and codicils made by any *taluqdar*. The only point argued in the present appeals was that Jagannath Singh and Ran Bahadur Singh plaintiffs of the two suits being attesting witnesses to the Will, the bequest in their favour was void under s. 54 of the Indian Succession Act.

The answer of the learned Subordinate Judge to this argument was that under the Law of England on which the provisions of the Indian Succession Act are based, it was open to the plaintiffs to produce evidence to show that they were not attesting witnesses but signed the Will for some other purpose, that the evidence produced by them satisfied him that it was neither their desire nor the desire of the testator that they should be attesting witnesses, that they had not the mind to attest the Will and that their signatures were obtained with a view to show their consent to the family arrange-

ment and to prevent them acting otherwise than according to the desire of the testator and *taluqdar* Drigbijay Singh.

The learned Counsel on both sides took us through all the important rulings of English Courts on the subject. As to Indian Cases the argument of a Bench of this Court in the *Kalakankar case*, *Narain Singh* v. *Deputy Commissioner of Partabgarh* (1) would indicate from the report at page 119 that it was open to a party to rebut the presumption arising from the face of a document that persons who purported to be attesting witnesses were really not such.

The English cases range from 1866 to 1899. In the case of *In the goods of Wilson* (2), the Will ended at the bottom of the first page with the signatures of the testator and of a witness and at the top of the next page were certain words describing a Leasehold property. There were three signatures beneath this description. Evidence was permitted in this case to show whether those who had signed below the discription of the Leasehold property were attesting witnesses or not and the Court held that they were not and refused Probate because without those signatures there was the signature of only one attesting witness. In this case parol evidence was discussed and we consider this case to be authority for the proposition that such evidence may be admitted and may be considered to determine whether certain persons, whose names appear on the face of the Will, are attesting witnesses or not. The next case is that of *Dunn* v. *Dunn* (3). Here the question was in what capacity one R. Fowle had signed at the foot of the Will. The learned Judge held that the question was one of fact and that the Court must inquire what was the transaction which led to Fowle putting down his signature. On the evidence it was held that Fowle signed the Will as a receipt for the delivery thereof and not as an attesting witness. In the same volume at page 661 is reported the case of *In the Goods of Sharman* (4). Here also evidence was taken and on the basis thereof it was decided that the lady A. Sharman who, on the face of the document appeared to be an attesting witness, was really not such and had put down her signature because one of the attesting witnesses was under the impression that it was the proper course to pursue and that the legatee Miss Sharman should sign the Will, though the testator thought that the lady ought not to sign. The same Vice-Chancellor Lord Penzance who delivered judgment in the case of *In the Goods of Sharman* (4) heard and decided the case of *Griffiths* v. *Griffiths* (5). Referring to the former case he observed: "I then investigated the question whether the third person signed as a witness, or whether the execution was completed without his signature. Making the same inquiry in this case, I come to the conclusion that Homer did sign as a witness". The learned Judge discussed the evidence and came to that finding. Homer was executor and on the face of the document it would appear that he had signed as executor. The learned Judge, however, went into the question of fact and on the evidence produced before him came to the conclusion that Homer signed as an attesting witness also and that, therefore, the Will was valid. The same principles were observed in the case of *In the goods of Smith* (6). On evidence the learned Judge decided that the wife of the testator who was a legatee had affixed her signature to the Will not with the intention of attesting it but at her husband's request to verify its contents and, therefore, granted Probate omitting the name of the wife.

Randfield v. *Randfield* (7) is a case of the House of Lords where inquiry was made as to what were the circumstances attending the signature to a memorandum at the foot of the Will. This memorandum was signed by one G. B. and if he was considered to be an attesting witness he would forfeit his legacy. On a consideration of the evidence it was held that it was not an attestation of the Will so as to deprive G. B. of her right to the legacy.

On behalf of the appellant much reliance was placed on the cases of *Wigan* v. *Rowland*

(1) 55 Ind. Cas. 896; 7 O. L. J. 9.
(2) (1866) 1 P. & D. 269.
(3) (1866) 1 P. & D. 277.
(4) (1866) 1 P. & D. 661; 38 L. J. P. 47; 20 L. T. 683; 7 W R. 687.
(5) (1871) 2 P. & D. 300; 41 L. J. P. 14; 25 L. T. 574; 20 W. R. 192.
(6) (1890) 15 P. D. 2; 59 L J. P. 5; 62 L. T. 183; 38 W. R. 384; 54 J. P. 199
(7) (1860) 11 E R. 414; 8 H. L. C. 225; 30 L. J. Ch. 177; 6 Jur. (N. S.) 901; 9 W. R. 1; 125 R. R. 124.

(8) and *Cozens* v. *Crout* (9). In the case of *Wigan* v. *Rowland* (8) the Vice-Chancellor held that Wigan was an attesting witness and that his wife forfeited the legacy. The report says :—"His Honour thought that even if the parole evidence were admissible it would not be of sufficient force to countervail that which the written document afforded." It was not held here that parole evidence was not admissible. This case is prior in date to the cases quoted above ranging from 1866 to 1899 and we believe that there can be no question now of the admissibility of parole evidence in such a case. The report in the case of *Cozens* v. *Crout* (9) is very short and does not indicate whether oral evidence was pressed to the notice of the Lord Chancellor or not. On the face of the Will, Crout purported to be an attesting witness and claimed his share under the Will notwithstanding the attestation and stated in his answer that he was his father's favourite son, and had signed the Will as the token of approval merely at his father's special request after it had been duly attested by two witnesses. He had also described himself in an affidavit as the sole surviving witness of the Will. It is not clear whether these conflicting statements of Crout were considered by the Court or not. The report of the Court's judgment is "The Act contemplated that there might be more than two attesting witnesses although two were sufficient and H. E. Crout must be taken to have signed as a witness. The bequest to him was, therefore, void." The report would indicate that the point urged before the Court was that two previous witnesses were sufficient to prove the Will and that the signature of Crout, even though of an attesting witness, was a superfluity and may be omitted. Such an argument, of course, would be untenable because every attesting witness, whether he was necessary for proof of the Will or not, would forfeit his legacy. [See *Doe* v. *Mills* (10) quoted in *Administrator General of Madras* v. *Lazar Stephen Lazar* (11).]

The appellants' learned Counsel cleverly argued that there must be something on the face of the document to put the Court to inquiry and to a demand for oral evidence and that there being no such indication of the face of the Will in the present case it should be held that the two plaintiffs were attesting witnesses to the Will. We have read the Will and are of opinion that cl. (8) thereof does put the Court upon an inquiry. The translation given in the judgment of the lower Court expresses the meaning of the vernacular better than the translation at page 3 of Part III of the Paper. The clause runs as follows:—

"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will may be acted upon fully and they may not quarrel among themselves after my demise."

Clearly, therefore, the testator obtained the signatures of the defendants for some special purpose of his own. This is sufficient indication of a want of intention of attestation by the plaintiffs and, in our opinion, they were rightly permitted to lead evidence on the subject. In the nature of things when the Will was executed so far back as 30 years ago, practically the only evidence available to depose to the circumstances would be that of the surviving sons of the testator. All three uncles of the defendant have given evidence. Jagannath Singh stated (page 12 of the printed record): "I was not present at the time of the execution of the Will and my father did not sign it before me....After signing the Will my father sent for me and my brothers and we went to him. He then told us that he had signed a Will in favour of his sons and asked us all to sign the Will so that after his death there might be no disputes among us. We said we were ready to do as ordered by him. Then my father gave us the Will and all of us signed it. My father never asked us to sign it as attesting witnesses." Similar statements were made by Jang Bahadur Singh who has not sued because mutation of names had already been made in his favour and by Ran Bahadur Singh the other plaintiff. The learned Judge of the lower Court was a Hindu gentleman well-acquainted with the customs and habits of thought of the parties. His opinion, therefore, is entitled to great weight.

The appellants' learned Counsel pointed out, as he was entitled to do, that the plaintiffs put their names under lines headed *gawah* (witness). He asked us to

(8) (1853) 68 E. R. 1229; 11 Hare 157; 10 Hare, App. 18; 17 Jur. 910; 1 Eq. R. 213; 1 W. R. 383; 21 L. T. (o. s.) 150; 90 R. R. 619.
(9) (1873) 42 L. J. Ch 840; 21 W. R. 781.
(10) (1833) 1 Moo. & R. 288; 42 R. R. 795.
(11) 4 M. 244; 1 Ind. Dec. (N. s.) 1006.

conclude from this writing that the plaintiffs were attesting witnesses. We, however, do not know what knowledge the scribe had of the intentions of the parties It is usual for a scribe to make lines on the margin of a document: the first line without any heading for the executant of the document and every other line with a heading "witness." This work of the scribe cannot be any evidence of the intention of the parties. The question why the real attesting witnesses should not have signed before the sons of the *taluqdars* who are alleged only to have consented to the arrangement is easily answered. The real attesting witnesses were a Pleader of standing Sheikh Ata Ullah and three witnesses of no standing at all Jai Lal, Rampadarath and Ajit Singh, who were ordinary tenants of the *taluqdar*. According to Indian ideas of dignity it will be derogatory to the sons of a *taluqdar* to sign a document after men of small circumstance, whatever may be the object for which the signatures of the sons of the *taluqdar* may have been obtained. The respectable witness, the Pleader, signed first but the other signatures had to be made after the signatures of the *taluqdar's* sons were obtained in order to preserve their dignity.

The appellants' learned Counsel quoted a number of cases of Indian High Courts from 1877 downwards in which even witnesses to the registration of a Will were held to answer the description of attesting witnesses in order to validate a Will. Those cases have been examined by a Bench of this Court in *Syed Mohammad Hosan* v. *Syed Ali Hyder* (12) decided on 8th September 1924. One of us was a party to that decision. The cases considered were: *Manickbai* v. *Hormasji Bomanji* (13), *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (14), *Mitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (15) and *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (16).

In that case the Bench held that the witnesses to the registration before whom the testator acknowledged his signature to the Will and who signed the registration endorsement in the presence of the testator were attesting witnesses to the Will under s. 50 of the Indian Succession Act. It was objected in that case, as it is objected here that such persons cannot be said to have any *animo attestandi*. The appellants' learned Counsel argued that in that case a Bench of this Court did not insist upon such a state of mind of the witnesses, so here it was not necessary to inquire whether the plaintiffs, who purported to be attesting witnesses, had that state of mind or not. The Bench in that case, however, met the argument with the following observations and did not express an opinion that the matter was one of indifference whether the witnesses purporting to be attesting witnesses had the intention to attest or not. "Reliance was placed on behalf of the appellants on the principle enunciated in Jarman at page 117 last para that in every case the Court must satisfy itself that the names were written *animo attestandi*. Such an intention is to be concluded from the general circumstances which varied in every case. Indian Courts have held for a long number of years that registration proceedings like those connected with the present Will disclose an intention of attestation on the part of the witnesses who signed the registration endorsement."

We may further point out that the plaintiffs' rights under the Will were not questioned by their brother Lal Bahadur Singh while he lived, nor by the defendant, the present *taluqdar* till recently. Jang Bahadur Singh a brother of the plaintiffs obtained mutation of names in his favour with the consent of the defendant on the basis of this Will. Not only so but both Lal Bahadur Singh and Shiam Sundar Singh obtained mutation of names in their favour on the basis of the Will (see Exs. 1, 2, 3, 5, 6, 8, 10 and 11).

We hold that the plaintiffs were not the attesting witnesses to the Will.

At the request of one of us the question, though abandoned by the defendants-appellants' learned Counsel, was argued as to proof of the Will when the four sons of the testator were removed from the list of attesting witnesses. One attesting witness Ram Padarath Lal is still alive and was examined on behalf of the plaintiffs with a warning to the Court that he had been won over by the defendant whose tenant he was. The testimony of Ram Padarath

(12) 85 Ind. Cas. 509; 10 O. & A. L. R. 1229; 12 O. L. J. 1.
(13) 1 B. 547; 1 Ind. Jur. 630; 1 Ind. Dec. (N. S.) 1362.
(14) 6 C. 17; 6 C. L. R. 303; 3 Ind. Dec. (N. S.) 12.
(15) 11 C. 429; 5 Ind. Dec. (N. S.) 1046.
(16) 27 C. 169; 14 Ind. Dec. (N. S.) 111.

Lal does not go against the genuineness of the Will. What he tried to prove was that he did not sign in the presence of the testator, nor did he obtain from the testator any acknowledgment of his signature. The lower Court was satisfied that this witness was not to be believed and was in reality a proper attesting witness. The other attesting witnesses are dead. The document is more than 30 years old and we agree with the lower Court that presumption as to its genuineness and proper attestation may be drawn under s. 90 of the Evidence Act. We hold that the Will is genuine and duly attested as required by s. 50 of the Indian Succession Act.

In the result we dismiss both the appeals with costs.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1036 OF 1921.

February 18, 1924.

Present:—Mr. Justice Venkatasubba Rao.

CHERIAKKATAVAN KORAN—DEFENDANT No. 1—APPELLANT

versus

PUTHAM VEETTIL PONMILERI KOROTH AMMALU *alias* MADHAVI AMMA AND OTHERS—DEFENDANT No. 2 AND PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decision arrived* ex parte, *effect of.*

Plaintiff filed a suit to recover rent of certain property to which 2nd defendant was a party. One of the allegations in the plaint was that the 2nd defendant had no right to share in the management of the property. The 2nd defendant was *ex parte* and a decree was passed in favour of the plaintiff. Subsequently, the plaintiff brought another suit to recover the rent of the same property from another tenant. To this suit also the 2nd defendant was a party. The tenant pleaded that he held the property under a renewal obtained from the 2nd defendant:

Held, that the question of the 2nd defendant's right to share in the management of the property had become *res judicata* by virtue of the decision in the previous suit, and the tenant, therefore, could not avail of the plea put forward by him. [p. 563, col. 1.]

Hara Chandra Bairagi v. *Bepin Behari Das*, 6 Ind. Cas. 860; 13 C. L. J. 38, *Raj Kumar Roy Chowdhury* v. *Alimudi*, 16 Ind. Cas. 911; 17 C. W. N. 627, *Secretary of State for India in Council* v. *Syed Ahmed Badsha Bahadur*, 67 Ind. Cas. 971; 44 M. 778; 14 L. W. 128 & 188; 41 M. L. J. 223 & 228; (1921) M. W. N. 576 (F. B.), relied upon.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 41 of 1921, preferred against the decree of the Court of the District Munsif, Kuttuparamba, in Original Suit No. 821 of 1918.

Mr. *K. V. Madhavan Nair*, for the Appellant.

Mr. *K. Kutti Krishna Mevon*, for the Respondents.

JUDGMENT.—The lower Appellate Court has found that Ex. III is binding on the plaintiffs. It was executed by the 1st defendant in favour of the 2nd defendant and the plaintiffs, and the latter cannot be heard to say that the 2nd defendant on the date of Ex. III had no right to the property. The question, however, whether the 2nd defendant was entitled to the property on the date of Ex. III is now immaterial, because, subsequent to it the right of the plaintiffs to manage the property was recognised in a suit to which the plaintiffs and the 2nd defendant were parties. The plaintiffs had filed O. S. No. 649 of 1911 for recovery of rent against a third party and to that suit the 2nd defendant was made a party. The suit related to the property which is the subject-matter of the present action. The plaintiffs claimed that it had been bequeathed to them as Sriswath by their mother and that the 1st plaintiff was constituted the manager. The defendant (tentant) pleaded that he had obtained a renewal from the 2nd defendant who, by the way, was also 2nd defendant in that suit, and the following issues were raised:

"1. Whether the renewal and payment set up are true and binding on the plaintiffs?"

"2. Whether the 2nd defendant has a right under the Will to collect the rent and grant the renewal?"

The 2nd defendant was *ex parte.* The Court gave the following judgment:

"It is to be noted that under the Will the females are to manage and not the males. No doubt the Will cannot legally impress on the property the character of what is called Sriswath. * * * The 2nd defendant has no right to manage."

It will be seen that the issue relating to the right to manage was raised and that a finding was given. The decision of that question was necessary for the decision of the point in controversy between the parties. Although, therefore, the 2nd defendant was *ex parte*, the finding would operate as *res*

judicata as between the plaintiffs and the 2nd defendant. *Vide Hara Chandra Bairagi* v. *Bepin Behari Das* (1) and *Raj Kumar Roy Chowdhury* v. *Alimuddi* (2).

The learned Subordinate Judge has decided that the previous adjudication is *res judicata* even as against the 1st defendant. In this view he is not correct. But his view may be supported on another ground. The 1st defendant is merely a tenant and is not interested in the dispute between the plaintiffs and the 2nd defendant *inter se* relating to the management of the property. In a proceeding to which the plaintiffs and the 2nd defendant were parties, the right of the former as against the latter was recognised. If the previous suit had been one expressly instituted for the purpose of obtaining a decision in regard to the rival claims set up by the plaintiffs and the 2nd defendant the judgment obtained by the plaintiffs might be just as conclusive evidence of their right as a conveyance to them by the opposite party would be. This is the principle recognised in *Secretary of State for India in Council* v. *Syed Ahmed Badsha Bahadur* (3). The nature of the previous suit is, however, somewhat different, but I think, in the circumstances, the same rule may be applied and the 1st defendant will thus be bound by the result of the previous litigation.

The appellant's learned Vakil contended that the plaintiff having come to Court with a specific case founded on Ex. A. ought not to be permitted to obtain a decree on the footing of Ex. III. I do not think any useful purpose will be served by prolonging this litigation and compelling the plaintiffs to file a fresh suit. There is no substance in the contention that there is no allegation in the plaint that the plaintiffs determined the tenancy by a proper notice because the 1st defendant does not profess to rest his case on Ex. III and claim that he is holding over; but, on the contrary, he has set up a fresh lease, Ex. II, which the Subordinate Judge has found not to be binding on the plaintiffs.

Lastly an argument was advanced in regard to the construction of Ex. III. It was contended that "*chira*" which is a part of item (1) is held under it for a period of 12 years. There is no justification for this contention under the terms of the document.

In the result, the second appeal fails and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 6 Ind. Cas. 860; 13 C. L. J. 33.
(2) 16 Ind. Cas. 911; 17 C. W. N. 627.
(3) 67 Ind. Cas. 971; 41 M. 778; 14 L. W. 128 & 188; 41 M. L. J. 223 & 228; (1921) M. W. N. 576 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 993 OF 1922.
April 23, 1924.
Present:—Mr. Justice Neave.

DAYA RAM OJHA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of respondent—Legal representative, failure to substitute—Abatement.

Where in an appeal against a joint decree the appellant fails to bring on the record the legal representatives of one of the joint decree-holders who dies during the pendency of the suit, the appeal abates under O. XXII, r. 4 of the C. P. C., as against the heirs of the deceased decree-holder only, but the result of such abatement is that the appeal becomes imperfectly constituted and, in the absence of a necessary party, the Court cannot proceed to decide the appeal on the merits.

Arjan Mirdha v. *Kali Kumar Chakerbutty*, 68 Ind. Cas. 194 and *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi*, 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217, relied on.

Second appeal against the decree of the District Judge, Ghazipur, dated the 19th May, 1922.

Mr. *U. S. Bajpai*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—In this appeal a preliminary objection is taken by the respondents. The suit was brought by three persons (1) Ram Narain Pande (2) Nepal Misra and (3) Sheo Prasad Misra. They obtained a joint decree for possession of certain property and damages. After the appeal was filed, Ram Narain Pande died. Steps for substitution of the names of his legal representatives were not taken for more than three months after his death, when the appellants' application was rejected and it was ordered that the appeal should abate at least as against Ram Narain Pande. An application to have this order set aside was also rejected. The preliminary objection is that, as the decree for

joint possession is in favour of three persons, who are not members of a joint Hindu family, this appeal cannot lie against two of them only. In support of this contention, reliance is placed on a ruling of the Calcutta High Court in *Arjan Mirdha* v. *Kali Kumar Chakerbutty* (1). In the judgment in that case reference is made to a ruling of the same Court in *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (2), where the matter has been discussed in an elaborate judgment reviewing the authorities. It was held in the case that, where a joint decree had been obtained and the appellants had failed to bring on the record the representatives of one of the joint decree-holders, who had died, that, though under O. XXII r. 4, C. P. C., the appeal abated as against the heirs of the deceased plaintiff only, the result of such abatement was that the appeal was imperfectly constituted and that in the absence of a necessary party the Court would not proceed to decide the appeal on the merits. A number of earlier decisions of the Calcutta High Court to the same effect were referred to, in all of which the view taken was that, in such circumstances, the appeal could not be heard, because in the event of its being allowed on the merits the result would be that the decree would be set aside in respect of some of the plaintiffs but would remain intact in so far as the representatives of the deceased plaintiff were concerned, and there would be two contradictory decrees made in the same litigation.

The learned Advocate for the appellants refers to a compromise, which was entered into between the plaintiffs to the present suit at some time before the suit was instituted. He maintains that this compromise defined the shares of the plaintiffs in this property and that it would, therefore, be possible for this Court, in the event of the appeal succeeding, to distinguish the shares of the surviving plaintiffs. It does not appear, however, that under this compromise any partition was perfected or that the parties to it ever took action under it. The decree obtained by them is a joint decree without any specification of shares. In my opinion, the view taken by the learned Judges of the Calcutta High Court is the correct one ; and, though the appeal has abated as against the deceased plaintiff only, it cannot now be heard on the merits.

The preliminary objection accordingly succeeds, and the appeal is dismissed with costs including in this Court costs on higher scale.

Z. K. *Appeal dismissed.*

(1) 68 Ind. Cas. 194.
(2) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 220 OF 1922.
(PROBATE CASE NO. 22 OF 1920).
November 22, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Broadway.

MRS. CATHERINE MARY CHANDLER WIFE OF WILLIAM CHANDLER, RESIDENT OF LEIRE IN THE COUNTY OF LEICESTER, ENGLAND—APPELLANT

versus

ADMINISTRATOR-GENERAL, PUNJAB, AND OTHERS—RESPONDENTS.

Succession Act (X of 1865), s. 118—Will, construction of—Gift, subject to condition subsequent—Condition, failure of, effect of.

A testatrix devised the whole of her property to her son and daughter, and directed that should either of her children die unmarried his or her share would go to the survivor. Under a codicil a provision was added that should both the testatrix's children die unmarried, the property should go to one of her stepchildren. The son married and died leaving a widow who succeeded to his estate. Subsequently, the daughter died unmarried :

Held, (1) that the children of the testatrix took vested interests under the Will and the codicil subject to being divested in the event of the happening of certain conditions ; [p. 566, col. 1.]

(2) that the son having married and predeceased his sister the possibility of the estates taken by him and his sister becoming divested either under the Will or the codicil came to an end and the estate in question must be regarded as having vested absolutely in the daughter ; [*ibid.*]

(3) that, therefore, the heirs of the daughter were entitled to succeed to her estate in preference to the heirs of the testatrix. [p. 566, col. 1.]

Bechar Akha v. *P. De Cruz*, 19 B. 221; 10 Ind. Dec. (N. S.) 150, confirmed on appeal 19 B. 770; 10 Ind. Dec. (N. S.) 516, distinguished.

Eaton v. *Barker*, (1845) 70 R. R. 162; 2 Coll. 124; 9 Jur. 822; 63 E. R. 665, relied on.

A condition subsequent imposed upon a gift must be strictly construed. [p. 566, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Brasher, dated the 1st August 1922.

Lala *Balwant Rai*, for the Appellant.

Messrs. *Noad* and *D. C. Ralli*, for the Respondents.

JUDGMENT.—On the 1st December 1910 Mrs. Eleanor Marsden, the widow of Charles John Marsden, of Simla, executed a Will disposing of her property. To this Will she added a codicil on the 19th April 1918.

She died on the 11th May 1918 leaving her surviving her son Harold Charles Marsden and her daughter Mabel Marsden both unmarried. There were also three children of her husband by a former wife whose names are Mrs. Ellen Marsden Turner of Dehra Dun, Mrs. Isabella Thomas living in London and Charles Henry Strutt Marsden living in East Ham, in the County of Essex. Her own children Harold Charles Marsden and Mabel Marsden succeeded to their mother's estate under the terms of the Will and codicil.

Mrs. Eleanor Marsden in her Will provided that should either of her children die unmarried his or her share would go to the the survivor. Under the codicil a provision was made to the effect that should both the testatrix's children die unmarried the property was to go to the step-daughter Isabella Thomas.

On the 16th July 1919 Harold Charles Marsden married, thus rendering the provision in the codicil of no avail. He died on the 20th October 1919, leaving him surviving his widow Mrs. Elizabeth Marsden who succeeded to his estate.

On the 17th April 1920 Mabel Marsden died intestate and without having married. On her death a dispute arose between Mrs. Eleanor Marsden's step-children and Mrs. Catherine Mary Chandler, who is the daughter of a sister of Mrs. Eleanor Marsden. Letters of Administration to the estate of Miss Mabel Marsden were granted to the Administrator-General of the Punjab on the 30th September 1920 and, having regard to the dispute referred to above, the Administrator-General made a reference to this Court under s. 28 of Act III of 1913 asking for directions as to how the estate of Miss Mabel Marsden was to be disposed of. This reference came before Mr. Justice Brasher who on the 1st August 1922 held that the estate in question devolved on Mrs. Turner, Mrs. Isabella Thomas and Mr. Charles Henry Strutt Marsden, the step-children of Mrs. Eleanor Marsden and the half sisters and brother of Miss Mabel Marsden. Against this judgment an appeal has been filed by Mrs. Chandler, Mrs. Eleanor Marsden's sister's daughter, through Mr. Balwant Rai, while Mr. D. C. Ralli represented Mrs. Turner, Mrs. Thomas and Mr. C. H. S. Marsden. Mrs. Elizabeth Marsden, widow of Harold Charles Marsden, was absent although service has been effected on Mr. B. Bevan-Petman on her behalf. As she had not appealed against the judgment declaring her disentitled to any share in the estate she was not really interested in these proceedings.

It was contended by Mr. Balwant Rai that Harold Charles Marsden and Mabel Marsden only took a life-estate under the Will and codicil, and that inasmuch as Miss Mabel Marsden had died unmarried her portion of the estate must be regarded as having reverted to Mrs. Eleanor Marsden whose heir was Mrs. Chandler and as such entitled to succeed. Reference was made to ss. 126 and 127 of the Indian Succession Act, Williams on Executors, 11th Edition, page 1034 and *Bechar Akha* v. *P. De Cruz* (1). A reference to the sections of Indian Succession Act referred to above shows that they have no bearing on the point at issue, dealing as they do with precatory trusts. The same remark applies to the reference to Williams on Executors while the case reported as *Bechar Akha* v. *P. De Cruz* (1) clearly shows that the property there in question had been bequeathed purely as a life-estate.

On the other hand Mr. Ralli contended that under the Will and codicil Harold Charles Marsden and Mabel Marsden succeeded to an absolute estate which was liable to be divested on the happening of certain events. It was urged that Mabel Marsden took a vested interest in her share of the property which was liable to be divested in the event of her dying unmarried and leaving her surviving her brother; that inasmuch as her brother had married, the condition laid down in the codicil for the divesting of the estate became of no avail; and that, therefore, inasmuch as the conditions which might operate to divest her of her estate had failed, she became the absolute owner of that portion of the estate to which she had succeeded and her heirs were entitled to succeed thereto. Now "a vested interest, which is given over

(1) 19 B. 221; 10 Ind. Dec. (N. S.) 150 confirmed on appeal 19 B. 770; 10 Ind. Dec. (N. S.) 516.

in certain events, is divested if those events happen, though the gift over may be void, or though the legatee to take under the gift over dies before the testator." Therefore it was held in *Eaton* v. *Barker* (2) that under a gift to the testator's two sons and daughter in equal shares, with a gift over of the daughter's share, if she should die without issue, to the survivors or survivor of the sons, it was held that the daughter, having survived the sons, took absolutely. (See Law of Wills by Theobald, pages 652 and 653). In the present case the conditions imposed both by the Will and the codicil are conditions subsequent and must be strictly construed. Under s. 118 of the Indian Succession Act a bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person. Mr. Ralli relied on illustration (*d*) to this section which is to the following effect :—

A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* take the other half.

This illustration appears to be in point. Harold Charles Marsden and Mabel Marsden took vested interests under the Will and the codicil subject to being divested in the event of the happening of certain conditions. Inasmuch as Harold Charles Marsden married and predeceased his sister the possibility of the estates taken by him and his sister becoming divested either under the Will or the codicil came to an end and the estate in question must be regarded as having vested absolutely in Miss Mabel Marsden and it is her heirs, therefore, who are entitled to succeed to her estate. It has been rightly held that her half sisters and brother are her heirs and they have, therefore, rightly been held to be entitled to succeed.

The sppeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) (1845) 70 R. R. 162; 2 Coll. 124; 9 Jur. 822; 63 E. R. 665.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 90 AND 91 OF 1921 AND 49, 51, 52, 54, 55, 60, 61, 64 65, 67, 68, 69, 70, 71, 72, 73, 75, 76, 79, 80, 81, 83, 101 AND 117 OF 1922.

March 31, 1924.

Present :—Justice Sir Jawla Prasad, KT., and Mr. Justice Kulwant Sahay.

Rani BHUNESHWARI KUER *alias* BACHA SAHEBA—PLAINTIFF—APPELLANT

versus

SUKHDEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 69, 70, 71—Appraisement or division of crops—Jurisdiction of Collector—Final order—Form of order—Burden of proof—Procedure.

Where a landlord has the opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent, he is not entitled to get any decree except on proof of the actual produce of the land and if he fails to prove that, he must be content with the admissions made by the defendants. [p. 568, col. 2]

Where, however, the landlord could not make an estimate of the crops or was prevented from doing so by the tenants his claim cannot be thrown out simply because he has not been able to prove the actual produce of the lands in the direct possession of the tenants. In such circumstances the tenants should not be permitted to take advantage of their own wrongful acts and their failure to declare the true and proper produce of the lands in their actual possession. In such cases they have special means of knowledge and the onus of proving what is in their knowledge must rest upon them. [p. 568, col. 2; p. 569, col. 1.]

Clause 5 of s. 70 of the Bengal Tenancy Act does not require that a separate decree, apart from the order itself, should be prepared by the competent Revenue Authority It simply requires that the order shall be final and shall, on application by the landlord or the tenants to the Civil Court, be enforceable as a decree. [p. 572, col. 1.]

In a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under s. 69 of the Bengal Tenancy Act and then reduces it into a money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may, in execution of the order in the Civil Court, receive his dues from the latter. Again, in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise, such as is provided in s. 71, the Collector's order must clearly state the amount payable to the landlord by the tenant, so that the former may receive the same in execution of the order in the Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in desposit with the Collector. The only order that the Collector can pass is to deposit

the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale-proceeds in the Treasury to the credit of a party can be withdrawn any moment he likes. There will not be any necessity of execution. [p. 572, cols. 1 & 2.]

A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared. [p. 572, col. 2.]

The Collector's jurisdiction arises only when the rent is payable under the *bhaoli* system; and if this is disputed and a system of cash or *nakdi* rent is set up, the Collector will have no jurisdiction under s. 69 of the Bengal Tenancy Act and he must leave the question to be determined by a competent Civil Court. Where it is admitted that *bhaoli* rent is payable the Collector has jurisdiction under s. 69 to appraise or divide the crops and has a right to determine as to whether the system of payment of landlord's share is by appraisement or by division. [*ibid.*]

(Case-law referred to.)

Appeals from a decision of the Subordinate Judge, Gaya, dated the 10th January 1921.

Messrs. *Kailaspati, Parmeshwari Dayal* and *Nawal Kishore Prasad*, for the Appellant.

Messrs. *S. M. Mullick* and *S. N. Ray*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—These appeals arise out of suits for recovery of *bhaoli* and *nakdi* rents which were tried together analogously and disposed of by the judgment of the Court below on the 10th January 1921. The landlord is the appellant in some of the cases and tenants in the others. The lands for which rents are claimed are situate in *Mouza* Srewa, Parganah Piara, District Gaya.

As to the *nakdi* rent there is no dispute. The points of difference between the parties have been—

(1) as to the system of paying the *bhaoli* rent; the tenants' case is that the system is *batai* (a division of crop between the landlord and the tenant), whereas the landlord's case is that the system is *danabandi* (appraisement);

(2) as to the proportionate share of the landlord in the produce; the tenants allege that the landlord's share is half, and the landlord, on the other hand, claims that her share is 9/16ths;

(3) as to whether the rent for sugar-cane land is *bhaoli* or *nakdi*; the landlord says *bhaoli* and the tenants say *nakdi*; and

(4) as to the quantum of the produce in the years in suit.

The Survey Record of Rights, which was finally published on the 23rd November 1916, shows that the system of payment of rent for the *bhaoli* lands is *batai* or division of produce of all kinds including sugar-canes, and the share of the landlord therein is half.

The Court below has upheld the Survey entry as to the rent for the sugar-canes being *bhaoli* and as to the share of the landlord in the sugar-canes as well as in other kinds of produce being half. As to the system of payment of the rent, the learned Subordinate Judge has held that it is *danabandi* (*i. e.*, appraisement) as opposed to *batai* (division) entered in the Survey Record of Rights. The suit is for the years 1324 to 1326, *i. e.*, for the years just following the final publication of the Survey Record of Rights in 1323 (23rd November 1916) which accentuated the dispute between the landlord and tenants as to the system being *batai* or *danabandi*.

The case of the tenants was that in the year 1324 the paddy crops were admicably divided between the landlord and the tenants, but the landlord refused to give receipt for the rent in kind payable to him. The landlord instituted proceedings before the Collector under s. 69 of the Bengal Tenancy Act for recovering her share in the produce by appraisement of the *rabi* crops for the year 1324. The tenants objected stating that the system was *batai*. On the 11th April the Sub-Divisional Officer considered the objection and held that the custom was of division as decided by the Settlement Authorities. Accordingly he directed an *Amin* to divide the crops. The landlord then did not want to proceed with the case and the *raiyats* were then asked whether they wanted to have the property divided, and, if so, to pay the cost of division. The *raiyats* then deposited the costs and the *khasra* was ultimately filed on the 12th June 1917. Objection to that *khasra* was filed by the landlord on the 26th June 1917. On the 9th July the Sub-Divisional Officer held that "the *khasra* does not show the actual produce of the field owing to the loss done by rains etc. As reported by the *Amin* the *malik* refused to take the *hakimi* share and the *Amin* sold the *hakimi* share according to the *nirkhnama* supplied by the Praiya Police and deposited the sale-proceeds in the Treasury." This, however, was not a final disposal of the case under ss. 69 and 70 of the Bengal Tenancy Act. It appeared that the crops of some

of these lands were already cut. The tenants stated that it was so because the crops of those lands were divided between the landlord and the tenants. In these circumstances the Sub-Divisional Officer did not consider it desirable to institute proceeding under s. 71 of the Bengal Tenancy Act. Since then for the years 1325 and 1326 for the paddy and *rabi* crops proceedings under ss. 69 and 70, Bengal Tenancy Act were resorted to. The landlord was not satisfied with the result of those proceedings and she instituted the suits out of which these appeals have arisen.

The only question seriously raised in the appeal is as to the quantum of the produce in the years in suit. There has been no serious dispute and, as a matter of fact, the findings of the Settlement Authorities have been upheld by the Revenue Authorities under ss. 69 and 70 of the Bengal Tenancy Act as to the sugar-cane being held at *bhaoli* rent and the landlord's share in the produce of all kinds being half. As regards the system of payment of rent, namely, *danabandi* or *batai* the Court below has held that the system was *danabandi* and the landlord's share in the produce is half.

As to the quantum of the produce the Court below has disposed it of in the following words:

"I find that both parties have made incorrect estimates. The plaintiff's men have overestimated the crops while the tenants have underestimated them. According to the evidence on plaintiff's side, the average outturn of paddy varies between 15 to 35 maunds per *bigha*, that of *rabi* varies between 6 to 12 maunds a *bigha* and that of *gur* between 25 to 45 maunds per *bigha*. According to the evidence on the defendant's side, the average outturn of paddy varies between 6 to 12 maunds that of *rabi* between 15 seers to 2 maunds and that of *gur* between 5 to 11 maunds per *bigha*. Taking the mean of the lowest figures of the *malik* and the highest figures of the tenants I find that the average outturn of paddy is 13½ maunds, that of *rabi* 4 maunds, and that of *gur* 18 maunds per *bigha*. So in the absence of any satisfactory evidence on the point I allow paddy, *rabi* and *gur* at the above rates for the years in suit. If any of these rates of outturn exceed the rates of outturn given in the plaint, then the plaint rates shall prevail."

Upon the *bhaoli* rent thus ascertained and the undisputed *nakdi* rent the Court below has given cess at annas six per rupee on the yearly *jumma* and damages at 12½ per cent. We have been taken through the evidence of the case relating to the outturn of the crops in the years in suit. The evidence has been very meagre and does not at all seem to be convincing. The feelings between the landlord and the tenants being very much strained owing to the dispute as to the appraisement, it is not possible to believe that there was an estimate or appraisement by the landlord of the crops in the actual charge of the tenants. The Court below was, therefore, perfectly right in not accepting the appraisement papers or the estimates of the crops for the years in suit given on behalf of the landlord. The tenants were the last persons to give a correct idea of the actual produce, and consequently, their evidence also has been rightly rejected by the Court below.

On behalf of the respondents it is contended that the result of the rejection of the evidence both of the landlord and the tenants is that the plaintiff's claim should be decreed upon the admission made by the defendant in the written statement or in their evidence. This argument is based upon the assumption that the onus of proving the claim made in the plaint based on the estimate of the produce was on the landlord, and, if she failed to establish her claim, her suit could only be decreed upon the admissions, if any, made by the tenants. This is true so far as the ordinary principle of onus is concerned. Where the landlord has opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent he is not entitled to get any decree except on proof of the produce of the land, and if he fails to prove that, he must be content with the admissions made by the defendants. But where the landlord as in this case, could not make an estimate of the crops or was prevented from doing so by the tenants as held by the Court below, it will be hard to throw out her claim, simply because she has not been able to prove the actual produce of the lands in the direct possession of the tenants. In the present case the dispute between the parties arose soon after the Record of Rights was prepared and published; and that dispute was upon the crucial point of the system for the payment of rent, *danabandi* or *batai*. It was not, therefore, possible for the landlord to make a true estimate of the crops in pos-

session of the tenants and in fact she was prevented from doing so by the tenants. In such circumstances the tenants should not be permitted to take advantage of their own wrongful acts and their failure to disclose the true and proper produce of the lands in their actual possession. They had special means of knowledge and the onus of proving what was in their knowledge in such cases must rest upon them. Such has been the view taken by my learned brother in *Rang Lal Singh* v. *Rani Bhuneshwari Kuer* (F. A. No. 141 of 1920) to which I was a party. I adhere to it.

Therefore, in these cases the onus was not upon the landlord, and even if it was, in the circumstances of the case, it shifted upon the tenants to prove actual produce of the land. This principle so far as tenants and landlord are concerned is acknowledged in the statutory provision contained in s. 71 (4) of the Bengal Tenancy Act which runs as follows:

"If the tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest". We have considered the evidence on the record, the village note, crop cutting estimates in the different proceedings, and the reports of the *Amins*, who went to divide the crop, and we are satisfied that the estimate made by the Court below for the years in suit is not challengeable. The recent commutation of rent also points to the same direction. The evidence as to produce being not satisfactory, the rate of rent fixed by commutation would afford a sure guide for estimating the yield of the land in suit. Those proceedings, though not on the record, were mentioned to us by both parties. As a matter of fact, the order in the commutation proceeding was also shown to us.

The next question is as to whether the yield of the lands in suit has been expressed by the Court below in its judgment dated 10th November 1921 in *kachha* or *pucca* weights. The question arose in the Court below at the time of the preparation of the decree and the note appended by that Court in its judgment on the 24th January 1922 shows that the *kachha* weight was meant. Mr. Sushil Madhab Mullick says that it should be *pucca* and not *kachha*. It, however, appears from a reference to the proceedings under ss. 69 and 70, Bengal Tenancy Act particulary Ex. M-4, that the *kachha* weight was acted upon for the purpose of ss. 69 and 70 proceedings. The evidence of the plaintiff's witness No. 8, Ajodhya Singh, shows that the *kachha* weight was prevalent in the village during the years in suit. It is admitted that the *kachha* weight was prevalent up to 1324 and that in 1325 *pucca* weight was for the first time introduced. The evidence as to the system of *pucca* weight having been fully brought into force in 1325 is not satisfactory.

I, therefore, agree with the view taken by the Court below expressed in the note to the judgment dated the 10th January 1921 that *kachha* weight was meant to be adopted for determining the quantum of produce of the lands in the years in suit.

Appeals Nos. 73, 79, 80 and 83 are appeals by the landlord alone. There is no counter-appeal by the tenants, nor have the tenants appeared to contest these appeals of the landlord. These appeals are dismissed without costs.

In the remaining cases Mr. Parmeshwar Dayal on behalf of the tenants contends that the present claim of the plaintiff landlord is barred by proceedings under ss. 69 and 70 of the Bengal Tenancy Act. As to the paddy crop of 1324 he says that there was amicable division thereof between the landlord and the tenants and that the landlord took her share therein, but refused to grant receipt and consequently the suits were brought by the tenants. In view of the dispute between the parties on the crucial points, namely, as to the system of crop, appraisement or division, it is not possible to accept the contention of Mr. Parmeshwar Dayal that there was an amicable division of the crops. I, therefore, reject the contention of Mr. Parmeshwar Dayal so far as the payment of the landlord's share of the paddy crops of 1324 is concerned.

As to the *rabi* crop of 1324, it is true the tenants applied for division of the crops under s. 69 of the Bengal Tenancy Act, but it appeared that some of the crops of the land were already cut and removed by the tenants and hence only the remaining crops standing on the lands were divided. The Collector, therefore, did not pass any final order in that case. On the 9th July 1917 when the *Amin's* report was received the Sub-Divisional Officer stated "It is clear that the

khasra does not show actual produce of the field owing to the loss done by rains etc. As reported by the *Amin* the *malik* refused to take the *hakimi* share and the *Amin* sold the *hakimi* share according to the *nirkhnama* supplied by the Paraiya Police and deposited the sale-proceed in the Treasury *vide chalan* No 235 dated the 12th June 1917. File". This is the last order in the case (No. 230 of 1916-17), Ex. M. It does not purport to be an order under s. 70 of the Act and in no sense it is a final order under cl. 5 of the section. Therefore the proceedings adopted by the Collector under ss. 69 and 70 of the Act as to the *rabi* crop of 1324 cannot operate as a bar to the present claim of the landlord for her share of the produce of the lands in suit.

The contention of Mr. Parmeshwar Dayal, however, stands on a firmer ground so far as the produce of 1325, both paddy and *rabi* and the paddy produce of 1326 are concerned. Now, as to the paddy and the sugar-cane crops of 1325 both parties applied to the Collector under s. 69 of the Bengal Tenancy Act and after the preliminary proceedings the Collector on the 25th March 1918 passed the following order:

"*Khasra* filed. It appears that *raiyats* have taken the crop their share and so the *malik* also. *Khasra* approved. Case disposed of."

On the next day he passed the following order:

"This day a petition of objection was filed on behalf of Rani Bhuneshwari Kuer. Heard her Pleader. It is rejected for the reasons noted thereon."

The above orders were passed in the proceeding (Ex. M-1) started upon the application of the tenants but by virtue of the order passed in the proceeding (Ex. M-2) started at the instance of the landlord the same order was made applicable in the latter case. Therefore the aforesaid orders governed both the proceedings started at the instance of the landlord and tenant for the paddy and sugar-cane crops of 1325. This order is impugned by Mr. Sushil Madhab Mullick as being not a final order under cl. (5) of s. 70 of the Bengal Tenancy Act and, therefore, it cannot operate as a bar to the claim for rent now lodged by the landlord. It is conceded that the objection of Bhuneshwari Kuer landlord was heard and disposed of as is stated in the order of the 26th March 1918 by the Sub-Divisional Officer. But Mr. Mullick says that the Sub-Divisional Officer, has put the cart before the horse inasmuch as he disposed of the case a day prior, *i. e.*, on the 25th March 1918 and the objection was taken up and disposed of on the subsequent day. It is also stated that the order of the 25th March itself is inaccurate inasmuch as it mentions without any reserve that the landlord also took her share of the crops, whereas in the receipt given by the landlord with respect to the crops received on her behalf it was expressly stated that she received the crops under protest. On the 25th March 1918 the Sub-Divisional Officer's attention does not seem to have been drawn to the receipt and he apparently stated that both the *raiyats* and the landlord took their respective share of the crop under a misapprehension, and no doubt it is due to this misapprehension that he approved of the *khasra* on the 25th March 1918. If the matter had rested there we would not have the slightest hesitation in holding that the order of the Sub-Divisional Officer of the 25th March was not a final disposal of the dispute and that it was not an order such as is contemplated by cl. (5) of s. 70 of the Bengal Tenancy Act. But the objections set forth in the receipt, dated the 20th March, dealt with in the order of the 25th March were reiterated in a formal objection petition filed on behalf of the landlord and that objection petition was disposed of on the 26th March 1918. Therefore the objections taken in the receipt were also disposed of on the 26th March. The result of the order of the 25th March is that all the objections put forth on behalf of the landlord were disposed of by the Sub-Divisional Officer. The objections were rejected and, therefore, the order of the 25th March approving of the *khasra* was allowed to stand. That order is the final order in the case.

Similarly, proceedings (Ex. M-3) under ss. 69 and 70 of the Bengal Tenancy Act were instituted for the division of *rabi* crop for 1325 and were disposed of and the *khasra* filed by the Commissioner deputed to divide the crop was approved of on the 20th May 1918. It is urged that the *khasra* does not represent the entire crop of the lands in dispute, a portion having been clandestinely removed by the tenants. No doubt, *Amin* Abdul Nayeem, who was first deputed to divide the crops made a report to that effect, and, upon the objection of both the parties this *Amin* was re-called and Deo

Narayan Lal Mukhtar was deputed to divide the crops with a direction to "take up the work of division at once and note the number of fields from which crop has been removed and appraise the crops of those fields under s. 71, Bengal Tenancy Act" (*vide* order, dated the 26th March 1918). On the 4th April he was further asked to test the *Amin's* report and to submit a detailed report. He submitted his report on the 10th April stating that there was no removal of any crop but that some crop was damaged by insects and a small portion was stolen by thieves and that the tenants were not at all responsible for this. This report was considered by the Sub-Divisional Officer with the result that the *Amin's* report upon which Mr. Mullick relies was declared to be false and the Mukhtar Commissioner was directed "to divide the standing crop at once" (vide order ,dated the 11th April 1818). It is thus patent that there was no removal of any crop by the tenants and the Court accepted the report of the Mukhtar Commissioner and declined to take any action under s. 71 of the Bengal Tenancy Act as was originally contemplated by him when passing the order of the 26th of March 1918. Section 71, cl. (4) says:

"If the tenants remove any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest". The fact that the Collector re-called his previous order under the aforesaid clause shows that he was satisfied that the tenants were not at all responsible for any removal of the crops. Consequently in his final order the Sub-Divisional Officer dealt with the entire crop of the lands in dispute. That order runs as follows :—

"It appears that the crop of *raiti* share has been made over to tenants and the crop of *hakimi* share sold and sale-proceeds deposited into the Treasury as *malik* refused to take it.

"An objection has been filed on behalf of the defendant *malik* A Mukhtar Commissioner was deputed at the request of both the parties and Babu Deo Narayan Lal Mukhtar was unanimously selected as the Commissioner by both the parties. I have gone through the report and I do not find that he has submitted it in collusion with the *raiyats*. The defendant *malik* should have objected long ago. Objection disallowed.

"*Khasra* approved. Case disposed of" (*vide* Ex. M. 3). This order was passed after hearing the parties and disposing of all objections and is the final order in the case. The contention of Mr. Mullick, that the entire plot was not dealt with, is under a misapprehension and is overruled.

Now as to the proceeding for the paddy crop of 1326, this was started at the instance of the tenants and the last order in that case was passed after hearing the parties. By that order of the 24th of March 1919 (Case No. 20 of 1918-19) Ex. M-4, the *khasra* submitted by the *Amin* was approved. The order is a long one and it seems to have disposed of all the objections that were raised to the proceeding and the *khasra* submitted by the *Amin*. No irregularity has been pointed out in regard to that proceeding. The cases cited by Mr. Sushil Madhab Mullick, namely, *Deo Lal Mahto* v. *Bibi Rakayia* (1) and *Suraj Prosad Mahajan* v. *Karu Singh* (2) do not affect the proceedings and orders made in these cases inasmuch as orders were passed after considering the objections put forward by the parties and after hearing them in full.

The next objection is as to the form of the orders passed in the aforesaid proceedings. It is said that the order approving the *khasras* filed by the *Amin* or the Commissioner and disposing of the cases are not such as are contemplated by cl. (5) of s. 70 of the Bengal Tenancy Act, under which the order must be in the nature of a decree capable of being executed by a Civil Court. Reliance is placed upon the case of *Kailashpati Narayan Singh* v. *Ganga Singh* (3) and the case of *Suraj Prasad Mahajan* v. *Karu Singh* (2) which is based upon the the Calcutta decision. Sir Lawrence Jenkins, C. J., in the former case held that:

"It must be shown that as required by s. 70, sub-s. (5) the Collector passed an order entitled to finality and enforceable as a decree."

The full facts of the case and the exact order passed by the Revenue Authority under ss. 69 and 70 in that case do not appear and the decision is based upon the following

(1) 57 Ind. Cas. 572.
(2) 51 Ind. Cas. 763; 4 P. L. J. 325; (1919) Pat. 400.
(3) 4 Ind. Cas. 735; 10 C. L. J. 599.

observations by his Lordship the Chief Justice:

"It is conceded before us that there is no order which in the proceedings before the Sub-Divisional Officer can be treated as enforceable as a decree." That decision applies to the facts of the particular case decided and does not apply to the present case. Unlike that case we have the entire proceeding and the final orders passed in these cases and we have to see whether the orders are valid under cl. (5) of s. 70, Bengal Tenancy Act. The clause does not require, as is contended by Mr. Mullick, that a separate decree apart from the order should be prepared by the competent Revenue Authority. It simply requires that the order shall be final and shall, on the application by the landlord or the tenants, to the Civil Court, be enforceable as a decree." The orders in question are undoubtedly final. Now the question is whether the orders in question are enforceable as decrees. In the present case the Collector divided the crops and handed the share of the tenants and upon the refusal by the landlord to take her share in the crops, he (the Collector) directed them to be sold and the sale-proceeds to be doposited to her credit in the Treasury. No doubt in a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under s. 69 and then reduces it into money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may in execution of the order in the Civil Court receive his dues from the latter. Again in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise such as is provided in s. 71, the Collector's order must clearly state the amount payable to the landlord by the tenant, so that the former may receive the same in execution of the order in the Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector. The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale-proceeds in the Treasury to the credit of a party can be wihhdrawn any moment he likes. There will not be any necessity of execution. A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared. The rules of the High Court provide that in suits for money including suits upon mortgage, in suits for specific moveables, in suits for accounts, and in suits for arrears of rent no decrees need be drawn up if

(*i*) neither party has to recover anything unless the Judge otherwise directs;

(*ii*) the claim is satisfied after judgment but before the decree is drawn up.

This principle would apply to the case of division of the crops under ss. 69 and 70 of the Bengal Tenancy Act referred to above. The *Amin's khasra* in the present case shows the produce of the land and the share of landlord and the tenants. The tenants have received their share. The landlord refused to receive her share, and consequently it was sold by the orders of the Collector and the sale-proceeds deposited in the Treasury. It is then contended that the Collector had no power to sell the share of the landlord and in support of this contention Mr. Sushil Madhab Mullick cited the case of *Suraj Prosad Mahajan* v. *Karu Singh* (2). The order by the Revenue Authority objected to has been quoted at page 327 of the judgment. The order does not show that the *khasra* of the *Amin* was accepted and approved, nor does it appear as to whether the *Amin* sold the crops under the orders of the Collector or of his own motion. In the present case the landlord's share of the crop was sold upon her refusal to take it, under the orders of the Collector. The Collector could not keep in his charge indefinitely large quantities of grain and, therefore, the only course left to him was to sell the same and deposit in the Treasury the sale-proceeds thereof. The money deposited in the Treasury on behalf of the landlord represents her share. If the proceeding and the order passed by the

Collector under ss. 69 and 70 are otherwise valid, there is no reason to impeach its validity solely upon the ground that the money was deposited in the Collectorate to the credit of the landlord. The landlord in this case could have no claim against the tenants. No separate decree, therefore, could be prepared nor, as a matter of fact, is any decree prepared in such a case. The orders in question do not contravene the requirements of cl. (5) of s. 70. It is final and is capable of enforcement against the Collector in whose hands the landlord's share is.

The next objection of Mr. Mullick is that the Collector had no jurisdiction to institute a proceeding under s. 70 of the Bengal Tenancy Act, inasmuch as there was a dispute between the parties as to the system of payment of rent, namely, the *batai* or appraisement. In support of this contention he places the case of *Nukheda Singh* v. *Ripu Mardan Singh* (4). In that case the dispute was as to whether the rents were payable under *bhaoli* or *nakdi* system. The Collector's jurisdiction arises only when the rent is payable under the *bhaoli* system; and if this is disputed and a system of cash or *nakdi* rent is set up the Collector apparently will have no jurisdiction under s. 69 and he must leave the question to be determined by a competent Civil Court. In the present case it was admitted by both parties that the produce or *bhaoli* rent was payable. Therefore the Collector had jurisdiction under s. 69 to appraise or divide the crops as the case may be and he has a right to determine as to whether the system of payment of the landlord's share was by appraisement or division and as a matter of fact the finally published Record of Rights showed that the crops used to be divided by the landlord and tenant. That record was prepared and published in the year 1916 (1323) and it records the existing state of affairs and until that entry in the Record of Rights is disturbed and set aside by a proper authority the system of payment of rent would be as provided in the Record of Rights; and the presumption in favour of the continuity of that system arises. In this connection s. 51 of the Bengal Tenancy Act may be usefully referred to, which says:

"If a question arises as to the amount of a tenant's rent or the *conditions* under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same *conditions* as in the last preceding agricultural year."

Therefore if up to 1323 the payment of rent of the holding was by division of the crops, the presumption will be that in the following years the same condition prevailed. This is an additional presumption to that afforded by the Record of Rights; therefore in giving effect to the entry in the finally published Record of Rights and to the continuity of the condition of the holding the Collector was justified in holding that the *batai* system of payment of the produce or *bhauli* rent prevailed and in so doing he acted well within the jurisdiction vested in him by ss. 69 and 70 of the Bengal Tenancy Act. In this connection *vide* the case of *Thakur Singh* v. *Pardip Singh* (5). I would, therefore, overrule the objection of Mr. Mullick that the orders in question were not such as are contemplated by cl. (5) of s. 70.

The result, is, that the landlord's claim for the entire crops ,paddy, sugar-canes and *rabi* of 1325 and the paddy crop of 1326 is barred by ss. 69 and 70 of the Bengal Tenancy Act and must be dismissed. She is entitled to have from the Collector the money in deposit in the Treasury as representing her share of the produce of those years.

It is conceded that there was no final order passed under ss. 69 and 70 of the Bengal Tenancy Act as regards the claim for the remaining years, that is, 1324, and the *rabi* crop of 1326 and that, therefore, the landlord is entitled to the rent as found by the Subordinate Judge for the years in question. The landlord is entitled to the amount of rents due to her as found by the Court below, for those years.

The result is that the landlord's Appeals Nos 49, 51, 54, 60, 64, 67, 69, 71, 73, 75, 79, 80, 81 and 83 of 1922, 90 of 1921 and 101 of 1922 are dismissed without costs, and the tenants' Appeals Nos. 50, 52, 55, 61, 65, 68, 70, 72, 76, 117 of 1922 and 91 of 1921 succeed partially. Therefore the decrees will be prepared allowing the landlord only proportionate costs upon the amount found due to her in both the Courts below. Damage will be allowed at $12\frac{1}{2}$ per cent.

(4) 4 C. W. N. 239.

(5) 39 Ind. Cas. 645; 2 P. L. J. 183.

and cess six pies in the rupee in the amended decree.

Kulwant Sahay, J.—I agree.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 557 OF 1921.

January 25, 1924.

Present:—Mr. Justice Wallace.

RAMAKKAL—DEFENDANT No. 1—APPELLANT

versus

GOVINDANAYAKANPALAIYAM THIRUMAL PARIPALANA NIDHI LTD. BY ITS SECRETARY AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Change of law, effect of—Plea not permitted to be taken in previous suit, whether operates as* res judicata.

Where a suit is not *res judicata* on the date when it is filed, no change in the law can make it *res judicata* after it is filed. [p. 574, col. 2.]

An alienee from a judgment-debtor sued an attaching creditor under O. XXI, r. 63 of the C. P. C. to establish his right to the attached property. The defendant contended that the sale in favour of the plaintiff was fraudulent and voidable under s. 53 of the Transfer of Property Act. The Court found that the sale was not an absolute sham, but held, following the then prevailing view, that a plea of fraudulent transfer was not open to a defendant and decreed the plaintiff's suit. The attaching creditor thereupon filed the present suit for a declaration that the sale in favour of the claimant was a fraudulent transfer. The rulings on the basis of which the plea of fraudulent transfer had been disallowed in the previous suit had since been overruled by a later Full Bench judgment. On defendant's plea that the decree in his favour in the prior suit was *res judicata* in the present suit:

Held, that in the absence of any decision in the previous suit on the question whether the sale was a fraudulent transfer or not, no question of *res judicata* on that point could arise in the present suit. [p. 575, col. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Coimbatore, in Appeal Suit No. 126 of 1920, (A. S. No. 209 of 1920 on the file of the District Court of Coimbatore), preferred against the decree of the Court of the Principal District Munsif, Coimbatore, in O. S. No. 867 of 1918.

Dr. *S. Swaminathan*, for the Appellant.

Mr. *T. M. Krishnaswamy Aiyar*, for the Respondents.

JUDGMENT.—The only question argued by appellant before me is that of *res judicata* because of the decision in O. S. No. 151 of 1917 on the file of the Court of the Second Additional District Munsif of Coimbatore and A. S. No. 21 of 1918 on the file of the Court of the Subordinate Judge of Coimbatore.

2. In O. S. No. 151 of 1917 the present 1st defendant, the alienee, sued to establish her claim to the property sold to her by her brothers, which the present plaintiff had attached as the property of one of the brothers. The present plaintiff therein contended that the sale was fraudulent and voidable under s. 53 of the Transfer of Property Act. On appeal A S. No. 21 of 1918 the Subordinate Judge held that the sale was not an absolute sham, and that, as regards the plea of fraudulent transfer, the present plaintiff could not urge that in defence, without first suing to have the sale set aside; and there is no doubt that the law then stood so. (*Vide Palaniandi Chetti* v. *Appavu Chettiar* (1) and *Subramania Ayyar* v. *Muthia Chettiar* (2). That Court, therefore, refused to go into the question of fraudulent transfer and on the technical point repelled the present plaintiff's defence and decreed the suit.

3. It is plain then that the decision in A. S. No. 21 of 1918 only decided that the sale was not a sham, and refused to decide whether it was a fraudulent transfer. Plaintiff's present suit, to declare that the sale is a fraudulent transfer and have it set aside, was filed in accordance with the law as correctly laid down then by the Subordinate Judge in A. S. No. 21 of 1918, and it was filed while that law was still in force and before it had been upset by the Full Bench ruling in *Ramaswami Chettiar* v. *Mallappa Reddiar* (3).

4. There is no point in arguing that the law when plaintiff filed his suit must be deemed to have been the law as subsequently laid down in *Ramaswami Chettiar* v. *Mallappa Reddiar* (3). If plaintiff's suit was not *res judicata* on this ground when it was filed, no change in the law can make it *res judicata* after it was filed.

(1) 34 Ind. Cas. 778; 30 M L. J. 565; 19 M. L. T. 390.

(2) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705.

(3) 59 Ind. Cas. 947; 43 M. 760; (1920) M. W N. 572; 39 M. L. J. 350; 28 M. L. T. 170; 12 L. W. 475 (F. B.).

5. It was contended that since the sale *ex hypothesi* fraudulent was voidable by plaintiff, his avoidance is sufficient in law, to destroy 1st defendant's rights under it and renders the suit unnecessary. I confess myself unable to understand this argument or to conceive how 1st defendant's rights can be affected by a unilateral act of plaintiff.

6. It is quite clear to me that since no decision on the question whether the sale was a fraudulent transfer or not, was given in A. S. No. 21 of 1918, no question of *res judicata* on that point arises in this suit; nor is there any question of *res judicata* as regards the form of the suit since it is still, under the present law, open to plaintiff to bring his suit in the present form to avoid the sale.

7. The more important contention put forward is that, though the question of the sham nature of the document is *res judicata* and though the question of its fraudulent nature was the only question still open for trial, both the lower Courts have in fact decided that it was a sham and not a fraudulent transfer and have thus erred materially in law in re-trying a dead issue. The language of both Courts by insufficiently distinguishing between a sham transaction which passes no interest and a fraudulent transaction which does pass an interest, no doubt lends some support to the contention. But on a careful perusal of the lower Appellate Court's judgment and its final conclusion that the sale was a "fraudulent" one, I see no reason to remand the suit for a fresh finding. There is sufficient in the judgment of the lower Appellate Court on which to base its finding that the sale considered as a transfer was even so in fraud of creditors and, therefore, voidable.

8. I am not prepared to interfere and dismiss this appeal with costs.

V. N. V.
Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 658 OF 1923.
November 20, 1924.
Present:—Mr. Justice Mukerji.
JHABBA LAL—PLAINTIFF—APPELLANT
versus
DEBI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 57 (c), *58* (b), *63, 73—Lease for fixed period—Covenant to vacate if land required by lessor for* khud kasht—*Ejectment, suit for, nature of.*

Clause (c) of s. 57 of the Agra Tenancy Act contemplates an independent covenant the breach of which would entail a forfeiture of the lease. It does not contemplate a breach of a condition relating to evacuation of the land itself. [p. 576, col. 1.]

Defendants held certain lands from the plaintiff under a lease for a fixed period, one of the conditions of which was that whenever the plaintiff required lands for his *khud kasht* the defendants would vacate the lands without waiting for the expiry of the full term of the lease. Plaintiff sued the defendants for ejectment on the ground that he wanted the lands for his *khud kasht* and that the defendants had refused to vacate them after due notice:

Held, that the case fell under cl. (*b*) of s. 58 of the Agra Tenancy Act and ejectment could take place only in accordance with the provisions of that clause. [*ibid.*]

Second appeal against the decree of the District Judge, Bulandshahr, dated the 6th of April 1923.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Benoy Kumar Mukerji*, for the Respondents.

JUDGMENT.—The appellant was the plaintiff in the Court of first instance. The defendants-respondents held certain lands from the plaintiff under a lease for 7 years, *viz.*, 1323 to 1329. One of the conditions of the lease was that whenever the plaintiff required the lands either for his *khud kasht* or for the purpose of planting trees, the defendants would vacate the lands without waiting for the expiry of the full term of the lease. The plaintiff came to Court with the allegation that he, having wanted the lands for being used as *khud kasht*, verbally asked the defendants in September 1921 (during the currency of the *fasli* year 1329) to vacate the lands and thereafter sent a written requisition dated 29th October 1921 asking the defendants to vacate the lands by 16th November 1921. The defendants not having complied with the notice the suit was instituted.

The suit succeeded in the Court of first instance but was dismissed on appeal by the learned District Judge. That learned officer was of opinion that the defendants had conclusively proved that the plaintiff had no necessity for the lands in question, it having been established that the plaintiff had ample lands of his own which he could not cultivate himself, but had to let out to tenants. In view of this fact and being also of opinion that the lease contemplated the evacuation of the lands only at the end of an agricultural year, the suit was dismissed.

In this Court, it has been contended that the suit was based on a breach of condition and was, therefore, maintainable under cl. (c), s. 57 of the N. W. P. Tenancy Act. In my opinion cl. (c) s. 57 has no application. The condition, a breach of which is alleged to have been committed, is the condition relating to evacuation of the lands themselves. This is not clearly the meaning of the clause. The clause contemplates an independent covenant, the breach of which would entail a forfeiture of the lease. For exemple, if it were a condition that on the planting of trees the lease would come to an end, on the lessee planting trees it would be said that he had committed a breach of condition and thereby forfeited the lease. In my opinion cl. (c) s. 57 has no application.

The case really falls under cl. (*b*), s. 58 of the Tenancy Act. The defendants would be non-occupancy tenants under the lease, and according to the allegations made in the plaint the term of the lease expired on the plaintiff giving a notice to the defendants to vacate. If that be the case, the suit could be instituted only within 30th of June and 1st October 1921, and not later than that. The suit was actually filed on 29th November 1921. Even if the suit had been instituted within the period limited by s. 63 of the Tenancy Act, the tenants could not be ejected till the expiry of the current agricultural year and, therefore, not before 30th June 1922, *vide* s. 73 of the Tenancy Act.

There is no substance in this appeal and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2364 OF 1921, WITH RULE No. 31 (S) OF 1922.

February 27, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

WAJUDDI PRAMANIK—DEFENDANT—APPELLANT

versus

MOHAMMED BOLAI MORUL *alias* DALAI MORAL—PLAINTIFF—RESPONDENT.

Appeal—Suit entertained without jurisdiction—Appeal, when maintainable—Appeal entertained without jurisdiction—Second appeal, whether maintainable—Bengal Tenancy Act (VIII of 1885), s. 153—Rent-suit—Plea of non-joinder of necessary parties and absence of separate collection—Appeal, whether lies.

If a Court assumes jurisdiction over a matter over which it has no jurisdiction and passes a decree either in the suit or in appeal, and that decree is open to appeal under the ordinary law, no objection can be taken to an appeal from that decree on the ground that the Court below had no jurisdiction to try the matter, for an appeal may lie to a higher Court on the sole question of jurisdiction. [p. 577, col. 1.]

Where a Court of first appeal entertains an appeal which does not lie to it, an appeal will lie from the decree of that Court. [*ibid.*]

Kalipada Karmokar v. *Shekharbashini Dasya*, 35 Ind Cas. 348; 24 C. L. J. 225; 20 C. W. N. 967 and *Bandi Ram Mookerjee* v. *Purna Chandra Roy*, 43 Ind. Cas. 758; 27 C. L. J. 115; 45 C. 926, followed.

Where a rent-suit is tried by an officer specially empowered under s. 153 of the Bengal Tenancy Act, the decision in the suit does not become appealable merely because the defendant takes the plea of non-joinder of necessary parties and also urges that there was no separate collection of rent by the plaintiff. [*ibid.*]

Narain Mahton v. *Manofi Pattuk*, 17 C. 489; 8 Ind. Dec. (N. S.) 865 (F. B.) and *Sadhanya Santra* v. *Basanta Kumar Sarkar*, 64 Ind. Cas. 733; 34 C. L. J. 579; 26 C. W. N. 96; 49 C. 538; (1922) A. I. R. (C.) 417, distinguished.

Appeal against a decree of the Subordinate Judge, Fifth Court, Dacca, dated the 13th of August 1921, reversing that of the Munsif, Fifth Court at that place, dated the 29th of June 1920.

Babus *Surendra Chandra Sen* and *Satis Chandra Chowdhury*, for the Appellant.

Babus *Mohendra Nath Roy* and *Monmotha Nath Roy*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was one for rent valued at Rs. 9-11-0 which the plaintiff claimed from the defendant as landlord in respect of 4 annas share of the property. The defence was first that the plaintiff was not entitled to maintain the suit in the absence of other persons interested in the 4-annas share claimed by him, and, secondly, because there had been no separate collection of the plaintiff's share of the rent. The learned Munsif gave effect to both these pleas. He found that there were other brothers and their heirs who were interested in the 4-annas share claimed by the plaintiff, and that there had been no separate collection of the plaintiff's share of the rent. He accordingly dismissed the suit. There was an appeal by the plaintiff and the learned Subordinate Judge reversed that decision. The learned Judge was of opinion that the plaintiff and the *pro forma* defendants were the only persons interested in

the 4-annas share and that the plaintiff had succeeded in showing by both oral and documentary evidence that the collection in the 4-annas share was separte. As a result of these findings he decreed the plaintiff's suit. This second appeal has been preferred to this Court mainly on the ground that no appeal lay to the Court of first appeal inasmuch as the officer who tried the suit was specially empowered under s. 153-B, Bengal, Tenancy Act. This allegation has not been controverted by the respondent; but two preliminary objections have been taken by him with reference to this appeal.

It is contended that as there was no appeal to the lower Appellate Court according to the appellant's own showing, a second appeal to this Court was incompetent. This point has been before this Court on many occasions and it is now settled that if the Court of Appeal below entertains an appeal which it has no jurisdiction to do, an appeal will lie from the decree of that Court: *Kalipada Karmokar* v. *Shekharbashini Dasya* (1) and *Bandi Ram Mookerjee* v. *Purna Chandra Roy* (2). This view is also consonant with common sense. If a Court assumes jurisdiction (I purposely avoid the expression "usurps jurisdiction") over a matter over which it has no jurisdiction and passes a decree either in the suit or in appeal, and that decree is open to appeal under the ordinary law, no objection can be taken to an appeal from that decree on the ground that the Court below had no jurisdiction to try the matter; because an appeal may lie to a higher Court on the sole question of jurisdiction. To hold otherwise would mean that the judgment of a Court which has no jurisdiction would remain in force and have the same effect as that of a Court of competent jurisdiction. We are therefore of opinion that conceding that no appeal, lay to the lower Appellate Court in this case, a second appeal to this Court is maintainable on the ground that the order passed by the lower Appellate Court is without jurisdiction.

We then come to the more important question in the case, namely, whether an appeal lay from the decision of the Munsif; that is, whether the Munsif decided any question relating to title to land or to some interest in land as between parties having conflicting claims thereto or as to the amount of rent annually payable by the tenant. No question of title has been raised in this case by parties with conflicting claims. The point left, therefore, for consideration is whether the question of the amount of rent annually payable by a tenant was determined. As we have observed, there is no dispute with regard to the rent payable in respect of the entire holding nor is there any question of the amount of rent payable to the plaintiff—it being established that the plaintiff has a right to the 4-annas share of the rent. The only objections to the plaintiff's right to recover rent were that the plaintiff had other co-sharers and so the suit was bad for defect of parties and that there was no separate collection. None of these grounds, in our opinion, comes within the exception to the rule that in a suit for rent below a certain value no appeal lies. It is argued on the authority of the decisions in the cases of *Narain Mahton* v. *Manofi Pattuk* (3) and *Sadhanya Santra* v. *Basanta Kumar Sarhar* (4), that the present case is covered by the principle laid down in those cases. We think that these cases are distinguishable from the present one. In the Full Bench case of *Narain Mahton* v. *Manofi Pattuk* (3), the plaintiff brought a suit for rent claiming a certain share in the property. The defendant stated that the plaintiff's share was not what it was alleged to be but much less. The effect of the defence was that the plaintiff was not entitled to recover the amount claimed by him as rent but that he was entitled to recover a sum less than the sum claimed by him. The Full Bench was of opinion that the question of the amount of rent annually payable by a tenant was in issue. The whole controversy turned upon the meaning of the expression "amount of rent annually payable." On one side, it was argued that the expression meant the amount of rent annually payable in respect of the entire tenancy. It was contended, on the other hand, that the expression referred to the amount of rent annually payable by the defendant to the plaintiff. To the same effect is the decision in the case of *Sadhanya Santra* v. *Basanta Kumar Sarkar* (4). In that case the plaintiff brought a suit for the entire rent on the allegation that he was entitled as landlord to the extent of 6-annas 8-*gandas* share and in the rest he had ac-

(1) 35 Ind. Cas. 348; 24 C. L. J. 235; 20 C. W. N. 967.

(2) 43 Ind. Cas. 758; 27 C. L. J. 115; 45 C. 926.

(3) 17 C 489; 8 Ind. Dec (N. S.) 865 (F. B.).

(4) 64 Ind. Cas. 733; 34 C. L. J. 579; 26 C. W. N. 96; 49 C. 538; (1922) A. I. R. (C.) 417.

quired an *ijara* lease from the other co-sharers. The defendant admitted the extent of the plaintiff's share as landlord but denied the existence of the *ijara* lease. It is clear, therefore, that the question raised in that case was whether the plaintiff was entitled to recover the entire rent or rent in respect of 6-annas-8-*gandas* share only. It was held that as it was a case for the determination of the question of the amount of rent annually payable to the plaintiff an appeal lay to the lower Appellate Court. These cases, therefore, are no authority for the proposition urged by the learned Vakil for the respondent. If the decree of the First Court had decided that the plaintiff is not entitled to the 4-annas share claimed by him but to a smaller share, and appeal would probably have lain on the authority of the cases above cited. We accordingly hold that the appeal lay to the lower Appellate Court was incompetent.

The second objection taken to the hearing of this appeal is that the *pro forma* respondents were not made parties to the appeal. It appears that they were mentioned as parties in the memorandum of appeal but no steps were taken by the appellant to secure their proper representative. We do not think that, in the peculiar circumstances of this case, this objection should be allowed to prevail. The suit was brought by the plaintiff alone impleading certain persons as *pro forma* defendants who, it is said, were the heirs of one Araj who was the only other person interested in the 4-annas share claimed by him. These defendants applied to be made plaintiffs but their application was rejected. The suit was dismissed and the plaintiff alone appealed. The *pro forma* defendants did not question the correctness of the order made by the Munsif, refusing their application to be made plaintiffs. The appeal succeeded and the plaintiff's suit was decreed. The objection taken by the defendant in this Court is against the maintainability of the plaintiff's appeal to the lower Appellate Court. This is a question in which the *pro forma* defendants are not interested.

We may mention that the appellant has also filed an application under s. 115, C. P. C., and obtained a Rule thereon. As we hold that the lower Appellate Court had no jurisdiction to entertain the appeal we can set aside the order of the lower Appellate Court in the exercise of the jurisdiction vested in us under that section. But as we are of opinion that the second appeal lies to this Court from the decree of the lower Appellate Court, it is not necessary to consider this question further.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs in all the Courts.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1750 OF 1922.

November 18, 1924.

Present:—Mr. Justice Ryves and Mr. Justice Mukerji

Molvi ALI HAMMAD—PLAINTIFF—APPELLANT

versus

GHURPATTAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Title, proof of—Nature of property—Limitation.

Where in a suit for recovery of possession the plaintiff proves antecedent title and there is no allegation of dispossession nor is there any finding that the plaintiff was actually dispossessed on a certain date, Art. 144 of Sch. I of the Limitation Act applies to the case and the Court should consider whether the defendant has completed a title in himself by being in adverse possession for the statutory period. [p. 579, col. 2.]

Secretary of State for India v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.) and *Jai Chand* v. *Girwar Singh*, 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669, followed.

In considering the question of possession in such a case the Court should consider the nature of the property and as to how far it is capable of being possessed directly. [*ibid.*]

Kuthali Moothavar v. *Peringati Kunharankutty*, 66 Ind. Cas. 451; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 26 C. W. N. 666; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.), followed.

Second appeal from a decree of the District Judge, Azamgarh, dated the 1st November 1922.

Messrs. *P. L. Banerji, Iqbal Ahmad, N. P. Asthana* and *Mukhtar Ahmad*, for the Appellant.

Messrs *N. Upadhiya* and *Ram Nama Prasad*, for the Respondents.

JUDGMENT.—The plaintiff in the Court of first instance is the appellant here.

He brought the suit, out of which this appeal has arisen, praying for a declaration of his title to a large tract of land the largest portion of which was covered with wood, water, etc., and in the alternative for possession. He said in his plaint that once many years ago the parties were co-sharers, that there was a partition in 1889 and the entire tract of land fell to the plaintiff's share and was formed into one complete *mahal*. He further stated that a short time before the institution of the suit, that is to say in 1918 the defendants had a partition case among themselves and, as a result of that, they divided the land. He further alleged that on the 24th of October 1918 the defendants interfered with his possession. The suit was instituted on the 10th of December 1918.

The defence was that the title was with the defendants and at any rate they had acquired it by having completed twelve years' adverse possession.

The Court of first instance found that the plaintiff had failed to prove by satisfactory evidence his possession within twelve years of the suit. He also found that the defendants too had failed to prove their adverse possession for that period. The learned Subordinate Judge applied Art. 144 of the Indian Limitation Act and said that the defendants having failed to prove twelve years' adverse possession the plaintiff ought to succeed. He accordingly gave a declaration as to plaintiff's title.

Some of the defendants appealed and the learned District Judge decreed the appeal having applied Art. 142 of the Indian Limitation Act.

In this Court two main points have been urged. First, it has been urged that the plaintiff's title having been found to have existed in 1889 it was for the defendants to have proved adverse possession for over twelve years. The second point urged is this. A large portion of the land which is unculturable is covered with wood and water and that the nature of this land has not been taken into consideration by the learned Judge of the lower Appellate Court. The argument is that where possession is doubtful and title is clear, possession ought to follow title.

As we read the judgment of the learned District Judge we find that he also agreed with the Court of first instance that the plaintiff had made out his title under the partition of 1889. The learned Judge however, found that in the Settlement of 1901 the plaintiff's name disappeared from the Settlement Record and that the names of the defendants have continued since the last Settlement. He, therefore, found that the plaintiff had failed to prove that any title subsisted in him. Evidently he applied Art. 142 of the Limitation Act.

It appears to us that the plaintiff having proved that he got the lands in suit in 1889, that fact should have been taken as the basis of decision. The plaintiff nowhere stated in the plaint that he had been dispossessed. It has not been found as a fact that he was actually dispossessed on a certain date. In the circumstances according to the Privy Council case of *Secretary of State for India* v. *Chelikani Rama Rao* (1) followed in *Jai Chand* v. *Girwar Singh* (2), Art. 144 would apply and the learned Judge should have considered whether the defendants had completed a title in themselves by being in adverse possession for twelve years.

The second point mentioned above is really involved in the first. In considering the question of possession the learned Judge will have to consider the nature of the property. How far that property is capable of being possessed directly will have to be considered. We may draw the learned Judge's attention to a recent case decided on the 18th of July 1921 by their Lordships of the Privy Council in *Kuthali Moothavar* v. *Peringati Kunharakutty* (3). That case related to certain hills. The title was with one party and the other party had proved that he had exercised possession over the property in a clearer manner than the party having the title. In the circumstances of the case the Judicial Committee held that the party with title should succeed.

We are of opinion that the learned Judge has approached the case from a wrong point of view and it is necessary that he should re-consider the case in the light of the remarks contained in this judgment.

We accordingly set aside the decree of the Court below and remand the case to it

(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(2) 52 Ind. Cas. 366; 17 A. L. J. 814; 41 A. 669.

(3) 66 Ind. Cas. 451; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 26 C. W. N. 666; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.).

for being re-tried. Costs here and hitherto will abide the result.

Z. K. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1138 OF 1922.
June 4, 1924.
Present:—Mr. Justice Daniels and Mr. Justice Neave.

RAM ADHAR—PLAINTIFF—APPELLANT
versus
BHAGWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Attestation of document by witness—Knowledge of transaction—Mortgage by Hindu widow—Attestation by reversioners, effect of.

Attestation of a document may take place in circumstances that would indicate that a witness attesting the document did in fact know of the nature of the transaction and assented to it. [p. 580, col 2.]

Hari Kishen Bhagat v. *Kashi Parshad Singh*, 27 Ind. Cas. 674; 42 C. 876 at p. 886; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 A. 64 (P. C.) and *Pandurang Krishnaji* v. *Markandeya Tukaram*, 65 Ind. Cas. 954; 49 I. A. 16; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 5 N. L. J. 6; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. C.) 20; 49 C. 334 (P. C.), referred to.

A mortgage-deed executed by a Hindu widow to pay off a debt due from the reversioners of her deceased husband was attested by the reversioners:

Held, that the reversioners had assented to the mortgage and that they and their successors were estopped from questioning it after the estate had fallen into possession. [p. 581, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Cawnpore, dated the 22nd April 1922.

Mr. *Peary Lal Banerji*, for the Appellant.
Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the enforcement of a mortgage by sale of the mortgaged property. The mortgage was executed by *Musammat* Gulbari a Hindu widow in possession of the estate of her deceased husband. The defendants to the present suit are the reversioners, her husband's brother and nephew, who have succeeded to the estate after her death. The point on which the Courts below have differed is whether the defendants are estopped from questioning the mortgage by reason of the fact that they, or rather the first defendant and the father of the second defendant through whom the second defendant claims, were assenting parties to the mortgage. The learned Munsif held that they were estopped. The learned Subordinate Judge considered that there was no evidence on the record from which the Court could legally infer their consent. It is this finding which is challenged in appeal. The facts are practically undisputed. The debt in respect of which the mortgage was executed was a debt due from the defendant Bhagwan Singh and from Buddhi Singh the father of the second defendant. They were at the time the presumptive reversioners to the estate. They attested the mortgage-deed. They also identified *Musammat* Gulbari before the execution officer. The learned Subordinate Judge relies on the numerous rulings in which it has been held that mere attestation is not sufficient to fix a party with knowledge of the deed attested. This principle is not open to dispute but in all the rulings in which it has been laid down their Lordships of the Privy Council have been careful to safeguard it by stating that attestation combined with other circumstances may amount to evidence of consent. Thus in *Hari Kishen* v. *Kashi Parshad Singh* (1), their Lordships are careful to point out that there was no evidence that the reversioners benefited by the transaction or that so far as they were concerned there was any need for the mortgages. Similarly in *Pandurang Krishnaji* v. *Markandeya Tukaram* (2), a case specially relied on by the learned Subordinate Judge, it is pointed out that attestation may take place in circumstances that would indicate that the witness did in fact know of the nature of the transaction. Here the facts speak for themselves. Not only did the reversioners attend before the Registrar, identify the executant, and attested the deed, but the debt in respect of which the deed was executed was a debt due from the reversioners themselves as principal debtors. It is impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it. We cannot, therefore, agree with the learned Sub-

(1) 27 Ind. Cas. 674; 42 C. 876 at. p. 886; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 64 (P. C.).

(2) 65 Ind. Cas. 954; 49 I. A. 16; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 5 N. L. J. 6; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. C.) 20; 49 C. 334 (P. C.).

ordinate Judge that there was no evidence on the record from which the consent of the reversioners could be inferred. It is pointed out on behalf of the respondents that the widow was surety for the debt and that this fact is recited in the deed. We do not think that this fact affects the merits of the case. The mortgage did not purport to be a mortgage of the widow's limited interest only but of the entire estate and when we find that that mortgage was executed with the assent of the reversioners in respect of the debt due from themselves, we agree with the Trial Court that they and their successors are estopped from questioning it now that the estate has fallen into possession.

We, therefore, set aside the decree of the Court below and restore that of the Trial Court with costs both in this Court and in the lower Appellate Court. Costs in this Court will include fees on the higher scale. We extend the time for payment to six moths from this date.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 251 OF 1922.

February 28, 1924.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

BRAJESWARI DASI—PETITIONER—APPELLANT

versus

RASIK CHANDRA GHOSE AND ANOTHER—RESPONDENTS.

Will—Probate—Sound disposing mind, what constitutes—Burden of proof.

The onus of proof is upon an applicant for Probate to satisfy the conscience of the Court that the testator had a sound disposing mind at the time of making the Will. [p. 583, col. 2.]

If a testator has given instructions for his Will and it is prepared in accordance with those instructions, it will be valid though at the time of execution the testator merely recollects that he has given those instructions but believes that the Will which he is executing is in accordance with those instructions. [*ibid.*]

It would also be sufficient if it is proved that the testator had approved the Will although there might be no direct evidence as to his giving any instructions. [p. 582, cols. 1 & 2.]

In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from all participation in that property. The protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. [p. 582, col. 2.]

The question, therefore, which the Court is to decide in a case in which a testator has devised the whole of his property to one of his relatives, is not whether the testator knew that he was giving all his property to the devisee and excluding all his other relations from any share in it, but whether he was at the time of execution of the Will capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition though the justice or injustice might cast some light upon the question as to his capacity. [p. 582, col. 2; p. 583, col. 1.]

A testator who was a young man of about 21 years of age and had been suffering from diarrhœa and fever for two months before his death and was enfeebled both in body and in mind devised his entire property by Will, shortly before his death, in favour of his aunt by whom he was being nursed during his illness:

Held, that in the circumstances of this particular case, it was necessary for the propounder of the Will to prove that the terms of the Will had been clearly understood by the testator and had been approved by him; and that the mere fact that the testator could at the time of execution say that it was his Will or could answer some simple questions which were put to him did not show that he had a sound disposing mind at the time. [p. 582, col. 2.]

(Case-law referred to.)

Appeal against a decree of the Subordinate Judge, Maldah Rajshahye, dated the 24th of July 1922.

Babu *Satindra Nath Mukherjee*, for the Appellant.

Babu *Gopal Chandra Das* for Babu *Nisitha Nath Ghatak*, for the Respondents.

JUDGMENT.—This appeal is against an order refusing Letters of Administration with copy of the Will annexed.

The Will was executed by one Suresh Chandra Ghose on the 12th May 1920, was registered on the 17th May 1920 at 5 P. M. and the testator died that night. It appears that the testator was about 21 years of age at the time of his death. He had lost his father and mother and he was for about two months before his death suffering from fever and diarrhœa, and was residing at the house of one of his paternal uncles Nabin, whose wife Brajeswari nursed him during that period. The Will purported to

give practically all the properties of the testator to Brajeswari after making provision for a minor sister. Brajeswari propounded the Will and two of the paternal uncles of the testator contested the Will. The execution of the Will by the testator is not disputed but the Court below has found that it was not properly attested, and that the testator was not of a sound disposing mind at the time of the execution of the Will.

Brajeswari appealed to this Court and it is contended that the Court below was wrong in holding that the testator had not a sound disposing mind when he executed the Will. There are six attesting witnesses to the Will, three of them, namely, Janmejoy, Harish Chandra and Lalit, have been examined besides a few others who were not attesting witnesses including Nabin, the husband of Brajeswari. The Court below was not satisfied on the evidence that the testator had a sound disposing mind at the time. Nabin stated that the testator read the Will and signed his name and that he was then in possession of his faculties. Harish deposed that the testator said that he had bequeathed the properties to his aunt and that he asked two or three questions to the testator to which the latter gave replies. Guru Charan said that when the testator died he was in possession of his faculties. Janmejoy was the scribe of the Will and he said that he drafted the Will at the request of Nabin, that Nabin called him to write out the Will, and that he dictated the terms of the Will to him. Lalit another witness said that he was called by Nabin to witness the Will and that the testator told him that unless he executed a Will they would not nurse him and he would die. The witnesses Janmejoy and Lalit ware declared hostile witnesses in the Court below. Now so far as the evidence of Janmejoy goes it would appear that instructions as to the Will were given by Nabin but we are asked to leave that evidence out of consideration because in the lower Court he was declared as a hostile witness. It appears that he was present before the Sub-Registrar and identified the testator. But leaving aside the evidence of Janmejoy and Lalit there is no evidence to show under whose instructions the Will was prepared; whether such instructions were given by the testator or by Nabin as stated by Janmejoy.

Ordinarily it would be sufficient if it were proved that the testator had approved the Will, although there might be no direct evidence as to his giving any instructions. But in the present case the circumstances are these: the testator was a young man of about 21 years of age. He was suffering from diarrhœa and fever for at least two months before his death, and he was enfeebled both in body and mind at the time he was being nursed by his aunt who has set up the Will. We think that in these circumstances it was necessary for her (the propounder of the Will) to prove that instructions for the Will were given by the testator, at any rate that the terms of the Will were understood by the testator and approved by him. Then in the next place we have to remember that the mere fact that the testator could say that it was his Will or could answer some simple questions which were put to him does not show that he had a sound disposing mind at the time. As was pointed out in the case of *Harwood* v. *Baker* (1) by the Judicial Committee "that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of re-collecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

"If he had not the capacity required, the propriety of the disposition made by the

(1) (1840) 3 Moor. P. C. 282 at p. 290; 13 E. R. 117; 50 R. R. 37.

Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity". In the case of *Longford* v. *Purdon* (2) it was observed; "A man is competent to make his Will if he has sufficient memory and intelligence to be able to comprehend the nature of his property to remember and understand the claims of relations and friends and to have a judgment of his own in disposing of his property; if a man possesses this amount of memory and intelligence, he is a competent testator; if he is not able to perform the mental acts mentioned, then he is not a competent testator". In *Sefton* v. *Hopwood* (3) it was said by Cresswell, J.: "It is not sufficient in order to make a Will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called 'a disposing mind'; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible Will or a reasonable Will, or a kind Will. But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that it suffices" [See also *Woomesh Chunder Biswas* v. *Rash Mohini Dassi* (4) affirmed on appeal by the Privy Council in *Rash Mohini Dasi* v. *Umesh Chunder* (5), *Susil Kumar Banerjee* v. *Apsari Debi* (6), and *Surendra Krishna Mondal* v. *Sm Rance Dassi*, (1)] where the cases on the point are collected and discussed. As stated above the Will practically gave all the properties of the testator to Brajeswari. The testator had three sisters two of them were married and the third was a minor living with him. The only provision made with regard to the minor sister was that Brajewari was to give her in marriage and if she failed to do so she would not get the properties mentioned in schedule *Ka* of the plaint which consisted of a homestead on 2 *cottahs* of land and the Will directed that in that event the minor was to be maintained from the income of that homestead. That is all the provision with regard to the minor sister and nothing was said about the married sisters. The aunt certainly was not in the line of heirs at all. It is true that she nursed him during his last illness. But the question is whether at that time he was able to understand his position to appreciate the property and to form a judgment with respect to his relations and their claims upon his bounty. Having regard to the circumstances of the case we are unable to differ from the Court below in the finding that he was not of a sound disposing mind. Had it been shown that the testator had himself given instructions for the Will and that the Will was prepared in accordance with his instructions it would have been a different matter. It is pointed out in the case of *Parker* v. *Felgate* (8) "If a testatrix has given instructions for her Will, and it is prepared in accordance with them, the Will will be valid though at the time of execution the testatrix merely recollects that she has given those instructions but believes that the Will which she is executing is in accordance with them." There is no evidence of the testator having given any instructions for the Will.

It appears that the testator was attended by a Doctor named Radha Raman who has not been called nor the petitioner who nursed the testator has been examined though some steps appear to have been taken at an early stage for her examiuation on commission. These two witnesses would have been very competent witnesses to depose to the mental and physical conditions of the testator. The onus of proof was upon the applicant for Probate who was to satisfy the conscience of the Court that the testator had a sound disposing mind. The Court below came to the conclusion that it had not been proved and we are unable to differ from it. It is unnecessary in this view to consider the question whether the Will was properly attested.

The appeal accordingly fails and is dismissed with costs, hearing fee being assessed at one gold *mohur*.

Z. K. *Appeal dismissed.*

(2) 1 R. Ch. 75 at p. 77.
(3) (1858) 1 F. & F. 579.
(4) 21 C. [illegible]; 10 Ind. Dec. (N. S.) 818.
(5) 25 C. 824; 25 I. A 100; 2 C. W. N. 321; 7 Sar. P. C. J. 298; 13 Ind. Dec. (N. S.) 537.
(6) 27 Ind. Cas. 276; 19 C. W. N. 826; 20 C. L. J. 501
(7) 59 Ind. Cas. 814; 24 C. W. N. 860; 33 C. L. J. 34; 47 C. 1013.
(8) (1883) 8 P. D. 171; 52 L. J. P. 695; 32 W. R. 186; 47 J. P. 808.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 561 OF 1923.
November 14, 1924.
Present:—Mr. Justice Mukerji.
Srimati SHAM DEVI—PLAINTIFF—APPELLANT
versus
BHAGWAT DAYAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment, what amounts to—Statement by vendee that he purchased property from mortgagee, whether acknowledgment of subsisting mortgage.

For a statement to amount to an acknowledgment within the meaning of s. 19 of the Limitation Act, there should be an acknowledgment of liability and it should be a conscious acknowledgment. [p. 586, col. 1.]

When a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into the possession of his vendor as a mortgagee. All that he admits is that his vendor came into the possession of the property on foot of a mortgage. No question arises in his mind as to whether the mortgage subsists or has become time-barred. The statement by itself does not signify to the mind of the person making it or to anybody else that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making the statement. Such a statement does not amount to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act. [*ibid.*]

Second appeal against a decree of the District Judge, Bulandshahr, dated the 2nd of January 1923.

Messrs. *B. K. Mukerji* and *S. N. Mukerji*, for the Appellant.

Messrs. *P. L. Banerji* and *S. N. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff of the Court of first instance is the appellant in this Court. She brought, as a purchaser of the equity of redemption, a suit for redemption of a mortgage alleged to have been executed in 1843. The suit succeeded in the Court of first instance, but the learned District Judge on appeal dismissed it. He came to two conclusions, *viz.*, the appellant had failed to prove that she had any subsisting title to the property at the date of the suit and that the suit was barred by time.

In appeal, it is contended that both the findings are incorrect. The learned Counsel for the respondent urged that the finding as to title was a finding of fact and was binding on this Court.

On the question whether the finding of the learned Judge was a finding of fact, the argument of the learned Counsel for the appellant was that the facts were all admitted, the interpretation of the documents was all admitted, but the argument of the learned Judge was faulty and it was open to this Court to see where the fallacy of the argument of the learned Judge lay and then it was further open to this Court to consider the case on the merits.

In order to appreciate this argument it was necessary to go into the evidence which was practically entirely documentary. I have examined the entire evidence and that evidence stands as follws:—

It appears that there were two brothers, Asalat Khan and Karim Bakhsh, each of the brothers owning a 10-*biswa* share in a certain village. This was in 1806. As I have said the mortgage was executed in 1843. It appears that the factum of the mortgage was found established by the Court of first instance and the question was not raised again before the learned District Judge. Then we find that by 1855 the property of the brothers had been alienated. Karim Baksh had mortgaged 5 *biswas* to one Chittar Mal and 5 *biswas* to one Abadullah. Out of the share of Asalat Khan $7\frac{1}{2}$ *biswas* had been purchased by Abadullah and Abadullah had taken a mortgage of the remaining $2\frac{1}{2}$ *biswas*. It is this mortgage of $2\frac{1}{2}$ *biswa* that is sought to be redeemed. Then we find that Abdullah's son Abdul Latif joined the mutineers and his property was confiscated. In 1861 his property was sold and was purchased by the respondent's ancestor. This property was described as 8 *biswas* proprietary rights and 6 *biswas* mortgagee rights. It will be noticed that a certain change had taken place between 1855 and 1861 when the auction sale was held. In 1855 Abadullah had proprietary rights in $7\frac{1}{2}$ *biswas* and mortgagee rights in $7\frac{1}{2}$ *biswas*. In 1861 he had only 14 *biswas* in all, *viz:* 8 *biswas* in proprietary rights and 6 *biswas* as a mortgagee. Then it appears that in the *khewat* of 1861 which is to be found in the *wajib-ul-arz* of that year dated the 10th of October 1861 the property was recorded as follows:—

Descendants of Karim Bakhsh mortgagors of $4\frac{1}{2}$ *biswas*, the same property being held by Harsukh Rai (the ancestor of the respondent) as mortgagee: Harsukh Rai proprietor of $9\frac{1}{2}$ *biswas*.

It was stated that out of these $9\frac{1}{2}$ *biswas* he had purchased 8 *biswas* belonging to Abdul Latif and he had purchased $1\frac{1}{2}$ *biswas* from Karim Bakhsh's descendants.

Chittar Mal was shown as the mortgagee of 6 *biswas*, being the property of Karim Bakhsh's descendants. It will be noticed that no names of descendants of Asalat Khan ever appeared in the *wajib-ul-arz* and *khewat* of the 10th of October 1861. Further, we find that Fatehyab, son of Asalat protested against this entry and made an application for correction of the *khewat*. His contention was that his name should have been recorded as a mortgagor of 2½ *biswas*. His application was dismissed, we do not know for what reasons, on the 20th of January 1862. Fatehyab lived up to the year 1921, but it does not appear that he ever stirred himself to obtain a correction of the *khewat*. It was on his death that his descendants sold the property to the appellant. On all this evidence the learned Judge came to the conclusion that the appellant had failed to prove that she or her predecessor had any title in the 2½ *biswas* left in them.

The learned Counsel for the appellant has contended that the mortgagee was put in possession of property and the mortgagee was bound to hand over that property to the descendants of the mortgagor and it was for him, *viz.*, for the mortgagee to account for the loss of title in the mortgagor. There can be no doubt that there is a good deal of force in this argument. Abstractly speaking this argument is sound. But we have to look at the argument in the light of the circumstances of the case. We see that between 1855 and 1861, *viz.*, within the space of six years, a decided change had taken place in the entry in the *khewat* and that change was to the detriment of Fatehyab, a descendant of Asalat Khan. Fatehyab became aware of that change and he took steps to have an alleged error remedied. He failed. But he never took any steps by way of a suit in the Civil Court or elsewhere to have the error corrected. The question then is whether under the circumstances, the Court below was justified in saying that after the lapse of 60 years, that is after the entry of 1861 had been allowed to stand for over 60 years, the plaintiff can say that her or her prdecessors' title still subsists. Many things may have happened between 1855 and 1861 to justify the entries made in the later year. In my opinion the inference to be drawn is an inference of fact from admitted entries in documents and it cannot be said that that inference is perverse or illegitimate. It is not necessary for me to express my own opinion on the point. I do think that the Judge's finding as to want of this in the appellant is a finding of fact and that finding is binding on this Court.

As I am deciding this second appeal as a Single Judge and there is every likelihood of there being a Letters Patent Appeal, I would like to decide the second question, *viz.*, that of limitation as well.

Undoubtedly the suit would be time-barred except for an alleged acknowledgment made in 1861. It appears that after his purchase Harsukh Rai made an application to the Collector tendering the purchase-money and asking for a delivery of the property to him. In this application he said that he was paying so much for the proprietary rights purchased by him and so much for the mortgagee rights purchased by him. It is argued that this statement of Harsukh Rai that he was paying so much money for the mortgagee rights was an acknowledgment of the fact that he was liable to be redeemed. Reliance has been placed on the case of *Mani Ram Seth* v. *Seth Rup Chand* (1). On the other hand the learned Counsel for the respondent relies on the same case on which the Court below relied, *viz.*, *Khiali Ram* v. *Taik Ram* (2).

The Privy Council case relied upon by the appellant has been distinguished in a much later case by the Madras High Court, *viz*, *Kandasami Reddi* v. *Suppammal* (3). It has been pointed out in the Madras case that the facts before the Privy Council were entirely peculiar and that case was no authority for the proposition that a mere statement that a certain person was a mortgagee amounted to a statement that that mortgage subsisted as an enforcible transaction. In the case before the Madras High Court the suit was on foot of a mortgage which would be time-barred except for a certain statement in a plaint once filed by the defendants. In that plaint the defendants as plaintiffs of the suit had stated that they had executed on a certain date a certain hypothecation deed for a certain amount of money and that they had received the consideration in

(1) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

(2) 36 Ind. Cas. 452; 14 A. L. J. 834; 38 A. 540.

(3) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M.) 104; 32 M. L. T. 166.

a certain way. The learned Judges of the Madras High Court were of opinion that mere statement of a fact that a certain mortgage had been executed did not amount to an acknowledgment of an existing liability under it.

There can be no doubt the question of law discussed in Allahabad case [*Khiali Ram* v. *Taik Ram* (2)] did not arise after the finding that the mortgage sought to be redeemed had not been established. But the case before this Court was a first appeal and it was probably necessary for the learned Judges to decide all the questions raised before them. In the Allahabad case the question raised was very similar to the question raised in this Court. Indeed, the alleged acknowledgment in the Allahabad case was in much stronger language. The learned Judges following the case of *Dharma Vithal* v. *Gobind Sadvalkar* (4), were of opinion that an acknowledgment must be a conscious acknowledgment and must show that the person who was acknowledging understood that he was by the statement acknowledging a liability. Their Lordships quoted in extenso from the Bombay case and came to the conclusion that the document before them did not amount to an acknowledgment.

Apart from authority, on the language of s. 19 of the Limitation Act, it appears clear to me that for a statement to amount to an acknowledgment there should be an acknowledgment of liability. When a man says that he purchased a certain mortgagee right he only means that he purchased a certain property which came into the possession of the vendor as a mortgagee. All that he admits is that the vendor came into possession of the property on foot of a mortgage. No question arises in his mind as to whether the mortgage subsists or has become time-barred. The statement by itself does not signify to the mind of the person making the statement or to anybody else that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making the statement. As I have said, apart from authority, I am of opinion that an acknowledgment of liability must be a conscious acknowledgment of the same.

Now, the question is whether the Privy Council in *Mani Ram Seth* v. *Seth Rup Chand* (1) has in any way so explained s. 19 of the Limitation Act as to lay down that any acknowledgment of the original transaction would amount to an acknowledgment that the liability which would follow from the original transaction subsits at the date of the statement. As pointed out by the learned Judges of the Madras High Court, the defendant in the Privy Council case, beyond stating that he had a current account with the estate of a deceased person, also stated that any such liability that he might be under would not disqualify him to be appointed an excutor of the estate. This latter statement clearly signified that the man said not only that he had an account with the estate of the deceased but also that he might be a debtor to the estate on the date of making the statement. The Privy Council case, therefore, is in no way an authority for the case now before me. I, therefore, agree with the Court below that the suit is time-barred.

The result is that the appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(4) 8 B. 93; 8 Ind. Jur. 261; 4 Ind. Dec. (N. S.) 439.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1749 OF 1922.

April 25, 1924.

Present:—Mr. Justice Neave.

RAM SARAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur SHEO PRATAB SINGH—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Undertaking given by party to plant no more trees on land in dispute, whether requires registration—Declaration, suit for, that undertaking is ineffectual, maintainability of.

A person cannot be permitted to give an undertaking to a Criminal Court to abstain from certain actions and then to go and file a civil suit for a declaration that the undertaking given by him is of no effect. Such a suitcannot be countenanced. [p. 587, col. 2.]

An undertaking given by a party to a proceeding under s. 145 of the Cr. P. C. to plant no more trees on the land in dispute, to remove any new trees that have been planted and to abstain in future from digging holes in the land is not a compromise and does not require registration. [p. 587, col. 1.]

Second appeal against a decree of the Small Cause Court Judge, Allahabad, exercising the powers of a Subordinate Judge, dated the 7th September 1922.

Mr. *Hamid Hasan*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for a declaration that what they describe as a compromise filed by them in a Criminal Court is null and void and not binding upon them. Briefly put, the facts are that the appellants are grove-holders. The respondents, who are their *zemindars*, made a report to the Police that they had planted some new trees and dug holes in their grove and that, as these groves were used as the site of a weekly market, there was a risk that these actions might give rise to disputes and breaches of the peace. The Sub-Inspector of Police made a report to the Magistrate on which proceedings were started against the appellants under s. 145 of the Cr. P. C. The appellant filed a petition containing the alleged compromise. As a matter of fact, this was not a compromise at all but an undertaking given by them to plant no more trees, to remove any new trees that had been planted and to abstain in future from digging holes. This application was filed and the case was later on dismissed apparently without reference to it.

The First Court appears to have treated this as a compromise dealing with immoveable property to the value of more than Rs. 100 which required registration, and granted the appellants a decree on the ground that the document was unregistered. The lower Appellate Court held that the application was no more than an undertaking in the form of a petition, which required neither to be stamped nor registered. The various allegations to the effect that the execution of the application had been obtained through fraud, coercion and undue influence were found by the Court below to be untrue.

Clearly the document in question was not a compromise. It was only an undertaking given by the appellants to the Criminal Court with the object of saving themselves from any further action under s. 145. It may be true that the Court took no action on it and decided the case on other grounds, but even so the appellants cannot be allowed to bring a suit, like the present one, to have the undertaking declared of no effect. It is unnecessary to decide whether it is effectual or not. That point can be raised if any other litigation takes place on the subject between the parties. A person is not entitled to give an undertaking to a Criminal Court to abstain from certain actions, and then to go and file a civil suit for a declaration that the undertaking given by him was of no effect.

The order passed by the Court below was a proper one and the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3770 OF 1921.

July 14, 1924.

Present:—Mr. Justice Taraporewala.

ROSE FERNANDEZ—PLAINTIFF

versus

JOSEPH GONSALVES—DEFENDANT.

Minor—Contract of marriage entered into by guardian, whether enforceable—Breach of promise of marriage—Suit for damages by minor, whether maintainable—Damages, assessment of.

A contract of marriage made on behalf of a minor by a person who is the natural guardian of the minor and who is the only person who could enter into such a contract is valid and binding. [p. 588, col. 2; p. 589, col. 1.]

Where a contract is made by a guardian of the minor so as to be binding on the minor and which is for the benefit of the minor there is an enforceable contract in law and the minor can enforce it. [p. 589, col. 1.]

Parents in India can make a binding contract of marriage on behalf of their daughters. [p. 590, col. 2.]

In assessing damages for breach of promise of marriage, the injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant's means should all be taken into consideration. [p. 593, col. 2.]

Mr. *Poonavala*, for the Plaintiff.

Mr. *Judah*, for the Defendant.

JUDGMENT.—This suit has been filed by the plaintiff, who has now attained majority, for recovering damages for breach of contract of marriage made by the defendant with her and her father. There is no dispute as to the facts in the case, and although the defendant's Counsel in his cross-examination tried to elicit facts with a view to show that the contract of marriage was by mutual consent cancelled or abandoned, the defendant has not ventured to go into the witness-box or lead

any evidence to substantiate the said allegation. I must, therefore, take it that the contract of marriage, which is admitted by the defendant, was subsisting at the date the defendant admittedly married another lady in the year 1921 and that he has committed a breach of the contract. The defendant's Counsel, however, has taken up a point which, if decided in defendant's favour, goes to the very root of the case. The point is that the contract in suit was either made by the defendant with the plaintiff or by the defendant with the plaintiff's father, that if it was made by the defendant with the plaintiff, the contract is void as having been made with a minor, on the authority of *Mohori Bibee* v. *Dharmodas Ghose* (1); and on the other hand, if the contract was made by the defendant with the plaintiff's father, the plaintiff cannot maintain the suit, she not being a party to the contract. If either of the points is decided in favour of the defendant, the suit will necessarily fail.

Now, as to how the contract was entered into, there is no doubt in my mind that the contract was entered into by the defendant with the plaintiff's father as the guardian of the plaintiff. No doubt the plaintiff was a consenting party; but she could not herself have entered into the contract she being then only about thirteen years of age. The facts proved as to the making of the contract are as follows:— The plaintiff's father and the defendant were employed in the docks and thus the defendant came to know the plaintiff. He asked the plaintiff's father to give the plaintiff in marriage to him and he also asked the plaintiff to marry him. Both plaintiff and plaintiff's father agreed. This was about a month or so before the writing of May 26, 1919, passed by the defendant. It appears that on that day the defendant desired that the plaintiff should go out with him as his fiancee. The plaintiff's father objected. Thereupon the defendant passed the writing, which has been put in as Ex. A, whereby he agreed to marry the plaintiff within two years and to pay Rs. 2,000 by way of damages if he failed to do so. He gave the said writing to the plaintiff's father as the natural guardian of the plaintiff, and the plaintiff's father thereupon allowed the plaintiff to go out with the defendant as desired by him. Upon these facts I hold that a contract of marriage was entered into between the defendant on the one hand, and the plaintiff's father on the other acting as guardian of the plaintiff, and on her behalf.

The next question for consideration is whether the father can enter into such a contract as guardian of the minor on her behalf so as to bind her and whether such a contract is for the benefit of the minor. Both here and in England many contracts for marriage are made while one of the parties is a minor. In England the question arose as to whether in a case where one of the contracting parties was a minor, the minor could claim damages for breach of such a contract. The question was decided in *Holt* v. *Ward* (2) and that is good law uptil now. The Court had there no difficulty in arriving at that conclusion because in England the contracts of minors at that date were held under Common Law to be voidable and not void, that is to say, the minor could enforce performance of the contract as against the other adult party, but the adult party could not enforce it against the minor. Thereafter the Infant's Relief Act of 1874 was passed which made certain contracts by minors mentioned therein void. That Act, however, left contracts of marriage untouched, and, therefore, even to-day in England, contracts for marriage made by a minor are voidable and not void. In India up to the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), although with some conflict, it was held that the contracts of minors were voidable. If that had been the state of law, there would have been no difficulty whatsoever in this case but, on the wording of the Indian Contract Act, their Lordships of the Privy Council held that all contracts of minors were void and not merely voidable. The question there was of a contract entered into by the minor himself, and it was a contract with regard to property. Whether their Lordships of the Privy Council would have applied the same principle to a contract of marriage is to my mind very doubtful; and, so far as I am concerned, unless there is an authority on the point which is absolutely binding on me, I am not prepared to hold that the contract of marriage made on behalf of a minor by a person, who is the natural guardian of the minor

(1) 30 C. 539; 5 Bom. L. R. 421; 30 I. A. 114; 7 C. W. N. 441; 8 Sar. P. C. J. 374 (P. C.).

(2) (1732) 2 Str. 937; 93 E. R. 954.

and who is the only person who could enter into such a contract, is void. The principle on which I hold the contract in this case valid is the principle which has been laid down subsequent to the Privy Council decision in cases where the Courts in India have tried to give the force of contract to an agreement made by the guardian of a minor on his behalf, where the guardian has power to enter into such agreement so as to bind the minor and the agreement is for the minor's benefit. There are other cases in which the Courts in India have tried to enforce the contract of an adult party with a minor against the adult party where the consideration proceeding from the minor has been completely executed and nothing has been left to be done by the minor and the only thing left is the performance of the contract by the adult party. Mr. Justice Srinivasa Ayyangar in *Raghava Chariar* v. *Srinivasa Raghava Chariar* (3) enunciates that principle. I may say at once that there is no question here of the minor having carried out her part of the contract and the only part remaining to be carried out being the promise on the part of the adult party. The promise of the plaintiff to marry had still to be carried out so that at the date of the suit there was the promise of the plaintiff which was executory and not executed. Mr. Poonawala, however, referred me to certain observations at page 324* of that report to be found in the judgment of Mr. Justice Srinivasa Ayyangar which are to the effect that: "Where consideration moves from a third party, there can scarcely be any doubt that a promise made to a minor by an adult would be enforceable by him." And as an axample, he says :—

"If a father gives consideration and requires the promisor to pay money or do some other thing for the benefit of his minor son, the minor son can enforce that promise."

Further on he says :—

"Where the consideration for the promise of the adult is a promise by the minor, inasmuch as the minor cannot make a promise enforceable in law, the consideration necessarily fails and the promise of the adult does not therefore become a contract;... If, however, at the time when the promise of the adult is sought to be enforced by the minor, the minor has performed his promise and that performance has been accepted by the adult, I should hold that the minor can enforce the promise."

It is not necessary for me for the purposes of this case to express my assent to or dissent from the said observations of Mr. Justice Srinivasa Ayyangar but, in view of the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), it appears to me doubtful whether, even where the promise of the minor is performed by him, the agreement of the minor can be held to be a contract enforceable at law so far as the adult party is concerned. As to the consideration proceeding from the adult enabling the minor to sue, there is no doubt that in this case the main consideration proceeds from the minor even though the consent to the marriage by the father is held to be part of the consideration. The case, therefore, can only fall under the principle first stated by me, namely, that where a contract is made by a guardian of the minor so as to be binding on the minor and which is for the benefit of the minor there is an enforceable contract in law and the minor can enforce it. I must say that the decisions in England are more favourable to a minor inasmuch as the minor is held to be entitled to sue the adult party on a breach of promise of marriage while mutuality is denied to the adult party so that the adult party cannot sue the minor on a breach of the contract by the minor; and under the Infant's Relief Act of 1874, I find the Legislature has gone so far to protect the infants that it has by s. 2 enacted that in the case of any contract by a minor, it cannot be ratified by the minor on attaining majority. It was so held in *Coxhead* v. *Mullis* (4). The position in India would be different as, on the authority of the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), I cannot hold that the contract is only voidable where it is made by the guardian for the benefit of the minor so as to bind the minor and that, therefore, the minor can sue on such a contract but cannot be sued on it. But that is a result which, in my opinion, does not justify me in refusing the partial relief which I can give to the minor plaintiff in the suit, namely, to hold that the contract of marriage made by the natural guardian is

(3) 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363 (F. B.).

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(4) (1878) 3 C. P. D. 439; 47 L. J. C. P. 761; 39 L T. 349; 27 W. R. 136.

binding on the minor and is for the minor's benefit and is, therefore, a contract enforceable by both parties.

Now, as to the guardian having powers to make a contract binding on the minor, there is a decision of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (5). There the contract was for the purchase of immoveable property on account of the minor. Their Lordships of the Privy Council held that neither the manager of the minor's estate nor the minor's guardian had any authority to make such a contract so as to bind the minor or the minor's estate. That case deals only with the minor's right in property which, in my opinion, the minor would be as eligible to exercise after he attained majority and which need not necessarily be exercised during his minority by any person on his behalf. There might be instances where it would be beneficial to the estate of the minor to sell his property or to invest his moneys in the purchase of property. In such a case the adult person, who takes an interest in the minor, can have himself appointed statutory guardian of the minor and with the sanction of the Court can do the acts necessary for the benefit of the minor. In my opinion the question of marriage is quite different from the question of an interest in property, particularly in this country, as every one knows marriages take place in most cases before the attainment of majority especially by girls. It is considered in this country a sacred and essential duty of the parents and guardians, particularly of girls, to see that they are settled down in life by proper marriage. It is only recently that we find ladies, and that too only among the advanced communities, taking to the learned professions. However, if the opinion of the majority in this country is considered it will be that ladies should get married and be settled in life and discharge the duties of wife and mother which are, in their opinion, as essential to the well-being of the community as the duties which are performed by males and which are now in rare cases performed by females. It may be stated that the parties here are Native Christians or Goans. The girl is a Goan Roman Catholic and the defendant is an East Indian Roman Catholic. Both are converts from Hinduism and, as is well-known in these Courts, the converts still observe many of the customs of the Hindus, and in some cases even the caste distinctions which prevail among the Hindus. Although the Goans were converted to Christianity hundreds of years ago, so far as customs, manners and habits are concerned, they still follow those of their Hindu ancestors, and among them marriage is considered to be primary duty of the parents of a girl. If, therefore, the Courts were to hold that the parents of girls cannot make binding contracts on their behalf, in my opinion, it would lead to very great hardship and it would really be going against the customs, the manners and the habits of the people. I consider these Indian Christians and Goans, so far as the duty of making contract of marriage is concerned, on the same footing as Hindus or Muhammadans and other communities in India, and on that footing I come to the conclusion that it is the duty of the parents to make a contract of marriage for their daughters, and that, therefore, they can make a binding contract on behalf of their daughters.

The second essential, as I have pointed out, is that the contract should be for the benefit of the minor, and that point I find was discussed in the case of *Holt* v. *Ward* (2), and even the Judges in England came to the conclusion that marriage was for the benefit of the minor. There is no question that in India it would be considered to be for the benefit of the minor. The principle which I have just enunciated is stated in Pollock and Mulla's Indian Contract Act at page 75 under the heading of "Specific Performance." Mr. Judah for the defendant contended that the observations of the learned authors at that page refer only to immoveable property as they are put under the heading of "Specific Performance." I do not agree with Mr. Judah. The principle is the same whether the contract is in respect of immoveable property or in any other respect. Specific performance is merely a relief and not the cause of action; the cause of action is the breach of the contract. In some cases there may be a relief by specific performance and in others there may not be; and it is in the discretion of the Court whether to give relief by way of specific performance or not. The principle, therefore, to my mind is the same whether we apply it to contracts in respect of immoveable property or other contracts. The principle which the Court has to consider is this: has

(5) 13 Ind. Cas. 331; 39 C. 232; 14 Bom. L. R. 5; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 21 M. L. J. 1156; 11 M. L. T. 8; 39 I. A. 1 (P. C.).

the guardian power to enter into the contract on behalf of the minor so as to bind the minor; and, secondly, whether the contract is for the benefit of the minor. If either of the two essentials is wanting, there would not be a contract enforceable at law, and, if both these essentials are present it would be a contract enforceable at law. By this decision I make the contract binding on the minor which is not done in England. But to my mind, considering the difference between the social customs and manners of people in England and in this country, there is much less hardship and much less harm in my holding that the natural guardian of a minor is entitled to make a contract of marriage binding on the minor than to hold otherwise; as to hold otherwise would mean that no one could make a contract of marriage for his minor daughter for fear that the other party may at any time put an end to it without incurring any liability. The breach of a promise of marriage has much more serious consequences in India in the case of girls, inasmuch as the chances of the girl making another good match are seriously affected. I, for my part, am not disposed to read that result in the Privy Council judgment. In my opinion it would be revolutionizing the manners and customs of the people here if I were to hold that a contract of marriage could not be entered into by a natural guardian for a minor girl. I may here refer to a decision of a Single Judge of this Court, Mr. Justice Kemp, in *Abdul Razak Keval* v. *Mahamed Husein Dalvi* (6). It is the decision of a Single Judge and is, therefore, not binding on me. There the suit was filed against the father of the girl claiming damages for breach of a contract of marriage entered into by the father of the girl with the plaintiff. The parties there were Muhammadans and there was no question of a minor suing in that case. The claim was made by the plaintiff against the father of the minor defendant and the only question discussed there was whether any damages could be awarded to the plaintiff on the same footing as they are awarded in England on a breach of a contract of marriage. An issue was raised as to whether a suit for a breach of promise of marriage could lie under Muhammadan Law, and that was decided in favour of plaintiff. On the question of damages Mr. Justice Kemp came to the conclusion that the two contracts were so different in their nature that the principles applicable in assessing damages to a breach of a contract of marriage entered into between the father of the minor girl with the other major party would be quite different from the principles applicable to the case of a breach of promise of marriage in England, although he held that all consequential damages, if proved under s. 73 of the Indian Contract Act to flow as the ordinary result from the breach, would be recoverable by the plaintiff. I do not agree with Mr. Justice Kemp if he meant to hold that no damages are ordinarily suffered by the wronged party on a breach of contract of marriage among Muhammadans or other Indian communities in their position. As I have stated the harm is greater to the girl in the Indian communities than to a European female, and if such breaches are allowed to be made without any penalty, either on the ground that there is no enforceable contract or that there are no damages, the consequences would be very serious so far as minor females are concerned.

There is a decision of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begum*, (7) which has some bearing on the point in question. There also the parties were Muhammadans. The suit was brought by the plaintiff who at the time of the contract was a minor for enforcing a contract entered into between the defendant and the father of the plaintiff: and the question was raised as to whether the plaintiff, who was not a party to the contract, could maintain the suit. Their Lordships of the Privy Council differentiated the decision in *Tweddle* v. *Atkinson* (8) and held, on the facts of the case, that a charge having been created on the immoveable property in favour of the plaintiff, the plaintiff was entitled as the party in whose favour the charge was created to maintain the suit. That is on the principle, which is well-recognised in English Law, that if under a contract a trust is created in favour of a party who is not a party to the contract, such party can enforce the benefit under the contract as a *cestui que trust*. The decision in this case, therefore, cannot be of any help to the plaintiff. The observations of their Lordships,

(6) 38 Ind. Cas. 771; 42 B. 499; 19 Bom. L. R. 164.

(7) 7 Ind. Cas. 237; 32 A. 410; 12 Bom. L. R. 638; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 37 I. A. 152 (P. C.).

(8) (1861) 1 B. & S. 393; 30 L. J. Q. B. 265; 8 Jur. (N. S.) 332; 4 L. T. 468; 9 W. R. 781; 124 R. R. 610; 121 E. R. 762.

however, at page 413, are important in so far as they support the conclusion at which I have arrived that in this country marriages are contracted for minors by parents and guardians and that they are so validly contracted. Their Lordships observe as follows (page 413*):—

"Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine was applied to agreements or arrangements entered into in connection with such contracts,"

The Common Law doctrine here referred to is that laid down in *Tweddle* v. *Atkinson* (8), namely, that a stranger to the consideration of a promise cannot maintain the suit on the contract.

Mr. Judah, for the defendant, referred to *Dunlop Pneumatic Tyre Co., Ld.* v. *Selfridge* (9) in support of his contention that a stranger to the consideration of a contract cannot maintain the suit. The question has been fully discussed in Pollock and Mulla's Indian Contract Act at pages 19 to 32 and, besides the judgment of the Privy Council, there is the authority of a Division Bench of this Court in the case of *Shankar Vishvanath Wagh* v. *Umabai Sadashiv*, (10) which decision is binding on me, to the effect that a person who is not a party to the contract cannot maintain a suit on the contract. It appears from the notes of the learned authors that an attempt was made by the Madras High Court to get round the decision in *Tweddle* v. *Atkinson* (8) and to follow an older judgment in *Dutton* v. *Poole* (11). But the later decisions clearly show that that attempt had not had the approval of the Courts in India in subsequent cases. As there is a judgment of this Court binding on me, I need not go into the question any further.

There is one more Bombay decision to which I should like to refer and that is *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (12). That decision was given before the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1). The principle, however, on which that decision proceeds is not, in my opinion, affected by the judgment of the Privy Council. The only difficulty that I have felt all along is whether the principle applied in the case of Hindus by the Courts, *viz.*, that the natural guardian can enter into a contract of marriage on behalf of a minor, can be applied to the Goans and the Indian Christians. Mr. Justice Candy held in that case that if the father of a minor girl entered into a contract of marriage on behalf of the minor he could not plead in defence of a suit for damages for breach of that contract that the minor girl was unwilling to marry the plaintiff and that he could not force the minor girl to marry and that the contract was impossible of performance and, therefore, he could not be held liable in damages. I find some very useful observations in that case at page 33* which go to support my conclusion in this case. Mr. Justice Candy there considers contracts made in England by fathers on behalf of their minor sons of apprenticeship and he says :—

"A contract of a father to give his daughter in marriage is analogous to the contract of a father apprenticing his son and binding himself for the performance by his son of all and every covenant on his part."

Then further on he says that in those contracts excepting where the Court finds on the facts that the contract was impossible of performance the contract was held to be binding on the father and that the father could not claim to be relieved from his obligation on the ground that the son or ward was unwilling to serve as contracted.

The question there considered was not the liability of the minor but of the father. But what I am concerned with here, is the well-recognized principle that the father can enter into a binding contract for the benefit of his minor child which contract is enforceable at law. A contract of apprenticeship is held to be good because it is considered to be for the benefit of the minor; in the same way a contract of marriage is for the benefit of the minor, and I see no reason why a father should not be held to have power to make a contract of marriage on behalf of his minor child. I have not been able to find in the English reports a single case where the father has entered into a contract of marriage on behalf of his minor child. However to my mind in India the Court

(9) (1915) A. C. 847; 84 L. J. K. B. 1680; 113 L. T. 386; 59 S. J. 439; 31 T. L. R. 399.
(10) 19 Ind. Cas. 736; 37 B 471; 15 Bom. L. R. 320
(11) (1688) 2 Lev. 210; 83 E. R. 523.
(12) 21 B. 23; 11 Ind. Dec. (N. S.) 16.

*Page of 32 A.—[*Ed.*]

* Page of 21 B.—[*Ed.*]

would be justified in applying the principles of contracts of apprenticeship in England in so far as to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor. Neither a contract of personal service nor a contract of marriage can be ordered to be specifically performed so that in either case the apprentice or the girl cannot be compelled to carry out his or her part of a contract against his or her wishes. However, if it is an enforceable contract, the other result, namely, the liability in damages of the party making the breach of the contract, would follow. It may be that in the case of a minor that liability may have to be satisfied by the natural guardian or father of the minor defendant, and the Court may come to the conclusion that the minor defendant should not be ordered to pay out of his or her own estate anything to the other party by way of damages. However, I need not go further into other contingencies and complications which might arise as a result of this decision. I am quite content to decide on the facts of this case and to my mind it would be a denial of justice if the defendant after the conduct on his part as proved in the case, *viz.*, moving about with the plaintiff as his fiancee for two years, should be allowed to break the contract with impunity and without having to pay damages for his wrongful act.

There are two more cases to which I would refer and one of them is directly in point, namely, *Muhammad Omar* v. *Budha* (13). There also it seems the learned Judge felt the same difficulty and hardship and he came to the conclusion, in my humble opinion rightly, that the minor was entitled to maintain the suit for damages for breach of a contract of marriage made by the minor's father during his or her minority. The learned Judge has relied in support of his conclusion on a judgment of the Punjab Chief Court in *Daropti* v. *Jaspat Rai* (14). That case was not a case of a minor but the case of a party who was not a party to the contract suing on the contract and the learned Judges there tried to get round the decision in *Tweddle* v. *Atkinson* (8) in a very ingenious manner different from the attempt made by the Madras High Court to which Pollock and Mulla have referred in their commentary already mentioned by me. I cannot, however, follow the judgment of the Punjab Court in *Daropti* v. *Jaspat Rai* (14) because a Division Bench of this Court has decided that a person who is not a party to the contract cannot maintain a suit. The Punjab Chief Court held that the suit was maintainable on the ground that contrary to the principle of English Common Law, "consideration," as defined in the Indian Contract Act, need not proceed from the promisee, but may proceed from a third person, and that the consideration in the suit had proceeded partly from the promisee and partly from the third party who had sued on the contract, and that, therefore, the principle in *Tweddle* v. *Atkinson* (8) which laid down that a stranger to the consideration could not sue on the contract, could not apply as the plaintiff was not a stranger to the consideration. The decision in *Muhammad Omar* v. *Budha* (13) is not merely based on the principle laid down in *Daropti* v. *Jaspat Rai* (14). The learned Judge tried to get support for his conclusion from the said judgment. Even though that support is not available to me, I can rely on the reasoning in *Muhammad Omar* v. *Budha* (13) that in this country contracts for marriage of minors are entered into by parents or guardians and it would be a great hardship and denial of justice if such contracts were held to be absolutely void so as to deprive the minors of any relief in respect of them. On all these considerations I find that this suit is maintainable by the plaintiff and that she is entitled to claim damages for breach of contract of marriage in this suit.

As to the quantum of damages, in England the question is one solely for the decision of the Jury. I am here acting in that capacity. In these breaches of contracts various facts have to be considered. As stated in Halsbury's Laws of England, Vol. XVI, page 277 :

"The damages in an action for breach of promise of marriage are not measurable by any fixed standard, and are almost entirely in the discretion of the Jury. The injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties, and the defendant's means

(13) 1 Ind. Cas. 393; 3 P. R. 1909; 9 P. W. R. 1909; 20 P. L. R. 1909.

(14) 49 P. R. 1905; 28 P. L. R. 1905; 47 P. W. R. 1905.

are all matters to be taken into consideration."

Leaving aside the question of injury to the affections of the plaintiff in this case, I do hold that the fact that the defendant went about with the plaintiff as his fiancee for a period about of two years, when she was between thirteen and fifteen years of age, must prejudice seriously her future life and prospects of marriage. Mr. Judah tried to contend that the plaintiff was too young to be affected by the fact of defendant going about with her. In my opinion in this country where girls attain puberty at a very early age, *i. e.*, thirteen to fourteen, it cannot be seriously contended that the plaintiff was a mere child. She was sufficiently grown up to understand very well what marriage meant to her. I have also taken into consideration the fact that probably in the community of the plaintiff there would not be many eligible husbands of the means and position of the defendant. The evidence as to the defendant's means, which is not contradicted, is that the defendant is earning about Rs. 250 to 300 per month, I have on the other hand taken into consideration the fact that the defendant quarrelled with the plaintiff's parents and that he was prohibited from entering the house where plaintiff lived and that social relations ceased between the two families. The plaintiff's father and mother said in their evidence that they knew that the defendant was still meeting the plaintiff outside the house and they allowed it in the belief and hope that the defendant would marry the plaintiff as promised by him. The version of the plaintiff's father and mother as to the origin of the quarrel, *viz.*, that it was due to defendant wrongfully asking for the return of the writing given by him, is not contradicted. So far as the plaintiff is concerned I do not see why her right to claim damages should be prejudiced to any appreciable extent by reason of the quarrel between the defendant and the plaintiff's parents.

There is one more point to be considered on the question of damages. The writing given by the defendant says that if he did not marry the plaintiff within two years, he would pay Rs. 2,000 by way of damages. If that amount was payable to the father the stipulation would certainly be void, but the amount is, in my opinion, clearly payable to the plaintiff as damages under the said writing.

The question whether the damages therein mentioned are a penalty or not does not arise in view of s. 74 of the Contract Act. Whether the sum is a penalty or the liquidated amount mentioned as payable in the case of a breach of contract, I have to decide on the facts what damages the plaintiff has suffered. If they do not amount to the sum mentioned in the agreement whether it be by way of penalty or not, the plaintiff is not entitled to recover the same. Considering all the facts and further considering that this is the first case of its kind, so far as I know, in Bombay, I think the ends of justice would be met by allowing the sum of Rs. 1,000 as damages to the plaintiff with costs.

I also order that all the Court-fees payable by the plaintiff shall be paid by the defendant.

K. S. D. *Suit decreed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2072 OF 1920.

January 14, 1924.

Present:—Mr. Justice Rankin and Mr. Justice Mukerjee.

ABHOY SANKAR MAZUMDAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SATYENDRA PRASANNA BOSE MAJUMDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Trespasser—Constructive possession—Wrong-doer, whether and when can acquire title by adverse possession—Intention.

Adverse possession to be effective must be possession adequate in continuity, in publicity and in extent of area and must be actual, visible, exclusive and hostile. The doctrine of constructive possession cannot be applied in favour of a wrong-doer whose possession is confined to the area of which he is in actual occupation. [p. 596, col. 2.]

Radhamoni Debi v. *Collector of Khulna*, 27 C. 943; 27 I. A. 136; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. S.) 617 (P. C.), *Nawab Bahadur of Murshidabad* v. *Gopinath Mandal*, 6 Ind. Cas. 392; 13 C. L. J. 625, *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry*, 31 C. 397 and *Jogendra Nath Roy* v. *Baladeo Das*, 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127, relied on.

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if, in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession. [*ibid.*]

Clark v. *Elphinstone*, (1881) 6 A. C. 164; 50 L. J. P. C. 22, referred to.

In order to bring a case within the Statute of Limitation there must be both absence of possession by the person who has the right and actual possession by another whether adverse or not, to be protected, to bring the case within the Statute. If a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the Statute abandons possession, the rightful owner on the abandonment, is in the same position in all respects as he was before the intrusion took place. [p. 596, col. 1.]

Once in fact there has been cessation of possession the question of intention is wholly immaterial, but in determining whether there has been discontinuance of possession, intention cannot altogether be left out of account. [p. 597, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Faridpur, dated the 19th of July 1920, modifying that of the Munsif, First Court at Goalundo, dated the 27th of October 1919.

Babu *Provas Chandra Mitter* for Dr. *Dwarka Nath Mitter*, Babus *Amarendra Nath Bose*, *Baranasi Bashi Mukerji* and *Phanindra Lal Mitter*, for the Appellants.

Dr. *Sarat Chandra Basak*, Babus *Jyotish Chandra Guha* and *Biraj Mohun Majumdar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit wherein the plaintiffs prayed for recovery of *khas* possession of certain lands upon declaration of their title thereto.

The plaintiffs' case as laid in the plaint was that the lands were situate in *Mouza* Benodepore which appertains to plaintiffs' estate bearing *Touzi* No. 831 of the Faridpore Collectorate and were comprised in the residue of the *thak* of that *mouza*, that the lands were formerly in the occupation of the plaintiffs' tenants and subsequently in their *khas* possession, and that the defendants Nos. 1 and 2 who were the proprietors of the adjoining estate bearing *Touzi* No. 832 in collusion with the other defendants got the lands recorded in the District Settlement within their estate, and afterwards dispossessed the plaintiffs.

The defence in substance was that the lands appertained to *Taluk* No. 832 belonging to the defendants Nos. 1 and 2, that the plaintiffs had no title thereto or possession therein, that the suit was barred by limitation and that the defendants had all along been in possession of the said lands for sometime through tenants and for sometime in *khas*, and that the same had been correctly recorded in the District Settlement as being within the defendants' estate.

A commissioner was deputed to hold a local investigation and demarcate the boundary line between the lands of the *chaks* of the two *Touzis* aforesaid and it was found that out of the plaint lands the whole of Cadastral Survey plots Nos. 1104, 1106 and 1134, and portions of Cadastral Survey plots Nos 1145, 1105, 1107, 1155, 1165 and 1166 which are outside the green circuit in the case map (which indicates *chak* No. 26 of *Touzi* No. 832) appertained to the residue of the *thak* which is comprised in plaintiffs' estate *Touzi* No. 831. This is not now disputed.

The Trial Court made a decree for ejectment in favour of the plaintiffs for such of the said plots or portions of them as fell outside the said green line, with the exception of Cadastral Survey plots Nos. 1106 and 1334 and a portion of Cadastral Survey plot No. 1104 which that Court found to be in the possession of certain tenants *bona fide* inducted by the defendants Nos. 1 and 2. For the portions so excepted the Court passed a decree that the plaintiffs would get rent at the prevailing rate from the defendants Nos. 4 to 8.

Against the said decision appeals were preferred by both the parties and the Court of Appeal below while affirming the findings of the Court of first instance on the question of plaintiffs' title dismissed the suit in its entirety holding that the defendants had acquired a title by adverse possession. The plaintiffs have thereupon appealed to this Court, and two contentions have been put forward by Mr. Mitter who has appeared for them. Firstly, it has been urged that the defendants Nos. 1 and 2 being wrong-doers, cannot be held to have acquired a title by adverse possession unless that possession was exclusive and continuous, and if there were intervals during which they were not in actual possession, it is the plaintiffs and not they, who are wrong-doers, that should be held constructively to have been in possession during those intervals. Nextly, it has been urged, that there is no finding in the judgment of the lower Appellate Court nor has any investigation been held by that Court on the question as to what was the condition of the lands about 12 years before the institution of the suit, such as would be necessary to determine the character and extent of possession which would be sufficient to confer a title on the defendants Nos. 1 and 2.

With regard to the first of the aforesaid contentions, Mr. Mitter has relied, amongst others, on the cases of *Trustees and Agency Co.* v. *Short* (1), *Secretary of State* v. *Krishnamoni Gupta* (2), *Basanta Kumar Roy* v. *Secretary of State* (3) and *Clark* v. *Elphinstone* (4).

Now, the law on this point is well-settled. Lord Macnaghten in the case of *Trustees and Agency Co.* v. *Short* (1) quoted with approval the statement of Baron Parke in *Smith* v. *Lloyds* (5), concurring in the judgment of Blackburn, C. J., in *McDonnell* v. *McKinty* (6) and the principle on which it was founded that "in order to bring a case within the Statute of Limitation there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected to bring the case within the Statute," and observed that "if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the Statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place." In *Secretary of State* v. *Krishnamoni Gupta* (2), the Judicial Committee of the Privy Council observed that "in order to sustain a claim to land by limitation under the Indian Act there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him," and their Lordships held that "the possession of the Government was in fact determined by the submergence of the land which then became derelict and so long as it remained in that state no title could be acquired against the true owner." In *Basanta Kumar Roy* v. *Secretary of State* (3), the Judicial Committee observed that there could be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation, and that the real owner does not discontinue his possession so long as the land is diluviated. There can be no question that adverse possession to be effective must be possession adequate in continuity, in publicity and in extent of area, and must be actual, visible, exclusive and hostile also, that the doctrine of constructive possession cannot be applied in favour of a wrongdoer whose possession is confined to the area of which he is in actual occupation [*Radhamoni Debi* v. *Collector of Khulna* (7), *Nawab Bahadur of Murshidabad* v. *Gopinath Mandal* (8), *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry* (9) and *Jogendra Nath Roy* v. *Baladeo Das* (10).] A series of isolated acts of trespass with no continuity of possession would fall short of the requisite, and if, in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession [*Clark* v. *Elphinstone* (4).]

In order to apply these principles to the facts of the case before us, we have examined the findings of the Courts below with some degree of care. Mr. Mitter has contended that the findings of the Court of Appeal below in so far as they seemed to indicate that there were breaks in the possession of the defendants would prevent the operation of the Statute in their favour. He has contended that when the lower Appellate Court observed in its judgment that "it cannot be said that the defendants Nos. 1 and 2 relinquished possession of the land" as soon as a particular tenant surrendered the land, or observed that "the intention of the defendants Nos. 1 and 2 was to be looked to" the said Court took an incorrect view of the law, inasmuch as the defendants Nos. 1 and 2 as trespassers can scarcely be expected to make a formal relinquishment of or to entertain the intention of abandoning the lands. He has argued that the intention of the defendants was a matter of no consequence and relied in support of his contention upon a passage in Lightwood on Possession of Land, page 61, where commenting on the case of *Trustees and Agency Co.* v. *Short* (1), the author says: "In other

(1) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(2) 29 C. 518; 4 Bom. L. R. 537; 6 C. W. N. 617; 29 I. A. 104; 8 Sar. P. C. J. 269 (P. C.).

(3) 40 Ind. Cas. 337; 44 C. 858; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.).

(4) (1881) 6 A. C. 164; 50 L. J. P. C. 22.

(5) (1854) 9 Ex. 562; 2 C. R. 1008; 2 W. R. 271; 156 E. R. 240; 23 L. J. Ex. 194; 22 L. T. (o. s.) 289; 96 R. R. 837.

(6) 10 Ir. L. R. 514.

(7) 27 C. 943; 27 I. A. 136; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. S.) 617 (P. C.).

(8) 6 Ind. Cas. 392; 13 C. L. J. 625.

(9) 31 C. 397.

(10) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

words the civil possession is not only out of the trespasser, but is vested again in the owner. This result seems to depend on the failure of the physical element in possession, and it is not necessary to refer especially to the intention. The possessor has, in fact, discontinued his occupation whether he intends to return or not."

Dr. Basak appearing for the respondents has argued, on the other hand, that upon the findings of the lower Appellate Court there is no room for the application of the principles enumerated above, for those findings do not indicate such interruption of possession as would vest the real owner with possession in the *interim*.

As already mentioned, we have carefully examined the findings. We have come to the conclusion that the findings of the Trial Court on the question of the intermittent character of the possession of the defendants Nos. 1 and 2 have to a very large extent been displaced or modified by the lower Appellate Court, and, in fact it has been found by that Court that during the intervals that there were no tenants on the lands, the defendants Nos. 1 and 2 were in *khas* possession thereof. It was contended that this finding as to *khas* possession is not based on evidence and consequently not a finding of fact but the mere statement of a legal position which, in the opinion of the Court, was acquired by the defendants Nos. 1 and 2 by reason of their tenants having left the lands. We are satisfied that this finding is based on evidence and must be treated as a finding on a question of fact. In any event, the intervals, if any, during which the lands were without tenants were of comparatively short durations and the other circumstances of the case are wholly inconsistent with an inference that the possession of the said defendants had, as a matter of fact, come to an end. It is true that once in fact, there has been cessation of possession the question of intention is wholly immaterial, but in determining whether there has been discontinuance of possession, intention cannot altogether be left out of account. For after all, the adverse character of possession must be based to a certain extent on the intention to exclude the real owner. The first of the two contentions must, therefore, fail.

As to the second contention referred to above, reliance has been placed upon the decision in *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (11), and the cases upon which it is based. In our opinion having regard to the character of the lands in suit which, according to the pleadings of the parties and the evidence in the case, were lands mainly in the occupation of tenants during the greater part of the period, no further investigation into the matter was necessary. This contention, therefore, must also fail.

In this view of the matter, we think the judgment of the lower Appellate Court was right, and we accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(11) 12 C. W. N. 273; 3 M. L. T. 212; 7 C. L. J. 414.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 12 OF 1924.
CIVIL SUIT No. 1808 OF 1923.
August 5, 1924.

Present:—Mr. Justice Marten and Mr. Justice Kincaid.

BAI DOSIBAI—PLAINTIFF—APPELLANT

versus

BAI DHANBAI—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Contract Act (IX of 1872), s. 17—Seller, duty of—Restrictive covenant, non-disclosure of—Purchaser, whether can repudiate contract—Right of repudiation, when should be exercised—Waiver.

The seller is bound to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware and which the buyer could not with ordinary care discover. [p. 599, col. 1.]

Nottingham Patent Brick and Tile Co. v. *Butler*, (1885) 15 Q. B. D. 261 at p. 271 on Appeal (1886) 16 Q. B. D. 778 at pp. 783, 787; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405, *Carlish* v. *Salt*, (1905) 1 Ch. 335; 75 L. J. Ch. 175; 54 W. R. 244; 94 L. T. 48, *In re Jackson and Haden's Contract*, (1906) 1 Ch. 412; 75 L. J. Ch. 226; 94 L. T. 418; 54 W. R. 431 and *Halkett* v. *Dudley*, (1907) 1 Ch. 590 at p. 600; 76 L. J. Ch. 330; 96 L. T. 530, referred to.

An omission to make such a disclosure may be a fraud within the meaning of s. 17 (5) of the Contract Act and so render the contract voidable at the option of the purchaser, if his consent to the agreement has been caused by the fraud. [*ibid.*]

A restrictive covenant with regard to the property sold is a material defect in title which must be specifically brought to the notice of the buyer and its non-disclosure by the seller would entitle the buyer to rescind the contract. [p. 599, col. 2.]

Reeve v. *Berridge*, (1888) 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549,

In re White and Smith's Contract, (1896) 1 Ch. 637; 65 L. J. Ch. 481; 74 L. T. 377; 44 W. R. 424 and *In re Haedicke and Lipski's Contract*, (1901) 2 Ch. 666 at p. 669; 70 L. J. Ch. 811; 50 W. R. 20; 85 L. T. 402; 17 T. L. R. 772, referred to.

The purchaser's right of repudiation must be exercised, if it is to be exercised at all, as soon as the defect in title is ascertained. [p. 603, col. 2.]

Halkett v. *Dudley*, (1907) 1 Ch. 590 at p. 600; 76 L. J. Ch. 330; 96 L. T. 539, followed.

Waiver must be an intentional act with knowledge and cannot be presumed. [p. 606, col. 2.]

Earl of Darnley v. *Proprietors of London, Chatham and Dover Railway*, (1867) 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, relied on.

Appeal from the judgment of Mr. Justice Shah.

Mr. *Coltman* (with him Mr. *Kanga*), for the Appellant.

Mr. *Munshi* (with him Mr. *Kania*), for the Respondent.

JUDGMENT.

Marten, J.—This is an appeal from the judgment of Mr. Justice Shah dismissing the plaintiffs' suit for specific performance, and allowing the counter-claim of the purchaser, defendant No. 1, for the return of her deposit of Rs. 5,000. The litigation turns on a restrictive covenant contained in the conveyance of September 24, 1918 (Ex. G), from the then owners of the Forjett Street estate, and on a similar covenant in the subsequent conveyance of June 14, 1920 (Ex. C), to the original plaintiffs Nos. 1 and 2 and Pestonji Edulji Mistry since deceased. The latter is now represented by his administratrix Bai Dosibai, who is the original plaintiff No. 3 and the present sole plaintiff. The original plaintiffs Nos. 1 and 2 have become insolvent, and are now represented by the Official Assignee, the present defendant No. 2.

I will refer to the above covenant as the $7\frac{1}{2}$ feet covenant, and it runs as follows :—

"That no building or other structures whatsoever whether temporary or permanent and no tree or shrub shall at any time be built, erected or placed or planted or suffered to be or to grow on any part of the land and premises hereby granted conveyed and transferred within a distance of $7\frac{1}{2}$ feet from the sourth-western boundary line of the plot hereby granted, conveyed and transferred and dividing the said plot No. 12 on the vendor's said Forjett Street estate except with the consent of the vendor or others the owners for the time being of the said plot No. 12."

The suit property thereby conveyed and subsequently sold to the first defendant was plot No. 11 on the Forjett Street estate.

If one turns to the plan (Ex. H in this Court), the suit property is there shown as lying to the north or north-west of the double line coloured green and orange. Plot No. 12 which had the benefit of this restrictive covenant lies to the west or south-west of the suit property. The earlier conveyance of September 24, 1918 (Ex. G) had contained a similar covenant by the then owners of plot No. 12 as regards the land retained by them. The result of this mutual covenant was to ensure a strip of 15 feet of open space *viz.*, $7\frac{1}{2}$ feet on either side of the boundaries of plots Nos. 11 and 12.

In fact the $7\frac{1}{2}$ feet covenant was broken by the original plaintiffs, for in 1921 or thereabouts a building was erected on the suit land, which for a length of about 40 feet was only $2\frac{1}{2}$ feet instead of $7\frac{1}{2}$ feet from the boundary line of plots Nos. 11 and 12, and it is not shown that this was done with the consent of the owner of plot No. 12. This building is marked C on the above plan. The portion hatched red represents the portion built in breach of the $7\frac{1}{2}$ feet covenant, and represents an area of 40 feet by 5 feet or an aggregate of 22 square yards. I may here explain that the northern-most land coloured green represents hilly ground, and that the adjoining open space coloured purple represents ground which was hilly, but which has since been levelled to the level of the first floor of the suit building, so we are told by Counsel.

Now when the original plaintiffs came to sell the suit land to the purchaser for Rs. 66,000 under the suit contract of September 8, 1922 (Ex. B), they not only omitted to disclose to the purchaser the fact that this building was erected in breach of the $7\frac{1}{2}$ feet covenant, but they did not even disclose to the purchaser the existence of the covenant at all. This in the absence of any explanation was a serious breach of their duty as vendors, and might entitle the purchaser to repudiate the contract on discovering the true facts.

The English authorities are clear and emphatic as to the duty of a vendor to disclose material defects, and I need only refer to *Nottingham Patent Brick and Tile Co.* v. *Butler* (1), *Carlish* v. *Salt* (2), *In re*

(1) (1885) 15 Q. B. D. 261 at p. 271 on Appeal (1886) 16 Q. B. D. 778 at pp. 786, 787; 55 L. J. Q. B. 280; 54 L. T. 444; 34 W. R. 405.

(2) (1906) 1 Ch. 335; 75 L. J. Ch. 175; 54 W. R. 244; 94 L. T. 58.

Jackson and Haden's Contract (3) and *Halkett* v. *Dudley* (4). No Indian authorities were cited to us, but under s. 55 (1) (*a*) of the Transfer of Property Act, the seller is bound to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware, and which the buyer could not with ordinary care discover. Under the concluding words of s. 55 an omission to make such a disclosure is fraudulent. *Prima facie*, therefore, such an omission may be also a "fraud" as defined by s. 17 (5) of the Indian Contract Act, and so render the contract voidable at the option of a purchaser under s. 19, if his consent to the agreement has been caused by the fraud. Or else a purchaser may sue for rescission under s. 35 of the Specific Relief Act. See ill. (*a*).

It is argued by the plaintiff's Counsel that though the defendant had not express notice, she had constructive notice of this covenant inasmuch as cl. 6 of the suit contract states that "the property forms part of a building estate," and cl. 17 states that the purchaser has to erect boundary walls "in conformity with the covenant in that behalf contained in the conveyance in favour of the vendors dated June 14, 1920." It is accordingly argued that the 7½ feet covenant is a usual one to find in a building estate, and that the reference to the conveyance of June 14, 1920, gave notice of all its contents. In my judgment both these contentions are unsound. The recitals and cls. 1 and 10 make it clear that the sale was to be free from incumbrances. By cl. 7 the vendors were to make out a marketable title free from all reasonable doubts, claims and demands, subject to the special provisions of cls. 4, 5 and 6. Now cl. 4 related to a mortgage, which was to be re-conveyed, cl. 5, to a disused water trough, and cl. 6, to the title-deeds being in the possession of the original owners of the building estate. So none of these clauses really affects the question, for I cannot accept the suggestion that the mere reference to a building estate would imply the existence of such a covenant as the 7½ feet covenant.

Turning next to cls. 15, 16 and 17, cl. 15 deals with certain rights of way and drainage, etc., for the benefit of the purchaser. Clause 16 refers to the strip marked "open space" on the plan Ex. H which lies on the south or south-east of the suit building. It is agreed by Counsel before us that the reference in cl. 16 to the "south-west" is an error. The effect of cl. 16 is that the whole of this open space is to be left unbuilt upon and open to the sky, and that the purchaser is to get the corresponding 5 feet on the other side of this southern boundary. So in all there would be an open space of 20 feet. It appears that there was a contemporaneous sale of this southern adjoining land to the father of the defendant's daughter-in-law, and it is said that cl. 16 embodied the mutual agreement of all parties, but nothing turns I think on this. The materiality of cl. 16 is that indirectly it would force the defendant to comply with the 7½ feet covenant so far as regards this southern strip, except that she would not be prohibited from planting shrubs, or perhaps trees. Then cl. 17 dealt, as I have said, with the boundary walls on the north-east and west sides.

Accordingly the contract contained express reference to many special matters including some of a restrictive nature. In my judgment, therefore, a purchaser might fairly assume that every material fact had been disclosed. He would certainly never expect to find that a serious restriction, such as the 7½ feet covenant was never even mentioned. Nor, I think, would the mere reference to the deed of June 14, 1920, in connection with another matter, *viz.*, boundary walls, put him on his guard in this respect, or oblige him to look at this deed to see if it contained anything beyond what the vendors said it contained. It must be clearly remembered that it was the duty of the vendors to disclose the existence of the covenant, for it was a material defect in their title. They knew their own title and the purchaser did not. The English cases of *Reeve* v. *Berridge* (5), *In re White and Smith's Contract* (6) and *In re Haedicke and Lipski's Contract* (7) illustrate the necessity of an express and full opportunity of inspection of a lease if a purchaser is to be bound by onerous and unusual covenants

(3) (1906) 1 Ch. 412; 75 L. J. Ch. 226; 94 L. T. 418; 54 W. R. 434.

(4) (1907) 1 Ch. 590 at p. 600; 76 L. J. Ch. 330; 96 L. T. 539.

(5) (1888) 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549.

(6) (1896) 1 Ch. 637; 65 L. J. Ch. 481; 74 L. T. 377; 44 W. R. 424.

(7) (1901) 2 Ch. 666 at p. 669; 70 L. J. Ch. 811; 50 W. R. 20; 85 L. T. 402; 17 T. L. R. 772.

which are not specifically mentioned. A mere reference to the lease itself is insufficient. I may also refer to *Cox* v. *Coventon* (8) and *In re Marsh and Granville* (9). So, too, if one turns to the definition of "notice" in s. 3 of the Transfer of Property Act, I think it cannot be said here that there was any wilful abstention from any enquiry or search which the purchaser ought to have made or any gross negligence on her part before she entered into the contract.

In my judgment, therefore, the suit contract did not give constructive notice of the 7½ feet covenant to the purchaser. It follows, therefore, that, having regard to this covenant, the vendors were not in a position to carry out their contract, *viz.*, to sell the property free from all incumbrances, unless at any rate they could procure a release of the 7½ feet covenant and a waiver of all past breaches of it from the owners of plot No. 12.

The plaintiff, however, contends that the purchaser has waived her rights under the contract inasmuch as the purchaser's Solicitors in their requisitions and correspondence only took objection to the covenant so far as regards the existing building "C" and not as regards the rest of the land, and were content to ask for the consent of the owners of plot No. 12 to the erection of such building and that such consent was obtained in time, though not until after the defendant had purported to rescind.

Alternatively the plaintiff says that assuming the purchaser had a right of repudiation on discovering the true facts, she was bound to exercise that right promptly, and that by treating the contract as subsisting after the discovery of the defect she precluded herself from exercising the right of repudiation at a subsequent time without first giving the vendors a reasonable time to cure the defect, which in fact she did not do.

This alternative point does not seem to have been argued in the Court below, and was only advanced before us at a late stage in the arguments. But as it seems to me to be the crux of the case, and to derive direct support from the equitable principles enunciated in *Halkett* v. *Dudley* (4) and several earlier authorities, I will proceed to deal with it at once.

(8) (1862) 31 Beav. 378; 8 Jur. (N. S.) 1142; 7 L. T. 78; 10 W. R 829; 135 R. R. 474; 54 E. R, 1185.
(9) (1883) 24 Ch. D. 11; 53 L. J. Ch. 81; 48 L. T. 947; 31 W. R. 845.

Turning in the first place to the facts, it appears from the two letters of September 21, 1922, from the vendors' Solicitors that the title-deeds or copies thereof were sent to the purchaser's Solicitors on that day. This was in accordance with cl. 3 of the contract of September 8, 1922. Accordingly the purchaser's Solicitors must have discovered the defect in the title somewhere between September 21 and November 1, when they sent in their requisitions, Ex. F. These requisitions were with reference to the adjoining Block 'B', but by agreement were treated as being repeated as regards the suit property block 'C', the title being a common one.

The material requisitions are Nos. 1 and 3 apart from certain general requisitions of a fishing nature such as Nos. 8 and 9. Requisition No. 1 asked if plot No. 12 had been sold, and whether the present owner of plot No. 12 was bound by the cross-covenant. Requisition No. 3 stated that the suit building was a breach of the 7½ feet covenant, and asked if the consent of the owner of plot No. 12 had been obtained and registered. If so, it was to be handed over on completion. If not, it must be obtained and registered. A note at the foot stated that the requisitions were sent in "subject to further requisitions arising from the papers not heretofore produced and to searches...and from the vendors' answers to these requisitions."

On November 6, the vendors answered requisition No. 1 by stating that they were not aware whether plot No. 12 had been sold, but whoever might be the owner would be bound by the cross-covenant. As regards requisition No. 3, after explaining that an open space had been left on the south instead of the west, and the reason therefor, the vendors stated that it was not necessary to obtain the consent of the owner of plot No. 12, and that no objection had been taken by him to the erection of the building.

I now turn to the correspondence, Ex. D. It is somewhat confusing that part of it (*viz.*, Ex. C to the plaint) deals with the suit property, and the rest of it (*viz.*, Ex. D to the plaint) with the adjoining block B, and that we have no single copy of the whole correspondence before us in order of date. But dealing first with Ex. C to the plaint, the purchaser's Solicitors wrote an important letter on November 7. In it they said ;—

"As at present advised, our client will decline to complete the purchase unless your clients produce the written consent of the owners of the said plot to the present building having been built in contravention of the agreement with his consent duly registered. Please let us know what your clients have to say about the same."

They also asked for the conveyance of September 24, 1918, (Ex. G) to consider the vendors' answers to requisitions, and they also required production of the original title-deeds of the building estate under cl. 6 of the contract. The reference to Ex. G is explained by the local practice in Bombay to dispense with an abstract of title and to hand the deeds backwards and forwards according to whether requisitions have to be made or answered. The other reference may be explained by the inference that up to that time the purchaser had only seen certified copies of the earlier deeds, and not the originals, which under cls. 6 and 11 had to be produced by the vendors, but at the cost of the vendors and purchaser in equal shares.

Now stopping there, the purchaser up to this point did not exercise her right of repudiation ; but on the contrary was treating the contract as subsisting ; and calling on the vendors to take steps in pursuance thereof which would cause them expense.

In my opinion, therefore, it was unfair conduct on the purchaser's part to cancel the contract eleven days afterwards without any further warning, as she purported to do by her letter of November 18, and to call for the return of her deposit.

On November 20, the vendors' Solicitors replied that the purchaser had no right to do this, and that they would write further after seeing their clients.

On December 4, the vendors' Solicitors wrote saying that the vendors would produce the consent of the owner of plot No. 12 to the suit building, and asked for the draft conveyance to be sent.

Then followed on December 6 another important letter from the purchaser's Solicitors, in which, after referring to their letters of November 7 and 18, they said it was useless to rely on the mere promise to produce the consent in question, and absurd to ask for the draft conveyance before such consent was produced. The letter ends:—

"In the absence of such consent and having regard to our letter of the 18th ultimo, we have stopped further investigation of title in this matter, and our client declines to do anything further till the written consent is produced. We have again to call upon your client to return the earnest-money with interest."

Despite the concluding sentence, I read this letter as meaning that the contract is still subsisting, but that nothing further will be done in it till the consent is produced.

This view is borne out by the next two letters. The vendors' Solicitors at once replied on December 7, saying that their client was arranging to produce the consent, and that it would be produced before completion. They also held the purchaser to her agreement, and again asked for the draft conveyance.

On december 8, the time fixed by cl. 8 for completion expired.

On December 18, the purchaser's Solicitors wrote saying that their client had waited for eleven days more to see whether the consent would be produced, and did not propose to wait any longer. The letter then went on :—

"We, therefore, hereby give notice to your clients through you that if your clients fail to procure and produce such consent and make out a marketable title free from reasonable doubt within a fortnight from date hereof that is on or before January 2, 1923, our client will put an end to the contract and treat the same as cancelled."

I draw particular attention to the final words "our client *will* put an end to the contract." To my mind this letter clearly showed that up to this date the contract was subsisting, and no right of repudiation finally exercised.

The vendors replied on December 19 and January 2, pointing out the unfairness of their notice at Christmas time, and the practical difficulties thereby caused. On January 11, 1923, the purchaser's Solicitors wrote calling for the return of the earnest-money on the ground that, "the contract for sale herein now stands cancelled by reason of your client's failure to comply with the requisitions contained in our letter of December 18 last within the time thereby appointed." It will be observed that this final cancellation is based on non-compliance with the notice of December 18, and not on any alleged earlier cancellation which had only been conditionally waived,

On January 19, the vendors' Solicitors wrote saying that they had arranged to obtain the consent, and they annexed the form of consent. On February 5, this consent (Ex. F) was signed by the owner of plot No 12, and on February 9 it was sent to the purchaser's Solicitors. It appears to have been registered on April 23, 1923. The vendors then instituted this suit on April 30, 1923.

As regards the other correspondence (Ex. D to the plaint) I need only refer to a second letter of November 18, 1922, from the purchaser's Solicitors in which they refer to an interview between the respective Solicitors. The precise date of that interview is not stated, and it appears from the vendors' reply of November 20 that they disputed the purchaser's version of that interview and also alleged that it was held "expressly without prejudice." So, as no oral evidence was given on the point, I leave it at that. Plaintiff's Counsel relied on a letter of February 26, 1922, from the purchaser's Solicitors, in which the letter said that the present position was due to the vendors' dilatoriness over the consent, inasmuch as the purchaser having insufficient monies of her own had originally arranged to raise part of the purchase-money on mortgage of the suit property, but that the intending mortgagee had got tired of waiting for the consent and declined to do anything further.

Now the view which the learned Trial Judge took of the above correspondence over the suit property is this. He said:

"My view of the correspondence is that though the defendant No. 1 was ready to accept the consent of the owner of plot No. 12 with regard to the breach of the covenant as sufficient to induce her to accept the agreement, I am not prepared to hold that there was in any sense a waiver on her part of the right which she had to put an end to the contract in virtue of the non-disclosure of this restrictive covenant. The facts which have been relied upon as constituting a waiver on her part are as stated in the letters of December 8 and 18, 1922. It is urged that she had been ready and willing to accept the consent of the owner of plot No. 12 to the existing breach of the covenant as sufficient. The correspondence disclosed that fact ; but I am unable to read the correspondence as constituting a waiver on her part of the right which she had. The letter of November 18 is definite and is clearly indicative of a desire to exercise her right to rescind the contract. I do not read the subsequent letters of December 8 and 18 as waiving that right in any sense, but as giving a further opportunity to the plaintiff if the consent was obtained within fifteen days from the date of the letter of December 18 to induce her to give up her right of rescinding the contract; but as that was not done, I do not think that it could be maintained that she gave up that right."

Then further on the judgment proceeds:—

"My finding, however, on issue No. 9 is that the contract was properly put an end to by the letter of November 18, and also by the letter of January 11."

I understand the learned Judge thus to hold that there was never any waiver either absolute or conditional of the right of rescission ; that the purchaser only gave the vendors a chance to induce her to change her mind by procuring the consent ; that it always remained optional for her to insist on rescission whether or no the consent was obtained in due time ; and that accordingly the contract was validly rescinded by her. With great respect I am unable to agree with that view of the correspondence. I read the purchaser's requisitions and letters as treating the breach of the 7½ feet covenant as a defect in title, but one which the vendors were required to remove by obtaining the consent in question.. This is, I think, clear as regards the original requisitions and the letter of November 7.

But even if a different construction was placed on the subsequent letters, what right had the purchaser suddenly to rescind the contract on November 18 in the face of her previous requisitions and letters? It cannot be justified on the ground of agreement or even acquiescence for the vendors promptly and persistently repudiated her alleged right. What right then had she in law? Now here the judgment of Lord Parker (then Parkar, J.), in *Halkett* v. *Dudley* (4) is, I think, of great value. The main portion of the head-note runs :

"A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon

as he finds that the vendor cannot make a good title."

In that case in January 1905, there was a consent-decree for specific performance and a reference to title. In February the abstract was delivered, and in April requisitions were delivered, one of which related to a restrictive covenant on a small part of the property. These requisitions were answered, and further requisitions sent and answered and repeated. On December 8, 1905, the vendor contracted for the release of the restrictive covenant. On December 22, the purchaser repudiated the sale contract for want of title. On January 4, 1906, the restrictive covenant was released. The matter afterwards came before the Judge on two summonses by the purchaser, the one to be discharged from his purchase and the other to vary the Master's Certificate of November 14, 1906, finding that a good title had been made, and that it was first shown on December 8, 1905.

Turning to the judgment, Parker, J., said (page 596)* :—

"The purchaser puts his case in this way. He says, first, that a purchaser discovering a fatal defect in the vendor's title has a right to repudiate the contract; secondly, that this right is unaffected by the decree for specific performance; thirdly, that he did repudiate the contract on July 11, 1905, or at any rate on December 22, 1905, before the objection as to the restrictive covenants had been removed;...Now I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase-money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will, at a future date, convey to a purchaser land which does not at the date of the contract belong to him but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed, I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fail to complete at the date fixed for completion. If this be so, the right of repudiation in question must be distinguished from the Common Law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. The point is touched on, though it is left open, in the case of *Bellamy* v. *Debenham*, (10); and the case of *Salisbury* v. *Hatcher* (11) to which I will refer presently, is further material on the point; but it is, in my opinion, equally clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose. That is, I think, the effect of the cases which were quoted to me by Mr. Upjohn, namely, *Hoggart* v. *Scott* (12), *Eyston* v. *Simmons* (13); *Salisbury* v. *Hatcher* (11) and *Murrell* v. *Goodyear* (14)."

Then after dealing with the first two of these cases, and citing part of the judgment in the third case, the learned Judge says at page 599* :—

"I read that passage primarily because it appears to me to be relevant on the point as to what is the nature of this right of repudiation on which the purchaser in the present case relies, and it really points to the fact that it has nothing to do with the equitable legal right of rescission; it is merely an equitable right arising out of want of mutuality, such as may possibly form the ground of a defence to the peculiar relief given by Courts of Equity, namely, relief by way of specific performance."

He then quotes (page 599) the Vice-Chancellor as saying (page 66):—

*Pages of (1907) 1 Ch. D. —[*Ed.*]

(10) (1891) 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478; 39 W. R. 257.

(11) (1842) 2 Y. & C. C. C. 54 at p. 66; 12 L. J. Ch. 68; 6 Jur. 1051; 60 R. R. 26; 63 E. R. 24.

(12) (1830) 1 Russ. & My. 293; Tam. 500; 9 L. J. (o. s.) Ch. 54; 31 R. R. 112; 39 E. R. 113.

(13) (1842) 1 Y. & C. C. C. 608; 11 L. J. Ch. 376; 6 Jur. 817; 62 E. R. 1038; 57 R. R. 469.

(14) (1860) 1 D. G. F. & J, 432; 29 L. J. Ch. 425; 6 Jur. (N. S.) 356; 2 L. T. 268; 8 W. R. 398; 125 R. R. 498; 45 E. R. 426.

"In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description, which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the fulfilment of a requisition made by himself, and founded on the very state of the title. In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discreditable to a Court of Justice."

Mr. Justice Parker then adds (page 599)*:—

"It will be seen that the decision in the case, or rather the principle of the decision, rests really upon a waiver of the want of mutuality in the contract."

The learned Judge then goes on (page 600)*:—

"Now assuming here that the defect of title due to the existence of the restrictive covenants was such a defect as to give rise to the right of repudiation which I have been describing, was such right exercised, or did the purchaser still continue to treat the contract as in operation? I am of opinion that no such prompt repudiation as was required on the part of the purchaser has been proved, but that, on the contrary, he continued after notice of the defect to treat the contract as subsisting, and to make requisitions and objections with a view to an inquiry as to the vendor's title which was proceeding in Chambers, an inquiry which would, of course, have been wholly useless if the contract had been effectually repudiated.

"It was suggested that the purchaser repudiated the contract as early as July 11, 1905, at an interview or appointment before the Master; but even as late as November 8, 1905, we find him delivering observations on replies to the requisitions, and such observations are not expressed to be made without prejudice to some alleged prior repudiation. The first real attempt to repudiate the contract was, I think, made before the Master on December 22 905, when the plaintiff was in a position to compel release of the restrictive covenants, and after that the defendant took no step to give effect to the repudiation until the very end of March 1906, long before which the covenants had been released.

"It is not necessary for me to go so far as to hold that, by not repudiating promptly, the purchaser lost his right of repudiation altogether; but it seems to me that by treating the contract as subsisting after the discovery of the defect he did preclude himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and that thereafter his only safe course was to limit the time within which the defect must be removed and a title made out, if the contract was to go through. There is no trace of any such course having been attempted in the present case. As I have said before, as late as November 8 the objection was insisted upon without repudiation, and the defect was in effect cured before the attempted repudiation on December 22 in the same year.

"Now hitherto I have assumed that the decree for specific performance did not affect the purchaser's right of repudiation; but I have come to the conclusion that, after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court."

Now, no doubt, that case is distinguishable on the facts because there the defect in the title was cured or agreed so to be before the purshaser repudiated: and also the purchaser could not repudiate without the leave of the Court having regard to the consent decree for specific performance. But the principles enunciated are closely in point here: they are stated by an Equity Judge of particular eminence; and they are traced back to earliar decisions by Knight-Bruce and Turner, L. JJ.

I need not I think go through all these earlier decisions. But I may cite from the judgment in *Murrell* v. *Goodyear* (14) which was decided in 1860. There the contract of sale was made on August 26, 1858, and in his requisitions on title the purchaser required the concurrence of an heir-at-law. There at pages 449-451* Turner, L. J., said as follows :—

"But then it is said, that upon October 27, 1858, notice was given to determine this contract, and that it must be treated as

*Pages of (1917) 1 Ch. D.—[*Ed.*]

*Pages of (1860) 1 De G. F. & J.—[*Ed.*]

null and void. Now it is to be observed that, with a full knowledge of this objection to the title, the defendant did not, in the requisitions which he made, take the objection, if he was entitled to take it, that the contract was void, upon the ground that the assignees had sold that to which they had no title. All that he said was, 'Procure me the concurrence of the heir-at-law'. He treated the contract, therefore, as a subsisting contract. I do not enter into the question whether he was or was not entitled to say that he would put an end to the contract. I am not by any means satisfied that he was. But supposing him to have been so, he treated the contract as a subsisting contract at the time when he made the requisitions upon the title; and not only so, but after discussions between the Solicitors with respect to the title down to as late as October 19, 1858, this contract was treated by the defendant as a subsisting contract, and the concurrence of the heir-at-law required.....Then comes this question: having treated the contract as a subsisting contract down to October 19, can the defendant, on October 23, four days afterwards, turn round and say, 'I determine this contract, and require payment back of the deposit which I have paid?' I think that every principle, and I may add, every authority, is against the existence of any such right on the part of a purchaser. The defendant was bound to afford to the vendors a reasonable time to enable them to clear the title of this difficulty which existed upon it. I think that by the effect of the letters, and by the dealing upon the contract, the defendant had put the case in the position of an ordinary case between vendor and purchaser. Mr. Langworthy, who argued this case very ably and very clearly, put the case thus:—He said, the purchaser is entitled to rescind the contract at once, upon the ground that there has been, not a fraudulent dealing by the assignees in putting up the property for sale, but an attempt by them to sell that to which they must be taken to have known they had no title—the entire fee. Well, as I said before, the defendant might, if he pleased, have set up that at the time when he sent these requisitions as to the title; but he did not do so. I do not mean to say he could have done so with success. I do not go the length Mr. Langworthy carried his argument upon that point;...But I say, without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this defendant it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, 'I treat this as a subsisting contract,' and then afterwards suddenly turn round and say, 'I have a right to revert to my original position. I have a right to destroy that contract, which for months and months, during the whole treaty of negotiation upon the title, I have treated as a subsisting contract."

So, too, in Halsbury's Laws of England, Vol. XXV, at page 403, it is stated in para. 692 :—

"The purchaser's right of repudiation arises as soon as the vendor's defect of title is definitely ascertained either from the abstract, or from his replies to the purchaser's requisitions...The right, however, must be exercised immediately the defect is so ascertained. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting, he cannot repudiate at any subsequent moment he may choose, but must give the vendor a reasonable time to remedy the defect."

The English authorities on the point being then clear, is there any reason why we should adopt different principles in India ? No such reason has been shown to us. On the contrary these principles seem to me to be principles of fairness and common sense. As the lawyer may say: "One cannot approbate and re-probate—at any rate at the same time." The business man may say: "You cannot sit on the fence and ask me to incur expenditure which may at your pleasure prove useless. Either rescind, or else give me a reasonable time to cure the defect."

In saying this, I do not mean that the difference that used to exist in England between remedies at law and remedies in equity are to be introduced here. But the purchaser had at least two possible remedies, *viz.*, she could exercise her option of avoiding the contract under s. 19 of the Indian Contract Act, or have it rescinded under s. 35 of the Specific Relief Act. But s. 19 of the Indian Contract Act also provides that instead she may insist that the contract be performed, and she be put in the position in which she would have been if the representation made had been true. This, in my opinion, she in effect did by her requisitions Nos. 1 and 3, and her letter of November 7. Further it is only fair to the vendors here

to point out that the word "fraud" is not expressly mentioned anywhere except in the written statement. There is no express issue on it, nor does the learned Judge use that word anywhere. Nor did the purchaser give any evidence to the effect that her consent to the suit contract was caused by any fraud as is contemplated by s. 19. But for the sake of argument I have assumed here that she might have been entitled to avoid the contract under s. 19, if she had acted differently.

Accordingly, in my judgment, the purchaser's notice of rescission of November 18, 1922 was invalid, having regard to her previous requisitions and her letter of November 7.

This brings me to the next point, *viz.* whether she ever gave the vendors a reasonable time to cure the defect and in particular was the fourteen days' notice given by her letter of December 18, a reasonable one? On this point the learned Trial Judge has found in favour of the vendors. He has held that the vendors obtained this consent within a reasonable time, and that the time limited by the purchaser's letter of December 18 was unreasonable. I respectfully agree with these findings. A release or waiver or a restrictive covenant is not usually an easy concession to obtain. In the present case the vendors did not at first know who the then owner was. So the title would have to be traced and verified to say nothing of negotiations and possibly a pecuniary compensation. Further the Christmas and New Year holidays intervened and according to the letter of January 2, 1923, the intermediary employed in the negotiations was out of Bombay till January 8. So, on the whole, I think the vendors did reasonably well to arrange by January 19 to obtain the consent, and to get it actually signed by February 5. It must be remembered that in Bombay six months is a more usual time for completion than the three months under the suit contract; and also that the purchaser had originally taken some five weeks to send in her requisitions.

In any event I am clearly of opinion that the time fixed by the letter of December 18 was quite unreasonable even having regard to the time which had already elapsed since November 1. To fix such a time in Bombay during the Christmas and the New Year holidays was really illusory. Even the High Court has then its one closed holiday of the year, when all offices are shut for a fortnight. The Government offices and Banks, etc., are also closed for many days and it is perhaps the most difficult time of the year to get any legal work done.

It follows, therefore, that, in my opinion, the notice of rescission of January 11, 1923, was also bad and that issue No. 9 ought to have been answered in the negative instead of in the affirmative.

On the other hand, I agree with the learned Judge in thinking that the purchaser did not lose her right of repudiation altogether. I need not repeat the correspondence, or the observations of Lord Parker in *Halkett* v. *Dudley* (4) on this point. It seems to me clear that she insisted on the consent to the building being obtained, or otherwise she would not complete the purchase. Waiver must be an intentional act with knowledge [see *Earl of Darnley* v. *Proprietors of London, Chatham and Dover Railway* (15)] and I think she never waived her right to get a good title to the building in accordance with the suit contract.

A more difficult question arises whether she did not impliedly waive her right to a release of the 7½ feet covenant as regards any future building and the strips of land to the north and south of the existing building. I cannot find that in the requisitions or the correspondence or the pleadings she ever expressly raised this point. Her sole objection up to then was as regards the existing building. This may be because she thought it of no practical importance, having regard to the lay of the land to take any objection as regards the remaining land. Nor is it at all clear whether this point was raised at the trial, although the issues are broadly framed. On the other hand, the learned Judge refers to it at the end of his judgment. Further the suit contract contains no clause obliging the purchaser to send in her requisitions within a specified time, or to accept the title subject to such requisitions.

On the whole, therefore, I think she can still force the vendors to carry out their original contract, *viz.*, to sell the property free from incumbrances, other than those expressly specified, and that accordingly the vendors must obtain, if they can, a complete release of the 7½ feet covenant. The appellant asks that a reasonable time be given for this purpose. Under all the circumstances I think a period of three

(15) 1867) 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 317; 15 W. R. 817.

months from to-day would be a fair time to fix.

Next comes the question what precise order we should make, and in particular whether there should be a general reference to title, or whether the objections to title at any further hearing should be confined to the 7½ feet covenant. I have already stated that there are no conditions binding the purchaser to furnish the requisitions within any particular time. Accordingly her Counsel has cited *Lesturgeon* v. *Martin* (16) to show that although at one stage of the negotiations a purchaser may be willing to accept the title if a particular obejction is removed, yet if there is to be a reference to the Master on title, it should be in general terms and not be confined to the particular objections. There Sir John Leach said (page 256*) :—

"That objection, however, was never removed, and the voluntary assurance, given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It may turn out, upon inquiry before the Master, that he had been ill-advised as to the effect of some of the objections originally taken to the abstract, or it may turn out that there is matter destructive of the title of the plaintiff (purchaser) which did not appear upon the abstract, and the reference to the Master must, therefore, be general as to the title of the plaintiff."

On the other hand the requisitions here were delivered as long ago as November 1, 1922. They are mainly requisitions asking for general information, and there appears to be no objection to the title other than the one before us. In a written statement of twenty-one paragraphs there is no suggestion of any defect in the title other than this restrictive covenant. Nor are there any in the eleven issues raised at the trial, although issue No. 7 is in general terms. As to that the learned Judge says : "Apart from the defect arising out of the restrictive covenant it is clear that the marketable title of the plaintiffs is made out."

There is also a marked distinction between our practice and that prevailing in the Chancery Courts. A reference to title in the Chancery Courts is almost a matter of course in a contested specific performance action. The Court then gets the advantage of the opinion on title of one of the conveyancing Counsel to the Court. Here we have no such Counsel to assist the Court. The practice which has generally prevailed here up to now is, I think, for the question of title to be fought out at the trial. I have at times protested at that, and suggested to the parties that a preliminary reference to the Commissioner on title would probably save much time. But it not unfrequently happens that the question of title is only one of the various points in a specific performance action, and the Court is anxious to assist the parties by determining all points in dispute once and for all without a reference to the Commissioner. If, in the present case, we were to send the case to the Commissioner for report on the title, it would probably only result in an additional hearing and additional delay, for one side or the other would take the matter to the Judge on objections to the report.

On the whole, therefore, I think the proper order will be to allow the appeal, and discharge the order made in the Court below, and to remand the suit for a further hearing. Our order had better be prefaced by a declaration to the effect that the restrictive covenant in the pleadings mentioned is a material defect in the plaintiff's title, but that in the events which have happened, the defendant No. 1 has not validly rescinded the suit contract and that the plaintiff ought to be allowed a period of three months from the date of our order in which to obtain a release of the said covenant, and that in that event she will be entitled to a decree for specific performance, but that in default of such release being so obtained the defendant will be entitled to be discharged from the suit contract, and to a return of her deposit with interest. The order should direct the suit on remand to be on Board on December 1, next, and that there shall be a new issue No. 12, *viz.*, whether the plaintiff has obtained a release of the restrictive convenant in the pleadings referred to and if so at what date. The remand will be heard on the footing that Issues Nos. 4, 7, 8, 9 and 11 have been answered in the negative, and Issues Nos. 2, 3 and 6 in the affirmative. Issues Nos. 5, 10 and 12 will then remain for final determination, and it will be for the Trial Judge to decide what decree should then be passed. That *prima*

(16) (1834) 3 My. & K. 255; 41 R. R. 65; 40 E. R. 97.

*Page of 3 My. & K.—[*Ed.*]

facie will depend upon the answer to this additional issue No. 12. We might, as in the Chancery Court, pass now a decree for specific performance, but I think this might be open to misconstruction in this Court, and that accordingly the order I propose is better suited to local practice.

As regards the present ownership of plot No. 12, it must be taken that S. D. Davar, named in the consent Ex. F dated February 5, 1923, was the owner of plot No. 12 at the date of Ex. F. This was pleaded in para. 12 of the plaint and not disputed in the written statement or at the trial.

As regards costs, I think on the whole, that the costs up to date of each party, including the costs of this appeal, should be costs in the cause. Minutes of this order are to be shown to us within ten days.

Kincaid, J.—I agree.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 494 OF 1923.

November 12, 1924.

Present:—Mr. Justice Mukerji.

RAGHUBIR SARAN DAS—PLAINTIFF—APPELLANT

versus

RAM DAS—DEFENDANT—RESPONDENT.

Procedure—Parties agreeing not to produce oral evidence—Court authorised to pronounce judgment after inspection of spot—Judgment, whether award—Appeal, whether lies.

At the trial of a suit Counsel for the parties stated that they did not desire to adduce any oral evidence and they suggested that the Court should inspect the locality and should decide the case on the basis of the local inspection and on an examination of such documentary evidence as might be adduced by the parties on the day when the statement was recorded. The Court inspected the locality, examined the documentary evidence, heard the arguments for the parties and decided the case:

Held, that the parties did not intend to constitute the Trial Court their sole arbitrator of the case and that the judgment of that Court, therefore, did not amount to an award and was appealable. [p. 608, col. 2.]

Shahzadi Begam v. *Muhammad Ibrahim*, 59 Ind. Cas. 787; 19 A. L. J. 14; 43 A. 266, *Bahir Das Chakravarti* v. *Nobin Chunder Pal*, 29 C. 306; 6 C. W. N. 121, *Nidamarthi Mukkanti* v. *Thammana Ramayya*, 26 M. 76 and *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*, 51 Ind. Cas. 827; 42 M. 625: 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397, distinguished.

Second appeal from a decree of the District Judge, Meerut, dated the 1st of February 1923, reversing that of the Subordinate Judge, Muzaffarnagar at Meerut.

Mr. *P. L. Banerji* and Dr. *K. N. Katju*, for the Appellant.

Mr. *K. C. Mital*, for the Respondent.

JUDGMENT.—This second appeal raises some interesting points of law. It appears that the suit related to a certain wall and a piece of land immediately to the south of it. The plaintiff who is the appellant before this Court claimed that the wall and the land were his private property. He complained that the respondent, the defendant, interfered with his right of possession in certain ways. At this stage of the case it is not necessary to enter into the details. The Court of first instance partially decreed the suit and ordered the supposed interferences with the right of the plaintiff to be removed. The lower Appellate Court came almost to a directly opposite conclusion and ordered the suit to be dismissed *in toto*.

The first point that has been taken in this Court is that no appeal lay to the Court below. This plea arises out of the following circumstances.

At the trial of the suit, the Counsel for the parties stated that they were not prepared to adduce any oral evidence. They suggested that the Court, Subordinate Judge, should inspect the locality and should decide the case on the basis of what he might see on the spot and on an examination of such documentary evidence as might be adduced by the parties up to 3 P. M. of the day when the statement was recorded. The learned Subordinate Judge inspectad the locality, examined the documentary evidence, heard the arguments for the parties and decided the case. It is urged for the plaintiff-appellant that the parties really constituted the Subordinate Judge their sole Arbitrator of the case and that the judgment was really an award of an Arbitrator, and no appeal lay to the District Judge. Several cases reported in *Shahzadi Begam* v. *Muhammad Ibrahim* (1), *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (2), *Nidamarthi Mukkanti* v. *Thammana Ramayya* (3) and *Chinna Venkatasami Naicken* v *Venkatasami Naicken* (4) have been relied on, on behalf of the

(1) 59 Ind. Cas. 787; 19 A. L. J. 14; 43 A. 266.
(2) 29 C. 306; 6 C. W. N. 121.
(3) 26 M. 76.
(4) 51 Ind. Cas. 827; 42 M. 625; 36 M. L. J. 291 (1919) M. W. N. 221; 25 M. L. T. 397.

appellant in support of his argument. I have examined each and every one of these cases and I have found that the intentions of the parties in those cases were clear and were that they were binding themselves by the decision that might be given by the Court. No such intention can be gathered from the language used in this particular case. All that the parties did was to make a statement that they were not going to adduce oral evidence and that they requested the Court to exercise its inherent power of inspection of the locality. That is all. The parties did nothing beyond this. It was open to the parties not to adduce any oral evidence. As a matter of fact, in the circumstances of a case like this, the oral evidence could be of little use. The oral evidence that could be adduced would only go to show the state of facts as could be ascertained more easily on an inspection. The facts were, for example, how certain beams lay, where certain spouts existed and so forth. In my opinion an appeal did lie to the lower Appellate Court.

Coming to the merits of the case. The learned Judge has found that the plaintiff had no title to the property claimed, *viz.*, to the wall and the land and dismissed the suit. The Court also considered certain other aspects of the case which will be mentioned presently.

In this Court, it has been urged that if the lower Court's finding that the plaintiff had no title be accepted as final there still remained the fact that the plaintiff had certain possessory rights and the lower Appellate Court had ignored the consequences of such rights as were apparent on the face of the record. I propose to examine this aspect of the case.

There can be no doubt that the finding of the learned Judge as to title is conclusive. This finding is based on facts observed on the spot and on an examination of the documentary evidence adduced by the parties. The Court found that the wall which the plaintiff claimed as his own was a part of a much larger wall going round a large tract of land within which were good many shops and business quarters. The Judge found that the land which the plaintiff claimed as his own was a portion of a lane which went all round the land enclosed by the wall and inferred that it was a part of the site of the market Smithganj itself which was enclosed by the enclosing wall. These were findings to which the lower Court had absolute jurisdiction to arrive and I am clear that this finding is binding on this Court.

Now coming to the question of possessory right and the consequences thereof. The Court of first instance dismissed a part of the plaintiff's suit and there was an appeal against that judgment. We need not, therefore, consider that part of the plaintiff's suit which failed in the Court of first instance. The judgment of the Appellate Court shows that only one point was taken before it, concerning the question as it remained after the finding that the plaintiff had no title either to the wall or to the site. As the judgment shows, it was urged on behalf of the plaintiff that the defendant's new building had blocked up two of his windows, opening on the lane. The learned Judge pointed out that these openings had been created during the course of the suit and when the defendant was erecting his own building. It is clear, therefore, that there are no merits in this portion of the case. I may point out that nothing was said in the plaint about these windows for the simple reason that they never existed when the claim was filed.

The Court of first instance having found that the wall and the land belonged to the plaintiff ordered that the mud spread on the surface of the land (which has been described throughout as *abchak*) should be removed and the room built over the lane should be demolished and the water spouts of the plaintiff should be restored to their original condition. This is all the relief which the plaintiff got there. Now if the land be not plaintiff's property no question of the removal of the earth that was stored on that land arises. According to the plaintiff's statement in the plaint, the *abchak* land in suit used to be frequented by passers by almost as if it were a public road. No question of possessory right can, therefore, attach to such property. We have to remember that title there is none. The land lay vacant and people visiting the the market passed over it. There was, therefore, no *de facto* possession of the plaintiff over the land. Order as to demolition of the roof cannot be sustained in the absence of a finding that the land over which the roof was built was the property of the plaintiff. It is true that the plaintiff has used a part of the wall, which he claimed as his and which has been found

not to be his, for the purposes of supporting his own building. But if this user of the wall has given the plaintiff any possessory right at all, that possessory right must exist on those portions of the wall alone which support his buildings or beams. His possessory right cannot be extended, by any fiction of law, or as a matter of inference, over any other portion of the large wall, a portion only of which is in plaintiff's use. His claim, therefore, to have the roof built over the lane removed cannot be sustained in any view of the case.

There remains the question of spouts. It appears that the water from the spouts will no longer flow over the surface of the lane, but will fall on the roof of the newly built room and will be drained off from that place. It has been urged that it is an absolute right of the plaintiff to let the water from his spouts fall on the land and that the defendant had no right to interfere. It is the decided opinion of both the Courts below that the suit is based on pure stubbornness on the part of the parties and that the actual inconvenience suffered by the plaintiff was insignificant. The question then is whether the fact that the plaintiff's spouts dropped water on the surface of the lane will entitle him to insist on any building erected under the spouts being removed. The learned Judge in the Court below has found that the lane is the property of either Government or the Municipal Board. He has found that the plaintiff obtained from time to time the permission of the Municipal Board to erect his buildings. The utmost then that he can say is that the Municipality by allowing him to construct the spouts granted to the plaintiff a right of easement to discharge water from his roofs over Municipal land. If that be so the plaintiff cannot claim any higher right than that of the owner of dominant heritage. It is common ground that the construction in dispute was made by the defendant with the permission of the Municipal Board. The Municipal Board would have a right, as the owner of a servient heritage, to make any arrangement they like, so long as they did not thereby restrict the easement or render its exercise less convenient. The principle underlying will be found enacted in s. 27 of the Easements Act. It cannot be said that the right of dropping of water was a possessory right. The right might at the most be a right of easement acquired by grant and nothing else. If it be a right of easement, the law enacted in s. 27 of the Easements Act will apply in full force. If it did not, the plaintiff's position would be worse.

I am satisfied that there is nothing in this appeal which should induce this Court to interfere with the judgment of the learned District Judge.

The appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 208 OF 1924.
July 3, 1924.
Present:—Mr. Justice Scott-Smith.
RAM GOPAL—PLAINTIFF—APPELLANT
versus
GANESHI LALL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Bond executed in consideration of debt due and withdrawal of prosecution, legality of—Public policy.

Where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a bond given by the debtor as security for the debt constitutes a valid and enforceable agreement. [p. 611, col. 1.]

Where there is good consideration for a bond, the mere fact that the creditor on recovering the bond gave up a non-compoundable criminal prosecution against the debtor does not invalidate the agreement contained in the bond to pay a debt which was justly due. [p. 611, col. 2.]

Jai Kumar v. *Gauri Nath*, 28 A. 718; 3 A. L. J. 505; A. W. N. (1906) 212, relied on.

Civil revision from an order of the Small Cause Court Judge, Delhi, dated the 5th December 1923.

Mr. *Shamair Chand*, for the Petitioner.
Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—This is an application for revision from the order of the Small Cause Court Judge, Delhi, dismissing the plaintiff's suit for Rs. 452 which was brought upon a bond for Rs. 400 executed on the 24th May 1922 by defendant No. 1 as principal and defendant No. 2 as surety.

The facts are briefly as follows:—

The plaintiff held three bonds in his favour executed by defendant No. 1 on the 11th January 1919, 17th May 1919 and 19th September 1921, interest being agreed upon

at 2 per cent. per mensem. As security for the debt—in the first bond two tongas and a horse and harness were pledged. The plaintiff instituted criminal proceedings under s. 406, Indian Penal Code, against defendant No. 1 alleging that he had disposed of the pledged property. A warrant of arrest was issued by the Criminal Court and the case fixed for hearing on the 25th May 1922. On 29th May 1922 defendant No. 1 executed the bond in suit for Rs. 400 on account of balance of debt due and his brother defendant No. 2 became his surety. Interest was fixed at 1 per cent. per mensem in place of 2 per cent. previously agreed upon. The learned Judge of the Small Cause Court dismissed the suit on the ground that part of the consideration for the bond in suit was withdrawal from the criminal proceedings under s. 406, and as the offence under s. 406, Indian Penal Code, is a non-compoundable one its composition was illegal. He held in effect that as part of the consideration was contrary to law no suit could be brought on the bond.

The plaintiff has come up to this Court on the revision side and it is contended on his behalf that defendant No. 1, at all events was liable for re-payment of the debt and that this part of the consideration for the bond sued upon can be separated from the other part, namely, the giving up of a criminal prosecution. The plaintiff's Counsel also says that he is quite willing to give up his claim against defendant No. 2 the surety. In Pollock and Mulla's Contract Act, at p. 168, it is stated that agreements for stifling prosecution are a well-known class of those which the Courts refuse to enforce on this ground. The principle is that "You shall not make a trade of a felony." Now it is contended in the present case that there is no question that the plaintiff is making a trade of a felony. The debt was actually due to him from defendant No. 1. It is pointed out that the plaintiff could have sued upon the original bond and there is, therefore, no reason why he should not sue upon the bond substituted for it. In *Jai Kumar* v. *Gauri Nath* (1) it was held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory-note given by the debtor as security for the debt constitutes a valid agreement. At page 721* the following remarks made by Cotton L. J., in an English case are quoted:

"It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and the doctrine contended for does not apply where a just and *bona fide* debt actually exists, where there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as possibly a criminal act. In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give a security for a debt which he justly owes to his creditor." In my opinion these remarks apply with force to the present case. There was a threat by the plaintiff to prosecute defendant No. 1 for criminal breach of trust. But it appears to me that that threat does not necessarily vitiate the agreement of the bond in suit, given by the debtor in regard to the debt which he justly owed to his creditor. Certainly there was no necessity for defendant No. 2 to stand surety and to that extent I think the agreement was probably void, but as the petitioner does not press his claim against the surety it is unnecessary to discuss this point further. No case has been cited by Counsel for the respondent exactly on all fours with the present one. Here there was good consideration for the defendant No. 1 to pass the bond sued upon and the mere fact that the plaintiff on recovering the bond gave up the criminal prosecution against his debtor does not appear to me to invalidate the agreement to pay a debt which was justly due.

I, therefore, allow the revision and setting aside the order of the lower Court decree the plaintiff's claim in full against Ganeshi Lall with costs of both Courts.

Z. K. *Revision allowed.*

(1) 28 A. 718; 3 A. L. J. 506; A. W. N. (16) 260[12].

*Page of 28 A.—[*Ed.*]

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 133 OF 1923.

September 8, 1924.

Present:—Mr. Justice Jackson.

THE PRESIDENT, TALUK BOARD, HOSPET—COUNTER-PETITIONER—PETITIONER

versus

TUTUR CHANDRAPPA—PETITIONER—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 55 (2) (4), 57—Honorary Magistrate, resignation by—Disqualification for election, whether removed before acceptance of resignation by Government—Interpretation of Statutes.

An Honorary Magistrate, disqualified as such for election as a member of a Local Board under s. 55 (2) (4) of the Madras Local Boards Act, cannot relieve himself of that disqualification merely by submitting his resignation to Government. The disqualification subsists until the resignation is accepted by the Government.

After an office is conferred and assumed, it cannot be laid down without the consent of the appointing power.

Pease v. *Lowden*, (1899) 1 Q. B. 386; 68 L. J. Q. B. 239; 63 J. P. 56; 79 L. T. 672, *Akula Sudarsana Rao* v. *T. A. Christian Pillai*, 76 Ind. Cas. 813; 45 M. L. J. 798; 33 M. L. T. 215; (1924) A. I. R. (M.) 396, relied on.

A Judge has no dispensing power which allows him to go behind the plain import of a Statute.

Petition, under s. 107 of the Government of India Act, praying the High Court to revise an order, dated 17th November 1922, of the District Court of Bellary, in O. P. No. 47 of 1922.

Mr. *K. Rajah Iyer*, for the Petitioner.

Mr. *C. Sambasiva Rao*, for the Respondent.

JUDGMENT.—Petition to revise the order of the District Judge of Bellary on a reference made to him under s. 57 of Madras Act XIV of 1920. The point referred to by the Judge, which is the sole question for determination, is whether an Honorary Magistrate who is disqualified for election as member of a Local Board under s. 55 (2), (4) of the above Act, can relieve himself of that disqualfication by submitting his resignation to Government or whether, on the contrary, the disqualification subsists until Government have removed him from his office.

The point was also referred to the Local self-Government Department by the President of the District Board, Bellary, and it replied in Government Order No. 1301, L and M dated 1st August 1922: "An Honorary Magistrate is disqualified for election or appointment as a member of a Local Board before his resignation is accepted by the Government". This order was filed before the District Judge who held that it was in literal conformity with the law, and that it would be thought, the matter might have ended. But the learned Judge proceeding upon what he describes as the spirit of the law, apparently meaning the intention of the Legislature which it had failed to express in its Statute, declared that a bare resignation is sufficient. A Judge has no dispensing power which allows him to go behind the plain import of a Statute, and on this particular point the law is clear. Under s. 14 (1) of the Cr. P. C. the Local Government may confer upon any person all or any of the powers conferrable on a Magistrate. Under s. 26 of the Cr. P. C. all Magistrates may be removed from office by the Local Government. A person so appointed cannot remove himself by resignation. This is the doctrine of the English Common Law; after an office was conferred and assumed, it could not be laid down without the consent of the appointing power, Paine's Law of Elections, 1890, page 201, English Case-Law is not of much assistance unless we know the exact terms on which the office sought to be renounced was held. But *Pease* v. *Lowden* (1) follows the above principle of Common Law. Two Scotch cases quoted in Rogers on Elections, Vol. II, page 27, carry the matter no further, as shown in *Akula Sundarasana Rao* v. *T. A. Christian Pillai* (2) where they are discussed. In this Madras case it is remarked: "it may be that the need for acceptance does not apply to honorary appointments. But it is unnecessary to pursue this line of argument further." Page 799*. I do not know what line of argument was then advanced. It is suggested before me that the appointment of an Honorary Magistrate is analogous to a contract without consideration, but pursued to its logical conclusion, this becomes absurd, for such an appointment would be *void ab initio*. I see no distinction in law between a Magistrate who receives and a Magistrate who does not receive a salary for the performance of his duties. Therefore, the headnote to *Akula Sudarasana Rao* v. *A. T. Christian Pillai* (2) is correct, although that actual judgment contains *obiter*, a query in the contrary sense. "An Honorary Magistrate does not cease to hold

(1) (1899) 1 Q. B. 386; 68 L. J. Q. B. 239; 63 J. P. 56; 79 L. T. 672.

(2) 76 Ind. Cas. 813; 45 M. L. J. 798; 33 M. L. T. 215; (1924) A. I. R. (M.) 396.

*Page of 45 M. L. J.—[*Ed.*]

his office on his resignation but only when the resignation is accepted".

The Civil Revision Petition is allowed with costs.

V. N. V. *Petition allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 60 OF 1924: SUIT No. 1379 OF 1921.

September 10, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kincaid.

MUKUNDCHAND BALIA—PLAINTIFF—APPELLANT

versus

SOBHAGMAL GIANMAL—DEFENDANT—RESPONDENT.

Wagering Contract—Kaccha adatia, *position of*—Teji mandi *transaction, nature of—Transaction, when wager—Intention to deal in differences only—Forward transactions.*

A *kaccha adatia* in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the *kaccha adatia* and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the *kaccha adatia* transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The *adatia* enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. [p. 614, col. 2.]

There is no presumption as regards *teji mandi* transactions that they are wagering transactions. [p. 615, col. 2.]

Manilal Dharamsi v. *Allibhai Chogla*, 68 Ind. Cas. 481; 47 B. 263; 24 Bom. L. R. 812; (1922) A. I. R. (B.) 408, referred to.

Where the plaintiff is employed as a *kaccha adatia* by an up-country constituent, and where transactions are entered into by the *adatia* with third parties in Bombay, and where the intention of the third parties is not shown to be to deal in differences only, it is not enough for the defendant to prove an agreement between himself and his *adatia* that the *adatia* would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. [p. 616, col. 1.]

Perosha Cursetji Parakh v. *Mankji Dossabhoy*, 22 B. 899; 11 Ind. Dec. (N. S.) 1182 and *Sassoon* v. *Tokersey*, 28 B. 616; 5 Bom. L. R. 503, referred to.

Mr. *B. J. Desai* (with him Mr. *M. C. Setalvad*), for the Appellant.

Mr. *Thanawalla* with him Mr. *Campbell*, for the Respondent.

JUDGMENT.—The plaintiff in this case carried on business in Bombay as a shroff and merchant and *kaccha* and *pakka adatia* at the material time. The defendant resided and carried on business at Itchhavar within the territory of the Bhopal State under the name and style of Bagmal Gianmal and Sobhagmal Thanmal. As an up-country constituent the defendant did business in Broach and Bengal cotton through the plaintiff in Bombay. He employed the plaintiff as his *kaccha adatia* to do business for him in forward transactions in cotton. The transactions commenced in *Sambat* 1971, but we are not concerned with the transactions of the *Sambat* years 1971, 1972 and 1973 directly. In *Sambat* 1974, there were various forward transactions and *teji mandi* transactions carried out by the plaintiff on behalf of the defendant and there was a certain sum due by the firm of Sobhagmal Thanmal to the plaintiff, which also was included in the agency account for the *Sambat* year 1974.

The plaintiff filed the present suit in March 1921 to recover Rs. 1,83,632-5-6, inclusive of interest up to the date of the suit, on the agency account between him and the defendant for the *Sambat* year 1974.

The defendant pleaded that the sum due by the firm of Sobhagmal Thanmal was not rightly included in this agency account, and that the plaintiff's claim in respect of that sum was barred by limitation. Further it was pleaded that the amount of the profit made in respect of jute, the plaintiff should give credit to the defendant in this account. The principal defence was that all those forward transactions and *teji mandi* transactions were wagering transactions. This defence was put in the written statement in this form:—

"The defendant admits that the plaintiff acted in Bombay as the *kaccha adatia* of the said two firms in various transactions. The defendant says that the transactions in Broach and Bengal cotton and the *teji mandi* transactions in Broach cotton were all wagering and gambling. The defendant says that it was agreed and understood between the parties that as regards transactions

in Broach and Bengal cotton only differences were to be paid and received and that the plaintiff should not upon the defendant's orders enter into any transactions therein with any person or firm who were likely to insist upon delivery being given or taken."

On these pleadings several issues were raised, and the three points of defence which I have just mentioned, were considered by the learned Trial Judge on the oral and documentary evidence in this case. The learned Judge came to the conclusion that the item of Rs. 10,521-9-6 was properly included in the agency account as between the plaintiff and the firm of Bagmal Gianmal, that it was done with the consent of the firm of Sobhagmal Thanmal, in which another partner Khemraj Maganlal was interested along with the defendant Sobhagmal Gianmal. As regards the transaction of 546 jute bales, the learned Judge held that it was a transaction on behalf of the defendant, and that as it was a joint venture of the plaintiff and the defendant, it could not form a proper item in the cotton agency account. As regards the principal defence of wager, the learned Judge came to the conclusion that there was an understanding between the plaintiff and the defendant that the plaintiff was not to call upon the defendant either to give or take delivery on any occasion, and that the transactions were in the nature of wagers, even though the actual contracts entered into by the plaintiff with third parties in Bombay on behalf of the defendant were not wagering transactions. The learned Judge was of opinion that the nature of the contracts with the third parties entered into by the plaintiff on behalf of the defendant could not affect the question as between the plaintiff and the defendant as to the transactions being wagers. Accordingly he came to the conclusion that the forward transactions and the *teji mandi* transactions in cotton in respect of which the plaintiff claimed the various amounts, were wagering transactions, and dismissed the suit with costs, except the costs of issues Nos. 1, 2, 3, 7 and 8, which costs were ordered to be paid by the defendant to the plaintiff.

The plaintiff has appealed to this Court from the decree passed by Mr. Justice Kemp; and the principal question in the appeal is whether these transactions between the plaintiff and the defendant are wagering transactions. It is necessary to state at the outset the course of business between the parties. It is an admitted fact that the plaintiff was employed by the defendant as his *kaccha adatia* in Bombay, and all the transactions, with which we are concerned in this suit, were carried out by him as a *kaccha adatiaa*. The incidents of *kaccha adatia* in Bombay have been stated by Chandavarkar, J., in *Fakirchand Lalchand* v. *Doolub Govindji* (1). Though the course of business in the present case may vary in some details, in all essential particulars the course of transactions here resembles that stated in the judgment to which I have just referred.

It is not disputed and cannot be disputed that a *kaccha adatia* in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and that when he enters into such transaction under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the *kaccha adatia* and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the *kaccha adatia* transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The *adatia* enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. I may mention that these facts are practically admitted by the defendant. In his evidence he admits that he employed the plaintiff as his *kaccha adatia* at four annas commission. He admits that he was responsible if the other party failed. By the expression "other party" is meant the third party with whom the contract is entered into by the *adatia*. Then in cross-examination he admits that the plaintiff was not liable for loss or the goods on these transactions, and that the plaintiff used to inform him of the persons with whom the transactions were effected.

Thus it is essential to remember that when under instructions from the defendant, the up-country constituent, the plaintiff entered into transactions with third parties in Bombay as his *kaccha adatia*, he did so in terms on behalf of an undisclos-

(1) 7 Bom. L. R. 213 at pp. 215, 216.

ed principal as his agent, and the privity was established on his entering into these transations between the third parties and the defendant. Exhibit M contains entries in defendant's journal showing the names of various persons with whom the particular transactions were entered into by the plaintiff on behalf of the defendant. The defendant admits that the names of third parties were communicated to him by the plaintiff, and though Ex. M does not relate to the transactions in suit, it is clear that the course of business with reference to the transactions in suit was exactly as I have just described.

The defendant's case then is that he had arranged with the plaintiff that he should never call upon him to give or take delivery. He has stated in his evidence this agreement in these terms:—" I agreed to give business on terms. I was only to pay differences and not give or take delivery and so also his constituents". Thereby he means that even the third parties with whom the plaintiff entered into transactions on defendant's behalf were not to give or take delivery.

It may be stated that the learned Judge has found in fact, and the record justifies the finding, that so far as the third parties in Bombay were concerned, the transactions were not wagers, and that, as between the plaintiff and the defendant on the one hand and those third parties, on the other the transactions were such as could be enforced in law by or against them. At page 55 of the Paper Book, Part I, the effect of the evidence is stated. The plaintiff's evidence on this point, which is parctically unchallenged, is to the effect that the transactions with third parties were not wagers, that is, they did not agree to deal in differences only. It may also be mentioned that the transactions in suit, like other transactions in the previous *Sambat* years, were arranged, at least in part, by the defendant's *munim* in Bombay with third parties and that the plaintiff's name was given as the *kaccha adatia* for the defendant by the *munim* of the defendant. Exhibits A, B, C and O are letters evidencing this course of conduct; and it is indisputable that at least some of the transactions were arranged with third parties in that way, *i. e*, not directly by the plaintiff, but by the defendant's *munim*, and then the plaintiff was informed as the *kachha adatia* for him. The learned Judge has not read these Exhibits in the sense in which I have just described them. But those letters are typical of the manner in which some of the transactions were entered into, and clearly show that in fact several transactions were arranged in that way, that the defendant's *munim* brought about the transacations, and finally effected them through the plaintiff as the defendant's *adatia*, the intervention of the plaintiff being necessary as the Bombay merchants, with whom these contracts would be entered into, would ask for guarantee for the payment of losses on behalf of the up-country constituent.

Most of the transactions in suit were forward transactions in Broach cotton, and some were *teji mandi* transactions in cotton. In this case there is no essential difference between the *teji mandi* transactions and the forward transactions in Broach cotton, so far as the plea of wager is concerned. It is not suggested before us that there is any evidence to distinguish the *teji mandi* transactions from the forward transactions in Broach cotton. Either all these are wagering transactions or none of them is a wagering transaction according to the argument before us. It is, therefore, unnecessary for us to deal separately with the forward and *teji mandi* transactions. Though the learned Judge was rather inclined to the view that the *teji mandi* transactions would be *prima facie* wagering transactions, he treated both the sets of transactions practically on the same footing on the evidence; and it is a matter to be decided on the evidece in the case, as to whether all these transactions are shown to be wagering transactions. I may mention that there is no presumption as regards *teji mandi* transactions that they are wagering transactions as pointed out by this Court in *Manilal Dharamsi* v. *Allibhai Chagla* (2).

I agree with the learned Judge in his conclusion of fact that the defendant must have pointed out to the plaintiff that he would not be in a position to give or take delivery, and that the defendant arranged with the plaintiff that he should not be called upon to give or take delivery. I do not consider it necessary to examine in detail the evidence bearing on this point, namely, that as between the plaintiff and the defendant there was an understanding

(2) 68 Ind. Cas. 481; 47 B. 263; 24 Bom. L. R. 812; (1922) A. I. R. (B.) 408.

that the plaintiff would not call upon the defendant either to give or take delivery.

On these facts the question arises whether the transactions in suit can be treated as wagering transactions. The learned Trial Judge is of opinion that the circumstance that there was no arrangement with the third party that he should only receive or pay differences is immateral, if there was an arrangement with the agent that the defendant would only be called upon to pay or receive differences. In coming to this conclusion the learned Judge has been influenced by the decision in *Manalal Raghunath* v. *Radhakisan Ramjiwan* (3). Apart from the decisions, where the plaintiff is employed as a *kaccha adatia* by an up-country constituent, and where transactions are entered into by the *adatia* with third parties in Bombay, and where we have as in this case, the circumstance that the intention of the third parties is not shown to be to deal in differences only, it seems to me that it is not enough for the defendant to prove an agreement between himself and his *adatia* that the *adatia* would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. The two parties to the contract in this case would be the defendant and his agent on the one hand and the third party with whom the *adatia* enters into the contract on behalf of the defendant on the other hand. It is essential for the defendant to prove, not what his arrangement with the plaintiff was, but as to whether there was a common intention to wager as between him or the plaintiff on the one hand and third party on the other. In this case it is established that the contract which is entered into by the *adatia* on behalf of the up-country constituent is a real contract which is enforceable against the third party by the defendant. The mere fact that as between the defendant and his agent there is an arrangement that the agent shall so arrange business as not to require the defendant to give or take delivery is a matter which does not affect the nature of the contract as between him and the third party in Bombay, but is a matter merely between him and the plaintiff, not affecting the nature of the contract. Having regard to the admitted course of business between the parties, and the law on the point, I should feel little difficulty in holding that the plea of wager is not open to the defendant, unless he is in a position to prove that the transactions entered into with third parties on behalf of the defendant were wagers, *i. e.*, that the common intention of the defendant and the plaintiff and the third parties was to deal in differences only.

Coming to decided cases on this point, it seems to me that the *ratio decidendi* in *Perosha Cursetji Parakh* v. *Manekji Dossabhoy* (4) supports the view which I have just mentioned. In *Sassoon* v. *Takersey* (5), it has been pointed out that in order "that a transaction may fall within s. 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager." Though the position of the agent in that case was not exactly the position of a *kaccha adatia*, as in this case, but in essential respects it closely resembled the position of the present plaintiff. There it was held that unless the common intention of the two parties was to deal in differences only, the contracts could not be treated as wagering transactions.

As regards *Manilal Raghunath* v. *Radhakisson Ramjiwan* (3), it must be remembered that it was the case of a *pakka adatia*. The position of a *pakka adatia* is essentially different from that of a *kaccha Adatia*. The incidents of *pakki adat* in Bombay have been stated in *Bhagwandas Narotam das* v. *Kanji Deoji* (6) and that statement has been approved by their Lordships of the Privy Council in *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (7). In *Manalal Raghunath* v. *Radhakison Ramjiwan* (3) the two questions which may arise for consideration in a case of that character have been stated by the learned Chief Justice. With reference to the first question, namely, "If the contract between the parties was one of employment for reward, was it knowingly made to further or assist the entering

(4) 22 B. 899; 11 Ind. Dec. (N. S.) 1182.
(5) 28 B. 616; 5 Bom. L. R. 503.
(6) 30 B. 205; 7 Bom. L. R. 611.
(7) 44 Ind. Cas. 284; 45 I. A. 29; 20 Bom. L. R. 561; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 12 C. W. N. 625; 7 L. W. 577; 42 B. 373; 11 Bur. L. T. 211 (P. C.).

(3) 62 Ind. Cas. 361; 45 B. 386; 22 Bom. L. R.

into agreements by way of gaming or wagering," the learned Chief Justice proceeds to point out what the defendant would have to prove in order to succeed on that issue: and among the four points stated the last one shows that, even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. That situations could arise in the case of *pakka adatia*, because as between the *pakka adatia* and the up-country constituent both are principal with reference to the contract, and it does not matter in the least as to whether the *pakka adatia* has entered into other contracts with third parties to cover that contract or not. It is entirely a matter of his discretion and choice to enter into contracts with third parties; but the contract between the *pakka adatia* and the up-country constituent is complete. In the case of a *pakka adatia* it is not so. If the *kaccha adatia* does not enter into a contract with a third party in pursuance of the instructions given by the up-country constituent, there is no contract, and the order of the constituent remains an unexecuted order. It is only when he enters into a contract with the third party on behalf of his constituent that the contract is complete, with this additional circumstance that the *kaccha adatia* guarantees payment of losses on behalf of the up-country constituent to the third party in Bombay. Further, in *Manalal Raghunath* v. *Raghakisson Ramjiwan* (3) this very point has been emphasised at page 419* of the report by the following observations:—

"The parties to a contract are always principals but if the contract is one of agency, the contract which the agent enters into in pursuance of the agency may be made by him with a third party: (1) either as agent in which case he is not liable, or (2) as principal without disclosing the fact that he is an agent, in which case the third party has nothing to do with the party employing the agent until he is disclosed, or (3) the agent may be personally liable to the third party as well as the person employing the agent."

And the learned Chief Justice has pointed out there that the transaction in that case came under none of the three categories specified by him. In the present case, the contracts clearly fall within the first and third categories. As I have already pointed out the contract is complete as between the defendant and the third party in all respects, with this additional circumstance that the *kaccha adatia* stands guarantee for the payment to the third party in Bombay for losses, and that the name of the up-country constituent is not disclosed to the third party, though the fact that the *adatia* is acting as an agent is undoubtedly disclosed to the third party in Bombay. In such a case the transaction may be a wagering transaction but only if the common intention of the two parties, *i. e.*, the third party in Bombay and the up-country constituent, to deal in differences only is proved. Unless that is proved, it cannot be treated as a wagering transaction.

It is not necessary to refer to the evidence in this case that the contracts with third parties were real contracts and not wagering transactions. The learned Judge has accepted that view of the evidence, and that is not challenged before us on behalf of the defendant. We are unable, therefore, to agree with the learned Judge that it is immaterial in the case that the transactions with third parties were not wagering transactions. In order to establish his plea, it is necessary for the defendant to prove that the common intention of the defendant and the plaintiff on the one hand and of the third parties on the other was to deal in differences only. No doubt in the written statement, the defendant did say that the transations with third parties were of that nature, and in his evidence no doubt in the passage which I have already quoted he does mean to say so. We are not clear from the judgment of the learned Judge as to whether he believed the defendant on that point. We rather think that he does not believe the defendant on the point that the intention of third parties was also to deal in differences only. However, that may be we are quite clear that on this record the only evidence in support of the plea that the common intention of the third parties was to deal in differences is the statement of the defendant himself, which is contrary to the rest of the evidence in the case, both documentary and oral. So far as the defendant means to say that the agreement was that the contracts with third parties were to be wagering contracts his statement cannot be relied upon. We are unable to believe the defendant if he means to say that the plaintiff agreed to do

*Page of 45 B.—[*Ed.*]

business on the terms that though he would be liable to the third parties for all the losses, he would not require the defendant to give or take delivery and further that he would do business on lines which would not give him any legal right to recover the losses which he may have to pay to the third parties. It is difficult to believe that any party would agree to do business on those terms. In fact Mr. Campbell on behalf of the respondent contended as follows:—"We offered to do business on the terms 'heads I win, tails you lose;' and the plaintiff agreed to do business on those terms." We do not believe that the plaintiff agreed to do business on those terms but we believe that the plaintiff agreed to accomodate the defendant so far that he would not insist upon the defendant giving or taking delivery in any of these transactions. That by itself would not make these transactions wagering transactions.

We find in favour of the plaintiff on the plea of wager and hold that the plaintiff is entitled to recover the losses incurred in respect of these transactions on behalf of the defendant. In this view of the plea of wager, Bombay Act III of 1865 does not present any difficully in the way of the plaintiff being able to recover the amounts due on the agency account. The defendant does not admit the statement of accounts as put forward by the plaintiff in respect of these transactions in his written statement. The parties do not agree before us, and a specific issue was raised in the Trial Court as to what amount was in fact due on these transactions to the plaintiff. There must be an inquiry as to the amount due on the account.

As regards the sum which was due by the firm of Sobhagmal Thanmal, it has been urged before us that the sum has been wrongly carried into the agency account on behalf of the defendant. But on a consideration of the evidence on this point, we accept the conclusion reached by the Trial Judge that the sum was properly carried into this account practically with the consent of the parties concerned. We do not see any reason to differ from that view. The fact that no demand was made on the firm of Sobhagmal Thanmal also supports the view that the sum was properly carried into this account.

As regards the jute transactions, though it was a joint venture, we see no objection to allow credit to the defendant in this suit. The plaintiff does not object to this suggestion of the defendant.

We allow this appeal, set aside the decree of the Trial Court and refer the matter to the Commissioner to ascertain what sum is due to the plaintiff on the agency account and direct that in taking that account the sum of Rs. 10,521-0-6 shoud be treated as an item in the agency account and credit may be given to the defendant for the sum due to him in respect of the transactions relating to 546 jute bales.

The plaintiff to have the costs of this appeal and of the suit except the costs of Issues Nos. 7 and 8 in the suit. As regards costs of Issues Nos. 7 and 8 we direct that each party should bear his own costs in the suit. Further costs and directions reserved.

The cross-objections are dismissed with costs except so far as allowed by our order as to the transactions in jute.

K. S. D. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 30 OF 1924.

August 25, 1924.

Present:—Mr. Dalal, J. C.

Musammat UMRAO KUAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARABJIT SINGH—PLAINTIFF—RESPONDENT.

*Hindu Law—Will—Devise in favour of widow and predeceased son's widow—Interest taken by legatees—Inheritance—*Stridhan *property, succession to—Marriage in approved form—Presumption.*

A Hindu testator devised his property by Will to his widow and to his predeceased son's widow:

Held, that each of the legatees took an absolute interest in one-half of the property under the Will.

Jogeswar Narain Deo v. *Ram Chandra Datt*, 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.), relied on.

Vydinada v. *Nagammal*, 11 M. 258; 12 Ind. Jur. 455; 4 Ind. Dec. (N. S.) 179, dissented from.

The heir of a Hindu woman to her *stridhan* is the nearest kinsman of her husband and not of her father, where her marriage had taken place in one of the approved forms.

The presumption, in the absence of any evidence to the contrary, is that a marriage was in one of the approved forms.

Jagannath Prasad Gupta v. *Ranjit Singh*, 25 C. 354; 13 Ind. Dec. (N. S.) 237 and *Sheo Pertab Bahadur Singh* v. *The Allahabad Bank, Ld.*, 25 A. 476; 7 C. W.

N. 840; 13 M. L. J. 336; 5 Bom. L. R. 833; 30 I. A. 209 (P. C.), relied on.

Appeal against a decree of the District Judge, Rae Bareli, dated 10th April 1923, preferred against that of the Munsif, Dalmau, dated the 24th January 1923.

Dr. *J. N. Misra*, Messrs. *G. N. Misra* and *K. P. Misra*, for the Appellants.

Mr. *Girja Saran Lal*, for the Respondent.

JUDGMENT.—A Hindu, Harpal Singh, devised his property by a Will to his widow, Sartajkuar and to his pre-deceased son's widow Umraokuar. They took possession on his death. On the death of Sartajkuar, the next reversioner to the last male holder, sued for possession of half the property in the Civil Court because the Revenue Court ordered mutation of names in favour of Umraokuar. The First Court of the Munsif of Dalmau dismissed the suit after deciding Issues Nos. 1, 2, 5, and 7. It held:—

1. That the widows succeeded to joint tenancy; so reversion will not open out till after the death of Umraokuar.

2. That the plaintiff Sarabjit Singh, the heir of the testator, was not the heir of Sartajkuar to her *stridhan* property.

The learned Judge of the lower Appellate Court decided on appeal that the tenancy was one in common and remanded the suit for trial of the other issues. He overlooked the second decision of the First Court, in pursuance of which also the suit failed.

This is an appeal from the order of remand. The first point is covered by the authority of the Privy Council so I shall not entertain the request of the appellants' learned Counsel to refer the matter to a Bench of this Court. In *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1) their Lordships held that in a devise like the present each of the legatees of 4-annas took an absolute interes in 2-annas share. They specifically disagreed with the Madras view to the contrary expressed in *Vydinada* v. *Nagammal* (2).

The First Court was worng in its decision of the second point also. The matter is clear and it is not necessary to ask the lower Appellate Court to decide it. In *Jagannath Prosad Gupta* v. *Runjit Singh* (3) it was held that the heir of a woman to her *stridhan* property is the nearest kinsmen of her husband and not of her father where the marriage is in one of the approved forms. The Judges were further of opinion that there was presumption in absence of any evidence to the contrary that the marriage was in one of the approved forms. There is no evidence to the contrary in the present case. The ruling of their Lordships of the privy Council in *Sheo Pratab Bahadur Singh* v. *The Allahabad Bank* (4) also favours this view. At page 489 of the report, the question was discussed of the heir of a lady Janki, who had succeeded to her mother's *stridhan* property. The observations regarding a previous suit were "The suit was framed upon the assumption that upon the death of Janki the property did not pass to any heir of hers, but reverted to the heirs of an earlier generation. In the judgment it is said [*Jagdish Bahadar* v. *Sheo Partab Singh* (5)]: "It is not disputed that the succession must be to the heirs of her (Janki's) father' presumably as the *stridhan* heirs of her mother in the absence of lineal heirs of the latter." I set aside the second finding of the Munsif also.

This appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.).

(2) 11 M. 258; 12 Ind. Jur. 455; 4 Ind. Dec. (N. S.) 179.

(3) 25 C. 354; 13 Ind. Dec. (N. S.) 237.

(4) 25 A. 476; 7 C. W. N. 840; 13 M. L. J. 336; 5 Bom. L. R. 833; 30 I. A. 209 (P. C.).

(5) 28 I. A. 100 at p. 106; 23 A. 369; 5 C. W. N. 602; 11 M. L. J. 178; 3 Bom. L. R. 288; 8 Sar. P. C. J. 19 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 53 OF 1924.

February 18, 1924.

Present:—Mr. Justice Suhrawardy, and Mr. Justice Chotzner.

ANANDA CHANDRA PRODHAN AND OTHERS—PLAINTIFFS—PETITIONERS

versus

SUK CHAND PRODHAN AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIV, r. 4—Examination of witness on commission, refusal to order—Revision—Interference by High Court.

There is nothing in law to prevent the High Court from interfering in revision with an interlocutory order refusing to issue a commission for the examination of a witness, if the High Court is of opinion that the order complained of is one which is calculated to do irreparable injury to a party to the suit. [p. 620, col. 1.]

Kumar Sarat Kumar Roy v. *Ram Chandra Chatterji*, 63 Ind. Cas. 9; 35 C. L. J. 78; (1922) A. I. R. (C.) 42, *Rai Yatindra Nath Chaudhury* v. *Hari Charan*

Chaudhri, 26 Ind. Cas. 954; 20 C. L. J. 426 and *Somasundaram Chettiar v. Manickavasaka Desika Gananasambanda Pandara Sannadhi*, 31 M. 60; 3 M. L. T. 246, referred to.

There is nothing in the C. P. C. which authorises a Court to fix a place where a certain person should be brought for examination on commission, nor is there anything restricting its power in that direction. [p. 621, col. 1.]

Plaintiff applied for a commission for the examination of a witness, who was a man of advanced age and in feeble health and unable to undertake a journey, but whose evidence was material to the case set up by the plaintiff. The Court directed the issue of a commission but fixed the place of examination of the witness at a distance from his house where it was impossible for the witness in his state of health to appear. On revision:

Held, that in the circumstances of the case the order of the Court amounted to a refusal to issue a commission and was likely to do irreparable injury to the plaintiff and the order must, therefore, be set aside with a direction that the witness should be examined at his house. [p. 621, col. 1.]

Rule against an order of the Sub-Judge, Fourth Court, 24-Parganas, dated the 14th December 1923, in Miscellaneous Case No. 92 of 1922, arising out of the Title Suit No. 70 of 1921.

Mr. *S. C. Maity* and Babu *Apurba Charan Mukherjee*, for the Petitioner.

Babus *Mahendra Nath Roy* and *Santosh K. Pal*, for the Opposite Party.

ORDER.—We are invited in this Rule to revise an order passed by the Subordinate Judge of 24-Parganas directing the examination of the plaintiffs' witness Brojo Mohan Tewari on commission at Geonkhali in the District of Midnapore. It appears that this order was issued in connection with a suit between two brothers the plaintiff and the defendant in respect of the ancestral property. The plaintiff filed an application before the Court below to examine this witness who lives in the village of Nandigram which is said to be situated at a distance of 20 miles from Geonkhali; the mode of conveyance between the places being over land and water. The application was granted; but on the defendants' objecting to the order the Court fixed Diamond Harbour as the place where the witness should be brought for examination. On further representation being made the Court appointed Geonkhali as the place where the witness should be brought for examination. The plaintiff objected to this order on the ground that the witness was not able to risk a journey to Geonkhali, but the Court refused to modify its previous order. The present application was made against that order and this Rule was issued.

The learned Vakil for the opposite party argues that this Court has no power either under s. 115, C. P. C., or s. 107 of the Government of India Act to revise the order now under consideration as it was passed in the exercise of the discretionary power vested in the Court below. No doubt it is a strong point in favour of the defendant. The order is an interlocutory order and is passed, as the learned Vakil for the opposite party contends, in the exercise of the discretion which the Trial Court had under O. XXIV, r. 4. But we do not think that our power of interference or superintendence is limited by the provisions of the Statutes. This Court has consistently held the view differing from the view taken by the Allahabad High Court that an interlocutory order like the present is one which can be revised by the High Court in the exercise of its revisional jurisdiction. But it has been held at the same time that this Court will not exercise its revisional jurisdiction except on rare occasions where the refusal of such jurisdiction would be tantamount to a denial of justice. Recently this Court has interfered with a number of interlocutory orders. See the cases of *Kumar Sarat Kumar Roy* v. *Ram Chandra Chatterji* (1) and *Rai Yatindra Nath Chaudhury* v. *Hari Charan Chaudhuri* (2). In the latter case all the cases on the point have been reviewed. The same view has been taken in the case of *Somasundaram Chettiar* v. *Manickavasaka Desika Gnanasambanda Pandara Sannadhi* (3). The result of an examination of all these authorities is that there is nothing in law to prevent us from interfering with interlocutory orders of this nature, if we think that the order complained of is one which is calculated to do irreparable injury to a party in a suit.

Now turning to the facts of this case, we find that it is alleged by the plaintiff that this witness Brojo Mohan Tewari is a man of 80 years old. There is a medical certificate to the effect that he is weak and debilitated. This is not contradicted by the opposite party and we take it that the proceedings of the Court below proceeded on this assumption. It is further stated by the plaintiff that he attempted to bring this witness to Geonkhali for the purpose of his examination but he refused to go

(1) 68 Ind. Cas. 9; 35 C. L. J. 78; (1922) A. I. R. (C.) 42.
(2) 26 Ind. Cas. 954; 20 C. L. J. 426.
(3) 31 M. 60; 3 M. L. T. 246.

there at the risk of his life. The witness lives beyond the local limits of the jurisdiction of the Court at Alipore and the Court has thought fit to issue a commission for his examination. The question is was it right to fix the place where this witness could be brought for examination. There is nothing in the Code which authorises a Court to do so nor, of course, is there anything restricting its power in that direction. But in the present case we are of opinion that the order passed by the Court was tantamount to refusing the application for examination of the witness. This might cause serious injury to the plaintiff. If for instance the evidence of this witness is not available and trial of the suit is proceeded with and the suit is decided against the plaintiff and on appeal the Appellate Court thinks that the evidence of this witness should have been taken on commission at his house, the result will be a remand, a further hearing and further loss of time and money. It is possible that by the time the remand order is made the witness may die or that his evidence may not be procured. The learned Subordinate Judge has not stated any reason why he considered Geonkhali to be be the most suitable place for his examination. We are told that in order to reach Geonkhali the witness has first to travel some miles by road which can only be done in a palanquin and then he has to go by boat in order to reach his destination. We are not sure if the witness is in a fit condition to undertake this journey and he has certainly refused to go to Geonkhali. In the particular circumstances of this case we think that in the exercise of our revisional jurisdiction we should set aside the order of the Court below directing the examination of this witness at Geonkhali and direct that the witness be examined in his house. If the learned Judge of the Court below thinks that it will not be proper to have the examination of the witness *vice versa* on the petition of any of the parties he may direct an examination by interrogatories.

The result is that this Rule is made absolute and the order of the Court below set aside. We make no order as to the costs of this Rule.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 235 OF 1923.

September 25, 1924.

Present:—Mr. Neave, A. J. C.

JAGMOHAN SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—APPELLANTS

versus

HARBANS SINGH—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Purchase of portion of mortgaged property by one of several mortgagees, effect of—Redemption, piecemeal, whether can be allowed.

It is only when all the mortgagees have joined in purchasing a portion of the property mortgaged to them that the integrity of the mortgage is broken up and the mortgagor or mortgagors become entitled to redeem the property piecemeal. Where one only of a number of mortgagees has acquired by purchase a part of the mortgaged property, the mortgage over that portion of the mortgaged property does not merge in the sale. In such a case the purchaser mortgagee is in no different position from an outsider so far as the right conveyed by his purchase is concerned. The mortgage remains one and undivided and if redeemed at all can only be redeemed in its entirety. [p. 622, col. 1.]

Sidh Gopal v. *Nanhu Khan*, 6 O. C. 223 and *Parwan Singh* v. *Bisheshar Singh*, 9 O. C. 63, distinguished.

Second appeal against the decree of the Subordinate Judge, Partabgarh, dated the 27th July 1923, preferred against that of the Munsif, Kunda, dated the 19th September 1922.

Mr. *Radha Krishna*, for the Appellants.

Mr. *Rudra Dutt Sinha*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The suit was brought for redemption of a mortgage executed on the 14th July 1883 by one Bisheshar Singh. The plaintiffs are three of his sons. The fourth son did not join in bringing the suit and has accordingly been made a *pro forma* defendant. He is defendant No. 14. There were originally six mortgagees but only one of these is still alive. He is Harbans Singh, defendant No. 10. The remaining defendants Nos. 1 to 9 and 11 to 13 are the representatives of the other five mortgagees. The property mortgaged consisted of certain plots of land in *Mouza* Ratipur in the Partabgarh District, and represented the two anna under-proprietary share of the mortgagor.

On the 3rd November 1898, Bisheshar Singh sold a one-anna share in this village to Harbans Singh, defendant No. 10. The lower Appellate Court has found that by this transaction he conveyed a half

share in the mortgaged plots to defendant No. 10.

The plaintiffs originally denied the validity of the sale to Harbans Singh, but the finding on this by the Court below is against them and this question is no longer in dispute.

The suit was brought for the redemption of the entire mortgage. The First Court granted the plaintiffs a decree. Harbans Singh appealed. It may be mentioned here that he alone of all the defendants had contested the suit, Nos. 1 to 4 and 6 and 8 admitting the claim, while the rest did not appear in Court. Harbans Singh contended that as he in his capacity of mortgagee had purchased half the mortgaged property, the plaintiffs should only have been allowed to redeem the other half. The learned Subordinate Judge has decided this plea in his favour, holding that he is entitled to insist upon retaining in his possession the portion of the mortgaged property purchased by him. In support of this view of the law the learned Subordinate Judge relies particularly on *Sidh Gopal* v. *Nanhu Khan* (1) and *Parwan Singh* v. *Bisheshar Singh* (2).

What the learned Subordinate Judge has overlooked is that in the present case Harbans Singh was not the sole mortgagee. This fact makes an important difference. It is only when all the mortgagees have joined in purchasing a portion of the property mortgaged to them that the integerity of the mortgage is broken up, and the mortgagor or mortgagors become entitled to redeem piecemeal. The concluding portion of s. 60 of the Transfer of Property Act provides. "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired, in whole or in part the share of a mortgagor." In the present case, one only of a number of mortgagees has acquired by purchase a part of the mortgaged property. It cannot be said, therefore, that the mortgage over that portion has merged in the sale. The purchaser-mortgagee is in no different position from an outsider so far as his rights conferred by his purchase are concerned. The mortgage remains one and undivided, and if redeemed at all can only be redeemed in its entirety. The order of the lower Appellate Court, therefore, cannot stand and must be set aside, and the decree of the First Court restored. The contesting defendant-respondent will, of course, still be entitled to seek any remedies which he may have under his sale-deed as against the mortgagors. The appellants must get their costs in this Court. In view, however, of the dishonest plea taken by them in regard to the validity of the sale, the parties will bear their own costs in both the Courts below.

Z. K.

(1) 6 O. C. 223.
(2) 9 O. C. 63.

PATNA HIGH COURT.

CIVIL REVISION No. 226 OF 1924.
November 12, 1924.
Present:—Mr. Justice Das.

BAJRANG PRASAD SINGH—PETITIONER
versus
Musammat SONEJHARI KUER AND OTHERS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 18—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside—Fraud and irregularity, distinction between—Fraud, proof of—Limitation.

Fraud in bringing about an execution sale is essentially different from irregularity in the conduct of the sale. [p. 623, col. 1.]

Narayan Sahu v. *Mohant Damodar Das*, 16 Ind. Cas. 464; 16 C. W. N. 894, relied on.

In order to obtain the benefit of the provisions of s. 18 of the Limitation Act in respect of an application to set aside an execution sale, the judgment-debtor must establish that there was some contrivance on the part of the decree-holder by which he was kept from the knowledge of his right to apply under O. XXI, r. 90 of the C. P. C. It is not sufficient to say that as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree-holder to keep the judgment-debtor from the knowledge of the fraudulent sale. [p. 623, col. 2; p. 624, col. 1.]

Fraud is, however, a continuing influence, and until that influence ends it retains its power of mischief, and, therefore, fraud antecedent to the accrual of the right of action may also be considered under s. 18 of the Limitation Act. [p. 624, col. 2.]

Rahimbhoy Habibhoy v. *Charles Agnew Turner*, 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222, followed.

Revision from an order of the Subordinate Judge, Muzaffarpur, dated the 25th March

1924, reversing that of the Munsif, Hajipur, dated the 19th November 1923.

Messrs. *S. P. Sen* and *A. K. Gupta*, for the Petitioner.

Mr. *S. K. Mitra*, for the Opposite Party.

JUDGMENT.—This application is directed against the order of the learned Subordinate Judge of Muzaffarpur, dated the 25th March 1924 by which he set aside a sale which took place on the 13th June 1918. The application under O. XXI, r. 90 was presented sometime in April 1923 and this has encouraged the contention on behalf of the decree-holder that the application is barred by time. The learned Judge in the Court below has come to the conclusion that the auction-sale was brought about by practising fraud and that the applicant is entitled to the benefit of s. 18 of the Limitation Act. In that view differing from the learned Munsif, he allowed the application and set aside the sale.

In my opinion the finding of the learned Judge in the Court below must be regarded as a finding to the effect that all the circumstances were present to entitle the judgment-debtor to have the sale set aside provided the application was made within time. I am not for the moment considering the question as to whether the decision of the learned Judge on the question of limitation can be supported; but his finding that there was gross irregularity in the conduct of the sale and that the judgment-debtor sustained substantial injury by reason of such irregularity is binding upon me in this Court. It is true that the learned Subordinate Judge has gone much further and said that there was fraud on the part of the decree-holder. I am not quite satisfied whether upon his decision it is possible to say that there was fraud on the part of the decree-holder. It is quite true that there was gross under-valuation of the property sought to be sold. It is quite true that the processes were not served on the judgment-debtor; but fraud is essentially different from irregularity in the conduct of sale. This was pointed out very forcibly by Sir Lawrence Jenkins in *Narayan Sahu* v. *Mohant Damodar Das* (1). But in any case I am satisfied that there was gross irregularity on the part of the decree-holder and that the applicant sustained substantial injury by reason of such irregularity, and that if there was no question of limitation raised in the case, the judgment-debtor would undoubtedly be entitled to succeed.

This brings me to the consideration of the question whether the learned Judge in the Court below is right in the view that the judgment-debtor is entitled to the benefit of s. 18 of the Limitation Act. The view of the learned Subordinate Judge may be stated in his own words: "The applicant alleges in her petition that she came to know of the sale on the 5th April 1923. In her evidence she says that she came to know about it on 4th *Baisakh* 1330 which corresponded to the above date. As it has been found that the sale was brought about by the decree-holder's fraud, it is for the decree-holder or his tenant to show that the applicant had knowledge before the 5th April 1923 in order to succeed on the plea of limitation. I find, therefore, that the application was not barred by limitation."

I am unable to agree with the view as presented in this part of the order of the learned Subordinate Judge. In the first place, I am not sure that the facts referred to by the learned Subordinate Judge established a case of fraud. It is, therefore, necessary for the learned Subordinate Judge to deal with all the evidence again and to come to a conclusion on the question whether there was really any fraud on the part of the decree-holder. If he comes to the conclusion that there was irregularity but not fraud within the meaning of that term as was in the decision of Sir Lawrence Jenkins, then clearly the application is barred by limitation. If he comes to the conclusion that there was fraud then the next question which he must consider is, whether upon the facts proved the judgment-dobtor is entitled to the protection of s. 18 of the Limitation Act. Now s. 18 provides that "Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded...the time limited for instituting a suit or making an application—(*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby." In order to succeed the judgment-debtor must establish that there was some contrivance on

(1) 16 Ind. Cas. 464; 16 C. W. N. 694.

the part of the decree-holder by which the judgment-debtor was kept from the knowledge of her right to apply under O. XXI r. 90 of the Code. It is, in my opinion, not sufficient to say that as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree-holder to keep the judgment-debtor from the knowledge of the fraudulent sale. Indeed in some of the cases it has been broadly laid down that fraud precedent to the accrual of the right of action can never be considered under s. 18: but whether this view can be maintained in view of the decision of the Judicial Committee in *Rahimbhoy Habibhoy* v. *Charles Agnew Turner*(2) is very doubtful. This was pointed out by Sir Lawrence Jenkins in the case to which I have referred but as was suggested by Sir Lawrence Jenkins fraud is a continuing influence and until that influence ends it retains its power of mischief. It was directly held by the Judicial Committee in the case to which I have referred that where a man has committed fraud and has kept property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring a suit. In view of what was decided by the Privy Council, I am unable as at present advised to accept the view that fraud antecedent to the accrual of the right of action can never be considered under s. 18. In my opinion it can and must be considered, because as pointed out by Sir Lawrence Jenkins, fraud is a continuing influence and until that influence ends it retains its power of mischief.

But although I am unable to agree with the extreme contention which has been put forward before me, I think that the petitioner is entitled to succeed on the ground that the judgment of the lower Appellate Court does not show that there was any fraudulent concealment of the execution proceedings on the part of the appellants. As this matter has not been very carefully considered by the learned Judge in the Court below, I am unable to decide the contention between the parties in this case. I think the best course will be to send the case back to the lower Appellate Court and ask it to come to a conclusion on the evidence in the case. The learned Judge must first consider whether there was fraud as distinct from material irregularity in the matter of the sale. If he comes to the conclusion that there was no fraud, then he must dismiss the application on the ground that it is barred by limitation. If he come to the conclusion that there was fraud still, he must consider whether there was any fraudulent concealment of the execution proceedings on the part of the appellants. In considering this matter he must not ignore what had taken place before the sale. He must consider the general conduct of the decree-holder both before and after the sale and he must deal with the question whether to quote the language of s. 18, the judgment-debtor has been kept from the knowledge of her right to apply by means of fraud perpetrated by the decree-holder.

Costs of this application, hearing fee two gold *mohurs*, will be costs in the proceeding before the Court below and will be disposed of by that Court.

Z. K. *Case remanded.*

(2) 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 43 OF 1924.

November 12, 1924.

Present:—Mr. Dalal, J. C.

GUNNA AND ANOTHER—APPLICANTS—APPELLANTS

versus

DARGAHI—OPPOSITE PARTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 17—Muhammadan Law—Guardianship—Minor, female—Married sister, whether can be guardian—Court, duty of.

Under s. 17 of the Guardians and Wards Act, in appointing or declaring a guardian of a minor, the Court must be guided by what appears under the circumstances to be for the welfare of the minor but this should be done consistently with the law to which the minor is subject.

The precept of the Muhammadan Law is that the custody of a female minor may not be given to a married sister where there is a possibility of the married sister's husband taking the minor into marriage for himself. Where, however, it is impossible to discover any suitable guardian the powers of the Court are not circumscribed by the tenets of the Muhammadan Law.

A person who is appointed guardian by a Court must be a person to whom the Court can render every available assistance under the law. It is a

contradiction in terms to choose a guardian and then tell him that the Court is not prepared to help him for the protection of property and person of the minor.

Appeal from an order of the District Judge, Lucknow, dated the 2nd September 1924.

Mr. *Zahur Ali*, for the Appellants.

Mr. *Raoof Ahmad*, for the Respondent.

JUDGMENT.—In my opinion the orders of the learned Judge dated 26th August and 2nd September are defective. There is a minor Muhammadan girl *Musammat* Nasiban about 12 or 14 years of age and one Dargahi is appointed her guardian. The minor's sister, who is presumably major, *Musammat* Jilahi and her husband Gunna complained that the present guardian was not a fit person and should be removed. The application was made under s. 39 of the Guardians and Wards Act. There was a further prayer that either or both of them may be appointed guardians of the minor girl. The learned Judge dealt only with the question whether the married sister could be appointed guardian when she is not married to a person who is in the prohibited relationship with the minor. That is the precept of the Muhammadan Law that the custody of a minor may not be given to a married sister where there is a possibility of the married sister's husband taking the minor into marriage for himself. Under s. 17 in appointing or declaring a guardian of the minor the Court is to be guided with what appears under the circumstances to be the welfare of the minor, but the proviso is that this should be done consistently with law to which the minor is subject, that is, the Muhammadan Law in the present case. Possibly if it were impossible to discover any suitable guardian in case of the present guardian being unfit, I do not think that the powers of the District Court would be circumscribed by the tenets of the Muhammadan Law. In the present case the learned Judge has not brought his mind to bear upon the subject whether the present guardian is a fit person to continue in the guardianship or not. There is no finding on the subject in either of the orders referred to above. In my opinion that matter is of far greater importance than the question as to who should be appointed guardian if the present guardian is removed.

I set aside both the orders mentioned above and direct the lower Court to come to a finding on the evidence, after recording further evidence, if the parties should produce any, whether the present guardian is a fit person to continue in the guardianship or not. Various allegations against him were made in this Court. As it is, the order of the District Judge makes the present guardian impotent as he has been warned that the Court was unlikely to give him any help to remove the minor forcibly from the possession of her sister. It appears that the minor is at present living with *Musammat* Jilahi, is happy there and desires to live there and not with the guardian appointed by the Court. The first question, therefore, to decide is whether the present guardian is a fit person to continue in guardianship or not. The person who is appointed guardian by a Court must be a person to whom the Court can render every available assistance under the law. It will be a contradiction in terms to choose a guardian and then tell him that the Court was not prepared to help him for the protection of the person and property of the minor. If the present guardian is considered to be fit by the Court, he must receive every assistance within the power of the Court. If he is considered unfit, he must be removed and then the question will arise as to who should be appointed guardian. If the Court does not approve of *Musammat* Jilahi or her husband or of both together, it will have to discover some other guardian if it is satisfied that the present guardian is not a fit person to continue as such and is not one to whom the Court could render such help as it is bound to render to guardians appointed by it.

With these observations I direct re-trial of the two petitions dated 8th July and 21st August 1924. No order is made as to costs here.

Z. K. *Re-trial ordered.*

MADRAS HIGH COURT.

ORIGINAL PETITION No. 95 OF 1922.

April 1, 1924.

Present:—Justice Sir C. V. Kumaraswami Sastri, KT.

In the matter of THE INDIAN COMPANIES ACT, 1913, AND *In the matter of* MORRISONS (INDIA) LTD., IMPERIAL BANK OF INDIA—PETITIONER.

Companies Act (VII of 1913), ss. 229, 230, 233—Presidency Towns Insolvency Act (III of 1909), s. 52—Floating charge created by Company—Applicability of s. 52—Agent for sale—Liquidation—Principal whether has priority—Debt before conversion into limited Company, whether binding.

Section 52 of the Presidency Towns Insolvency Act has no application to cases of floating charges created by a Company which has since gone into liquidation. [p. 626, col. 2.]

Where it appears that a Company in liquidation had acted as agents for sale of goods under an agreement by which goods were to be sold by the Company and the sale-proceeds were to be paid over to the principal and the unsold goods returned to the principal, the principal has priority in respect of the unpaid price of goods. [*ibid.*]

The liability of a Company incurred before it was turned into a limited Company and not undertaken by the latter, cannot be discharged by the limited Company on its liquidation. [p. 627, col. 1.]

Mr. *Sydney Smith*, for the Petitioner.

Mr. *Vere Mocket*, for the Respondent.

ORDER.—This is an application by the Liquidator for directions as to various matters set out in the Judges Summons. The first question is as regards the charges set out in schedule A to the Liquidator's affidavit. Schedule A is a list of preferential charges which under the Act have to be paid first and there is no dispute about schedule A. The amounts in schedule A will be paid first by the Liquidator and to the sums mentioned therein will be added Rs. 21 costs allowed to Abdur Rahaman on his application as regards rent. As regards schedule B, there is also no dispute as items referred to therein are sums payable in connection with income-tax and to the Postmaster General for customs duty. Schedule C refers to certain claims made by the Imperial Bank of Madras and to certain sums due to the Overseas Export and Import Co., and the Hongkong and Shanghai Banking Corporation. Items Nos. 1 and 2 of schedule C refer to the Imperial Bank of Madras. The Imperial Bank obtained a floating charge on the properties of the Morrison and Co. Ltd., by deed dated the 12th December 1921. This deed has been marked Ex. A in the liquidation proceedings. It appears from Ex. A that it was filed with the Registrar of Joint Stock Companies and registered on the 21st December 1921, so that the provisions of s. 109, cl. (*e*) of the Companies Act have been satisfied. It is clear from ss. 230 and 233 of the Companies Act that the Imperial Bank can have a charge over the assets of the Company. I do not think that s 52 of the Insolvency Act has any application to cases of floating charges created by a Company in favour of the Bank. Section 229 refers to the Insolvency Act only as regards the rights of secured and unsecured creditors. It is obvious that a floating charge, if, created, must leave the possession with the Company, as otherwise it cannot carry on business at all. The Imperial Bank will be paid the amounts of items Nos. 1 and 2 of schedule C to the affidavit of the Liquidator first. Item No. 3 of schedule C refers to the Oversea Export and Import Co., and the question is whether the goods were sold to Morrison & Co. Ltd., or whether Morrison & Co. were only the agents for the Oversea Export and Import Co. The Company does not appear and prove its claim to priority. It appears from the agreement that they were to deal *interse* as principal and agent and that drafts were drawn against the goods and I, therefore, do not think it is proved that the Oversea Export and Import Co. have any priority. As regards item No. 4 which relates to Honkong and Shangai Banking Corporation, it appears from the letters written by Morrison and Co., Ltd., to the Imperial Bank which represented the Honkong and Shanghai Banking Corporation that Morrison and Co. Ltd, were only agents for sale, that goods were to be sold and that the sale-proceeds were to be paid over in due course, that the unsold goods were to be returned and that the property was to be at the disposal of Honkong and Shanghai Banking Corporation. In these circumstances I think that Honkong and Shanghai Banking Corporation has got a priority in respect of Rs. 3,500 and Rs. 2,309-8-0, items Nos. 4 and 5. As regards the other schedules, I accept the statements referred to in the affidavit of the Liquidator, Mr. M. O. Alasingarachariar, who is one of the persons mentioned in schedule F and who claims Rs. 739, states that this sum is due for professional services rendered by him and that he has filed an affidavit proving

the amount due. The difficulty, however, in his case is that they were services rendered to Morrison and Co. Ltd. before it was turned into a limited liability Company and there is nothing to show that Morrison and Co. Ltd., undertook to pay the debts of Morrison and Co. On the contrary the proceedings of the Directors which are referred to by Mr. Mockett show that the debts were not payable by the Company. As, however, it is clear that excepting the Imperial Bank and the Honkong and Shanghai Banking Corporation who have got priority, there would not be assets to pay other creditors, it seems to me that he has not much hardship in the matter. The next question is as regards the remuneration of the Liquidator. The liquidation proceedings have been going on for the last two years and I think that Rs. 200 a month would be fair remuneration for the trouble taken by Liquidator during the period of liquidation. I allow him Rs. 200 a month from the date he assumed charge up to this date. I direct that schedules A and B and the Liquidator's remuneration and the costs of this application will be paid first and out of the balance the Imperial Bank and the Honkong and Shangai Banking Corporation will be paid rateably.

The taxed costs of the Liquidator as between attorney and client and of the Imperial Bank will be paid out of the funds in the Liquidator's hands. I certify for Counsel.

V. N. V. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 426 OF 1923.

July 10, 1924.

Present:—Mr. Justice Kanhaiya Lal.

ISHWAR PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu BISHUNATH PRASAD SINGH AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

*Limitation Act (IX of 1908), s. 5—Appeal filed after limitation—*Bona fide *mistake—Extension of time—Sufficient cause.*

In answer to a suit for ejectment of certain tenants from their holdings on the allegation that they were non-occupancy tenants the latter pleaded that they cultivated the land under certain other persons who were under-proprietors in the village. These latter persons were thereupon impleaded as defendants and set up under-proprietary rights. The Court held that no such rights were proved and decreed the suit, but the names of the intervenor were not shown in the decree which was passed in the case. The intervenor defendants filed an appeal in the Court of the District Judge beyond the period of limitation and explained that the delay was due to the fact that they had first intended to file an appeal in the Commissioner's Court and it was only after taking legal advice that they had discovered that the appeal lay to the Court of the District Judge. The District Judge refused to admit their appeal on the ground that their names did not appear in the decree. Thereupon they made an application to the Court for the amendment of the decree and the decree was amended by inserting their names in the decree:

Held, (1) that the right of the appellants to appeal from the decree of the First Court arose on the date when the decree was amended by the addition of their names and that in this view of the case their appeal could not be regarded as having been filed beyond time; [p. 628, col. 2.]

(2) that in any case the appellants were entitled to the benefit of s. 5 of the Limitation Act. [p. 629, col. 1.]

An honest mistake made by a litigant upon incorrect advice amounts to sufficient cause for extending the period of limitation within the meaning of s. 5 of the Limitation Act. [p. 628, col. 2; p. 629, col. 1.]

Shib Dayal v. *Jagannath Prasad*, 68 Ind. Cas. 812; 20 A. L. J. 674; 44 A. 636; (1922) A. I. R. (A.) 490 followed.

The judicial discretion given by s. 5 of the Limitation Act to admit an appeal after the prescribed period of limitation should be exercised if the appeal has been prosecuted with due diligence, and when in the exercise of judicial discretion a Judge fails to apply the rule, the Appellate Court should either remit the case or itself exercise the discretion. [p. 628, col. 2.]

Brij Mohan Das v. *Mannu Bibi*, 19 A. 348 (F. B.); A. W. N. (1897) 86; 9 Ind. Dec. (N. S.) 228, *Brij Indar Singh* v. *Kanshi Ram*, 42 Ind. Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 104 P. R. 1917; (1917) M. W. N. 811; 6 L. W. 592; 126 P. W. R. 1917; 22 C. W. N. 169; 15 A. L. J. 777; 19 Bom. L. R. 866; 127 P. L. R. 1917; 3 P. L. W. 313; 26 C. L. J. 572; 45 C. 94 (P. C.) and *Maqbul Ahmad* v. *Murta*, 33 Ind. Cas. 546; 14 A. L. J. 212, followed.

Second appeal from a decree of the District Judge, Allahabad, dated the 11th December 1922.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—These appeals arise out of three suits brought by the present plaintiffs-respondents for the ejectment of certain tenants from their holdings on the allegation that they were non-occupancy tenants. The defendants pleaded that they were not the tenants of the plaintiffs and that they cultivated the land on behalf of Ishwar Prasad and Kuber Prasad, the *mokarraridars* or inferior proprietors of the village and paid rents to them. An ap-

plication was made by Ishwar Parsad and Kuber Prasad to be made parties to the suit, on which they were asked to file their written statements. Their defence was that they had an under-proprietary right to the whole village, in which the disputed land was situated and that they had been realising rents from the tenants from the Settlement of 1289 *F.* as *mokarraridars* or inferior proprietors. The Trial Court framed an issue on the point and came to the conclusion that the defendants intervenors had no rights in the village of a proprietary nature and that the plaintiffs were entitled to eject the tenants from their holdings.

As the Trial Court had passed no express order, directing that the intervenors should be added as defendants, their names did not appear in the decrees, which were prepared in those cases. The decrees passed were merely decrees for the ejectment of the tenants, an appeal from which would ordinarily lie to the Commissioner; and the affidavit filed by the defendants appellants shows that with a view to file the appeal to the Commissioner of Benares, they took the papers to M. Bhairon Prasad but he returned the papers saying that as a question of proprietary title was in issue, the appeal would lie to the District Judge. The appeal was then filed in the Court of the District Judge of Benares from those decrees, but the office of the District Judge Benares, reported that the defendants intervenors were not mentioned in the decrees and no appeal by them could be entertained. The Trial Court was, therefore, asked to explain the situation and the result of that inquiry was that by an order of the 1st February 1923 passed on the application of the defendants appellants, the names of the defendants intervenors were added to the plaints and the decrees in each of the three suits. The decrees were passed on the 26th September 1922. The only persons who were mentioned in the decrees as defendents were the tenants, who could have filed an appeal within 60 days to the Commissioner. The names of the defendants intervenors were not entered in the decrees and they could not have filed any appeal anywhere. They eventually filed the appeal on the 22nd December 1922 and on an objection being taken that they had no right to file the appeal, because they were not parties to the decrees, their names were subsequently added to the decrees on the 1st February 1923. The right of the defendants intervenors to appeal from those decrees if they had any right to appeal arose when the decrees were amended by the addition of their names; and in that view of the matter the appeals could not be regarded as having been filed beyond time.

It is, however, possible to look at the matter from another stand point. The decrees, as they stood were passed against the defendants, tenants, who could have appealed to the Commissioner within 60 days. The defendants intervenors may have honestly believed that they could have instituted the appeal in the Court of the Commissioner within the same period. As held in *Brij Mohan Das* v. *Mannu Bibi* (1) an honest mistake could be made in good faith and a *bona fide* mistake might be taken into consideration in suitable cases.

In *Brij Inder Singh* v. *Kanshi Ram* (2) their Lordships of the Privy Council held that the judicial discretion given by s. 5 of the Indian Limitation Act to admit an appeal after the prescribed period of limitation should be exercised, if the appeal has been prosecuted with due diligence, and when in the exercise of a judicial discretion a Judge fails to apply the rule, the Appellate Court should either remit the case or itself exercise the discretion.

In *Maqbal Ahmad* v. *Murta* (3) it was held that where under a *bona fide* mistake an appeal was filed in time in a wrong Court an appellant who might otherwise suffer loss of rights and injustice, ought to be allowed to put the mistake right, and to appeal unless there was some conduct disentitling him to do so, and that if an application made to admit an appeal beyond time was rejected on the ground which was not really material then it must be taken that no real judicial discretion had been exercised and the lower Appellate Court could deal with the order with a free hand. In *Shib Dayal* v. *Jagannath Prasad* (4) an honest mistake made by a litigant upon incorrect advice was treated as sufficient

(1) 19 A. 348 (F. B.); 17 A. W. N. (1897), 86; 9 Ind. Dec. (N. S.) 228.

(2) 42 Ind. Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 104 P. R. 1917; (1917) M. W. N. 811; 6 L. W. 592; 126 P. W. R. 1917; 22 C. W. N. 169; 15 A. L. J. 777; 19 Bom. L. R. 866; 127 P. L. R. 1917; 3 P. L. W. 313; 26 C. L. J. 572; 45 C. 94 P. C

(3) 33 Ind. Cas. 546; 14 A. L. J. 212.

(4) 68 Ind. Cas. 812; 20 A. L. J. 674; 44 A. 636; (1922) A. I. R. (A.) 490.

cause for extending the period of limitation within the meaning of s. 5 of the Indian Limitation. Act.

An honest mistake appears to have been made in the present case by the defendants-appellants in thinking that the appeals from the decrees for ejectment passed against the tenants alone would lie to the Commissioner ; and as soon as they were dispossessed of that idea by Mr. Bhairon Prasad Vakil, they filed the appeal before the District Judge. The learned District Judge observes that the defendants-appellants had not shown their *bona fides* by taking their appeals to the Court of the Commissioner, as was usual in such cases ; but they stated that they were disabused by Mr. Bhairon Prasad, who advised them to file the appeals before the District Judge and that they filed their appeals before the District Judge accordingly. There is sufficient reason, therefore, on either of the above grounds for admitting the appeals under s. 5 of the Indian Limitation Act. A question has also been raised as to whether any appeal could have lain to the District Judge at the instance of the defendants intervenors; but that point does not really arise for consideration here.

The appeals are, therefore, allowed and the cases remandad to the District Judge with a direction to re-admit the appeals under their original numbers and to dispose of them in the manner required by law. The parties will bear their own costs of these appeals.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 856 OF 1922.

August 6, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SARADA PROSAD ROY CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAI MOHAN SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 95—Suit to set aside decree on ground of fraud—Limitation, commencement of—Suit for declaration and consequential relief—Nature of suit, whether changed by failure to adduce evidence with regard to consequential relief.

By giving up or not adducing evidence in support of the prayer for consequential relief and treating it as surplusage a plaintiff cannot convert a suit for declaration and consequential relief into one for a mere declaration. [p. 631, col. 1.]

A suit to set aside a decree on the ground that it has been obtained by fraud is governed by Art. 95 of Sch. I of the Limitation Act and limitation for the suit begins to run from the date on which the plaintiff had notice of the decree. [*ibid.*]

Appeal against a decree of the First Additional District Judge, Dacca, dated the 11th March 1922, reversing that of the Subordinate Judge, First Court of that District, dated the 29th March 1920.

Dr. *Naresh Chandra Sen Gupta* and Babu *Rajendra Chandra Guha*, for the Appellants.

Dr. *Sarat Chandra Basak* and Babus *Ramani Mohan Chatterjee* and *Kanai Lal Saha*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—The facts of this case are that the defendants had brought a suit against the plaintiffs and several others in respect of a fishery. During the progress of the suit an agent of the defendants approached the plaintiffs' Pleader and proposed that if the plaintiffs' men could give a certain information to the defendants with regard to a previous suit which would enable the defendants to win their case against the defendants in their suit, they would not execute the decree they would thus obtain in that suit as against the plaintiffs in the preseut suit; and would further give them a *miras patta* for 2½ annas share of the fishery. These terms were agreed to by the plaintiffs and the Pleader received certain information from the plaintiffs, the defendants obtained a copy of the judgment in Suit No. 13 of 1893 and with the help of it won the aforesaid suit being Suit No. 64 of 1910 which was instituted against the present plaintiffs and others. The present plaintiffs did not appear in that suit at the time of its hearing and the decree passed against them was *ex parte*. The argreement to which reference has been made was entered on the 5th September 1912. On the 23rd December 1912 the decree in Suit No. 64 of 1910 was passed *ex parte* against the present plaintiffs. On the 30th April 1913 the execution of the decree was taken by the defendants and a permanent injunction was issued against the plaintiffs restraining them from interfering with the defendants possession of the fishery. On the 31st August 1917

the present suit was instituted by the plaintiffs. The suit was for a declaration (1) that the *ex parte* decree obtained by the defendants against the plaintiffs on the 23rd December 1912 in Suit No. 64 of 1920 in the Court of the Second Subordinate Judge at Dacca and the execution proceedings in connection therewith be held to be fraudulent and that the same be declared to the ineffectual, in operative and not binding on the plaintiffs; (2) that the said decree be declared null and void and by virtue of the agreement and promise of the defendants incapable of execution against the plaintiffs and that the service of notice of injunction be declared to be fraudulent, inoperative and ineffectual. There were further prayers that the plaintiffs' title and possession might be maintained and that if it was found that the plaintiffs were dispossessed by execution of the decree, they might be restored to possesion. It was further prayed that a decree for permanent injunction might be passed restraining the defendants from doing any act causing disturbance to the title and possession of the plaintiff of the *jalkar*. With regard to these two last prayers, it appears that as they were not pressed before the First Court, they were dismissed by that Court, and the following order was passed by the learned Subordinate Judge: "Prayers *ga* and *gha* of the plaint are dismissed as no issue has been framed so far as those prayers are concerned, and no evidence also has been adduced with respect to the facts on which these prayers can be allowed, and also on the ground that these prayers are quite outside the scope of the suit as the Pleader for the plaintiffs admitted at the time of the argument." The only question, therefore, that was considered by the Subordinate Judge was whether the decree was fraudulent, inoperative and incapable of execution. He found in favour of the plaintiffs and decreed the suit in terms of the prayers *ka* and *kha*. The learned Additional District Judge on appeal has reversed the decree of the First Court on the finding that the plaintiffs have failed to prove fraud before the decree. It is, therefore, manifest that the only point on which the parties went to trial was whether there was any fraud on the part of the defendants; and if there was any fraud, whether that rendered the decree null and void and incapable of execution. The Courts below have differed in their decisions on this point. It is, however, urged before us by Dr. Nares Chandra Sen Gupta the learned Vakil for the appellants, that on the finding arrived at by the learned Judge his client is entitled to some relief, namely, that it should have been declared that, though the decree is not capable of being treated as null and void, it is incapable of execution and in support of this proposition he has cited a number of authorities to show that a suit for having a declaration to the above effect is maintainable and is not barred by s. 47, C. P. C. The question is one of great nicety but in the case we have been relieved of the necessity of considering it in view of the objection on the ground of limitation that has been taken by the learned Vakil for the respondents.

The facts found by the learned District Judge are that there was an agreement as alleged by the plaintiffs, that there was no fraud that execution was taken out by the defendants and notice of a permanent injunction was served on the plaintiffs on or about the 30th April 1918. No doubt the question of limitation was not considered by either of the Courts below but as the plea has been raised on the findings of the learned Judge, we are bound in law to consider it. The first question to be determined in this connection is as to the scope of the present suit. The learned Vakil for the appellants argues that that the suit is one for a pure declaration under s. 42 the Specific Relief Act and, therefore, the period within which the suit ought to be brought is six years from the accrual of the cause of action. We do not think that we should give effect to this arguments. The suit was, as we have indicated, brought for a declaration coupled with consequential relief. By giving up or not adducing evidence in support of the prayers for consequential reliefs and treating them as surplusages the plaintiff cannot convert the suit into one for a mere declaration. In fact if the suit was brought in the shape in which it now stands, objection might have been taken to its maintainability on the ground that that the plaintiff was bound to ask for consequential relief as he actually prayed for in the plaint. In the present case there was a permanent injunction issued against the plaintiffs; a mere declaration of the decree being fraudulent or incapable of execution could not give him all the reliefs that he ought

to ask against the decree of the defendants. He must get rid of the injunction. Then again the plaintiffs were apprehensive that they might be dispossessed in execution of the decree and, therefore, they prayed that their possession might either be maintained or that they might be restored to possession if dispossessed. Both these prayers have been held to be prayers in the nature of consequential relief. The suit, according to the allegations made in the plaint, is, in our judgment one for setting aside a decree, admitting that the facts alleged by the plaintiffs are true. By merely describing the decree as fraudulent or null and void he cannot convert it into a suit other than a suit for setting aside a decree under Art. 95 of the Indian Limitation Act. Then again the plaintiffs have been found by the learned Judge to be not in possession of the property. A mere declaratory suit, therefore, does not lie in the present case. We hold, therefore, that the plaintiffs' suit is one for setting aside a decree under Art. 95, Limitation Act.

The next question to be considered, therefore, is, as to the date when the plaintiffs' cause of action arose. In the plaint the cause of action is said to have arisen in January 1917 when, it is alleged, the defendant interfered with plaintiffs' possession. But it has been found by the learned Judge that the notices of injunction were served on the plaintiffs on the date mentioned therein *i. e.*, the 30th April 1913. It is argued that there is no clear finding on this point by the learned Judge. But what the learned Judge means to find is that the burden of proof that notice was not served, was on the plaintiffs and they failed to prove that notices were not served. In fact he goes further and finds that "it would be going too far to say that the service never actually took place and that the return was falsely procured and filed." Reading the observations of the learned Judge on this point, it is clear that he is of opinion that the notices were served on the plaintiffs. That being the case, the cause of action for the suit arose on the 30th April 1913. Whether the suit is treated as one for setting aside a decree under Art. 95, Limitation Act or one for specific performance of a contract under Art. 113 of the Limitation Act, it is governed by three years' limitation. The suit having been brought on the 31st August 1917 it is clearly barred by limitation. In this view of the matter, it is not necessary to enter into the other questions raised in the appeal which must be dismissed with costs.

Duval, J.—I agree.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FORM APPELLATE DECREE No. 389-B OF 1921.

June 26, 1924.

Present:—Mr. Justice Kotval, A. J. C.

YEKNATH—PLAINTIFF—APPELLANT

versus

BABIA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120—Criminal Procedure Code (Act V of 1898), ss. 145, 146—Attachment of property—Declaration, suit for—Limitation, commencement of.

In a proceeding under s. 145 of the Cr. P. C. the land in dispute was attached by the Magistrate under s. 146 and a Receiver was appointed in respect of it, the parties being referred to the Civil Court for the determination of their rights. The plaintiff subsequently brought a suit for a declaration that he was the owner of the land:

Held, (1) that it was the attachment by the Magistrate and not any wrongful act of the defendant which had given rise to the right to sue and that the right accrued when the attachment was made and limitation began to run from that date under Art. 120 of Sch. I to the Limitation Act; [p. 632, col. 1.]

(2) that after the date of the attachment by the Magistrate no fresh period of limitation began to run under s. 23 of the Limitation Act. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, Amraoti, dated the 13th August 1921, reversing that of the Munsif, Morsi, dated the 17th February 1921.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Mr. *M. Bhawanishankar*, for the Respondent.

JUDGMENT.—In 1908 there was a dispute between the parties to the suit out of which this appeal arises regarding the land in suit and in proceedings under Ch. XII of the Cr. P. C., the Magistrate attached the land under s. 146 and appointed a Receiver thereof referring the parties to the Civil Court for the determination of their rights. The present suit was brought in 1920 by the plaintiff for a declaration that he was the owner of

the land. The lower Appellate Court dismissed the suit on the ground that it was time-barred. The plaintiff challenges that finding in second appeal.

The parties are agreed that Art. 120 of the First Schedule, Limitation Act, applies to this case. The plaintiff, however, contends that the case being one of a continuing wrong the suit is within time.

Brojendra Kishore Roy Chowdhury v. *Bharat Chandra Roy* (1) has been relied on by the plaintiff for the contention that there is a continuing wrong. But in that case it was found as a fact that the plaintiffs were in possession, that the defendants attempted to interfere with their possession and a breach of the peace had become imminent when the property was attached by the Magistrate. In *Panna Lal Biswas* v. *Panchu Ruidas* (2), which is also relied on, the plaintiff was deprived of possession by the defendants two months prior to the attachment. There is no finding of either of these kinds in this suit. We do not know whether it was the plaintiff or the defendant who was guilty of interference with possession or dispossession. In the absence of all evidence as to the events preceding the attachment all that one can say as to what led the Magistrate to take possession is that it was either his inability to decide who was in actual possession or his decision that neither party was in possession. Neither of these can be said to be a wrong by the defendant. The alleged wrongful denial of the plaintiff's title was not what led the Magistrate to attach the property. The cases cited, therefore, do not help the plaintiff. In the circumstances of this case it is the attachment by the Magistrate and not any wrongful act of the defendant that gave rise to the right to sue and the right accrued when the attachment was made. In this view no fresh period of limitation began to run under s. 23 of the Limitation Act after the date of the attachment by the Magistrate in 1908. The suit, therefore, was barred by time and was rightly dismissed. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 31 Ind. Cas. 242; 20 C. W. N. 481; 22 C. L. J. 283.

(2) 65 Ind. Cas. 200; 26 C. W. N. 432; 49 C. 544; (1922) A. I. R. (C.) 419.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 790 OF 1924.

June 26, 1924.

Present:—Mr. Justice Scott-Smith.

ABDUL RAZAK—PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN—DEFENDANT—RESPONDENT.

Muhammadan Law—Minor — Guardian — Maternal grandfather—Discharge for mortgage-money.

Under the Muhammad an Law the maternal grandfather of a minor is not his *de jure* guardian and has no power to dispose of the immoveable property of the minor or to give a valid discharge in respect of mortgage-money due to the minor. [p. 633, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), *Muhammad Shafi* v. *Kalsum Bi*, 79 Ind. Cas. 260; 4 L. 467; (1924) A. I. R. (L.) 200, *Amina Bibi* v. *Ram Shankar Misar*, 50 Ind. Cas. 730; 41 A. 473; 17 A. L. J. 582, relied on.

Appeal against a decision of the District Judge, Ambala, dated the 10th January 1924, reversing that of the Sub-Judge, Fourth Class, Jagadhri, dated the 12th February 1923.

Lala *Shamair Chand*, for the Appellant.
Lala *Ishar Das*, for the Respondent.

JUDGMENT.—On the 18th March 1912 the minor plaintiffs-appellants took a mortgage of a house for Rs. 200 from one Chhotu through one Karim Bakhsh, who purported to act as their guardian. Chhotu sold his equity of redemption to Abdul Rahman, who, on the 6th November 1912 paid the Rs 200, mortgage-money, to Karim Bakhsh, and redeemed the mortgage and got possession of the house. The plaintiffs brought the suit out of which the present second appeal arises for possession of the house by ejectment of Abdul Rahman. The First Court decreed their claim, but the learned District Judge held that the payment of the mortgage-money to the *de facto* guardian of the minor plaintiffs was a valid discharge, and accepting the appeal dismissed the suit.

Allah Diya, the father of the minors and their next friend in the present suit, was absent at the time of the mortgage, and, according to the written plea of Abdul Rahman in the present suit, was absent at the time of redemption. It is unnecessary, therefore, to consider the evidence of Khuda Bakhsh, who states that Rs. 200 were paid in Allah Diya's presence. The sole question for consideration is whether the pay-

ment to the so-called *de facto* guardian Karim Bakhsh was a valid, discharge on behalf of the minors. Their Lordships of the Privy Council held in the case of *Imambandi* v. *Mutsaddi* (1) that one who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee, if let into possession of the property under such unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser. This was followed by a Division Bench of this Court in *Muhammad Shafi* v. *Kalsum Bi* (2) in which it was held that as regards the minor plaintiffs the sale was *ab initio* void as a mother under Muhammadan Law has no power to dispose of the immoveable property belonging to her minor children. A Division Bench of the Allahabad High Court in *Amina Bibi* v. *Ram Shankar Misar* (3) refered to the Privy Council case and held that a Muhammadan mother cannot as *de facto* guardian of her minor sons give a valid discharge for any payment made to the minors. Karim Bakhsh is the maternal grandfather of the minors, and as such is not their *de jure* guardian, and under the Muhammadan Law has no more power than a mother would have to dispose of the immoveable property or give a valid discharge for payment of the mortgage money. I hold that in view of the authorities referred to, Karim Bakhsh had no power to receive this Rs. 200 and to give a valid discharge. I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, restore the decree of the First Court with costs throughout.

Z. K. *Appeal accepted.*

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

(2) 79 Ind. Cas. 260; 4 L. 467; (1924) A. I. R. (L.) 200.

(3) 50 Ind. Cas. 730; 41 A. 473; 17 A. L. J. 582.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 101 OF 1923.

July 21, 1924.

Present:—Mr. Justice Kanhaiya Lal.

Lala GANGA RAM—DEFENDANT—APPELLANT

versus

LACHMAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Registration Act (XVI of 1908), s. 17—Compromise—Family arrangement—Registration—Limitation Act (IX of 1908), s. 19—Evidence Act (I of 1872), s. 114, ill. (e)—Acknowledgment—Agent, authority of, proof of—Presumption—Mortgage—*Wajib-ul-arz, *entry in—Verification by agent of mortgagee, effect of.*

A petition of compromise filed before a Revenue Officer dealing with a mutation proceeding which intimates that the dispute between the parties has been settled in a particular manner, and which recognises and confirms an antecedent but disputed title, operates as a family arrangement and does not require registration. [p. 634, col. 2.]

Bindesri Naik v. *Ganga Saran Sahu*, 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.), *Baldeo Singh* v. *Udal Singh*, 58 Ind. Cas. 732; 18 A. L. J. 877; 2 U. P. L. R. (A.) 202; 43 A. 1, followed.

The sufficiency of an alleged acknowledgment which is relied on as operating to save limitation must be judged with reference to the law in force at the time when the question arises and not with reference to the law in force at the date of the acknowledgment. [p. 635, col. 1.]

Soni Ram v. *Kanhaiya Lal*, 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.), followed.

No valid acknowledgment can be made by a general agent unless he is expressly or impliedly authorised in that behalf, but the authority may be presumed from the attendant circumstances. [p. 635, col. 2; p. 636, col. 1.]

Where a mortgage was recited in a *wajib-ul-arz* prepared during a Settlement effected under Regulation VII of 1822 as amended by Regulation IX of 1833, and the *wajib-ul-arz* was attested and verified by the agent of the mortgagees:

Held, that having regard to the directions issued to the Settlement Officers with regard to the preparation and verification of a *wajib-ul-arz*, it was open to the Court to presume under s. 114 of the Evidence Act, that the Settlement Officer had satisfied himself as to the authority of the agent to verify the *wajib-ul-arz* on behalf of the mortgagees, and that, therefore, the recital and verification constituted an acknowledgment within the meaning of s. 19 of the Limitation Act. [p. 635, col. 2.]

Gokul Singh v. *Sahib Singh*, 38 Ind. Cas. 162; 15 A. L. J. 121, *Narain Rao Kalia* v. *Manni Kuar*, 66 Ind. Cas. 394; 20 A. L. J. 359; 44 A. 546; (1922) A. I. R. (A.) 230, referred to.

Second appeal against a decree of the District Judge, Budaun, dated the 11th of October, 1922.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This appeal arises out

of a suit for the redemption of a mortgage effected by Khaman Singh in favour of Shib Lal and Khem Karan on the 8th June 1850. The Courts below have decreed the claim, allowing the plaintiffs, who are the legal representatives of one of the heirs of the original mortgagor, to redeem their share on payment of a proportionate part of the mortgage-money.

The main questions for consideration are whether the plaintiffs have a right to redeem the share in question and whether the claim is barred by limitation. It appears that Khaman Singh had two sons, Kehri Singh and Gangaram Singh. The share of Gangaram Singh passed to Khanjan Singh, who died leaving a widow, *Musammat* Hem Kunwar, and a brother Mewa Ram Singh, each of whom divided his property by a mutual arrangement in equal shares. *Musammat* Hem Kunwar was succeeded by Pem Singh, one of the nephews of her husband, either by virtue of some gift or adoption. On the death of *Musammat* Hem Kunwar there was a dispute about the $1\frac{1}{2}$ *biswas* share entered in his name, which was settled on the 11th September 1890 in this way that *Musammat* Gaura, his widow was allowed a one-third share, and Bahadur Singh and Partap Singh, the younger brothers of her husband, were allowed the remaining one-third share each. *Musammat* Gaura and Bahadur Singh subsequently sold their rights to Ganga Ram, the present defendant appellant, who is also the successor-in-interest of some of the heirs of the mortgagees.

In 1915 Mewa Ram Singh brought a suit for the redemption of a half share of the mortgaged property, impleading the mortgagees and other persons, claiming an interest in the equity of redemption, as defendants. One of the pleas raised in that suit was that Mewa Ram Singh could not sue for anything more than his half share of $2\frac{1}{2}$ *biswas* which he had obtained by a settlement with *Musammat* Hem Kunwar, and another plea was that the claim was barred by limitation. Lachman Singh and *Musammat* Hira Kunwar, the heirs of Partab Singh, were parties to that suit. It was found in that case that Mewa Ram Singh was entitled to redeem only $1\frac{1}{2}$ *biswas* representing his share, and that the acknowledgment made by the mortgagees at the time of the attestation of the *wajib-ul-arz* in 1865 saved limitation *Mewa Ram Singh* v. *Ganga Ram* (1).

The present suit has been brought by Lachhman Singh and *Musammat* Hira Kunwar to redeem their one-third share of $1\frac{1}{4}$ *biswas*, which had been allotted to Partab Singh by the compromise of the 11th September 1890. The learned Counsel for the defendant-appellant contends that that compromise is inadmissible in evidence for want of registration. But the compromise itself does not purport to convey or to create or declare any interest in immoveable property. It merely recognises or confirms an antecedent title, which was till then involved in dispute; and at best it amounted only to an intimation to the Revenue Court, before which the mutation proceeding was pending, that the dispute between *Musammat* Gaura, the widow of Pem Singh on the one hand and Bahadur Singh and Partab Singh on the other, had been settled out of Court in a particular manner. The settlement aforesaid operated as a family arrangement acknowledging or defining an antecedent but disputed title, and as pointed out in *Bindesri Naik* v. *Ganga Saran Sahu* (2) its registration was not necessary. In *Baldeo Singh* v. *Udal Singh* (3), it was accordingly held that such a family settlement proceeding as it did on the assumption of an antecedent title of some kind in the parties which it merely acknowledged or defined, did not fall within the purview of any of the provisions of the Transfer of Property Act so as to require an instrument in writing or registration. There can be no doubt, therefore, that Lachhman Singh and *Musammat* Hira Kunwar, the heirs of Partab Singh, are entitled to redeem a one-third share out of $1\frac{1}{4}$ *biswa* entered in their names. The remaining two-thirds share has been purchased by the mortgagee from *Musammat* Guara and Bahadur Singh and, as observed in *Kanhai Lal* v. *Brij Lal* (4), it does not lie in his mouth to impeach the settlement.

The question of limitation is by no means so simple. The suit was filed after the

(1) 52 Ind. Cas. 220; 17 A. L. J. 910.
(2) 20 A. 171; 2 C. W. N. 129; 25 I. A 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).
(3) 58 Ind. Cas. 732; 18 A. L. J. 877; 2 U. P. L. R. (A.) 202; 43 A. 1.
(4) 47 Ind. Cas. 207; 45 I. A. 118; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 40 A. 487; 20 Bom. L. R. 1048 (P. C.).

expiry of 60 years from the date of the mortgage and unless the verification of the *wajib-nl-arz* by Shib Lal and Fazl Ahmad, the general agent of the other mortgagees, can be regarded as sufficient within the meaning of s. 19 of the Indian Limitation Act, the claim would obviously be barred by time. It is conceded that under Act XIV of 1859 the acknowledgment made by a person, who was not himself the mortgagee, could not be regarded as sufficient to save limitation. But as held by their Lordships of the Privy Council in *Soni Ram* v. *Kanhaiya Lal* (5) the law of limitation applicable to the present suit is not Act XIV of 1859, the law in force at the date of the alleged acknowledgment, but Act IX of 1908, which was in force at the time of the institution of the suit. No title had been acquired by the mortgagee before Act IX of 1908 came into force and s. 19 of the Indian Limitation Act now in force must, therefore govern the question of the sufficiency or otherwise of the acknowledgment on which the plaintiffs-respondents seek to rely.

It is urged on behalf of the defendant-appellant on the strength of the decisions in *Gokul Singh* v. *Sahib Singh* (6) and *Narain Rao Kalia* v. *Manni Kuar* (7) that the Court might presume the genuineness of the signature of Shib Lal one of the mortgagees, who verified the *wajib-ul-arz* and also the genuineness of the signature of Fazl Ahmad, who purported to sign the verification on behalf of *Musammat* Daro, the widow of Ganga Ram, Gopal Singh and Sita Ram, the sons of Khem Karan, as their general agent, but the Court could not presume that the latter had authority to make an acknowledgment on behalf of his principals. But the circumstances in which the verification was made ought to be taken into consideration in determining the authority possessed by him at the time the verification took place. The settlement in which that *wajib-ul-arz* was verified was effected under Regulation VII of 1822 as amended by Regulation IX of 1833 then in force; and among the directions then issued for the guidance of Settlement Officers to carry out the object of those regulations, it was provided that the signatures of all the *lambardars* and as many as possible of the *pattidars* should be attached to the administrative paper, called the *wajib-ul-arz*, and it should also be attested by *patwari* and *kanungos* and be read out before the Settlement Officer in open Court and in the presence of the subscribing parties (Directions for Settlement Officers 1858, page 78). In other words no settlement could be regarded as complete until the *wajib-ul-arz* was prepared and attested by the signatures of all the *lambardars* and as many as possible of the *pattidars*, who assented to the same and acknowledged its correctness. The co-sharers were required for that purpose to attend or to send their agents, and it must be presumed that Fazl Ahmad was sent on a similar errand in the company of Shib Lal, one of the mortgagees, by the heirs of the other mortgagee, who may have been unable to attend in person themselves. Both Shib Lal and Fazl Ahmad, the general agent of the mortgagees attended to verify the *wajib-ul arz*, in which Shib Lal and the heirs of Khem Karan were recorded as mortgagees; and the verification made by Shib Lal one of the mortgagees and by Fazl Ahmad on behalf of the other mortgagees must, therefore, be taken to have been made in acknowledgment of the correctness of the fact that they were such mortgagees. Under s. 114 of the Indian Evidence Act the Court can presume that official acts had been regularly performed that is the Court must have satisfied itself as to the authority of Fazl Ahmed, and that the common course of business had been followed in such cases. The attendant circumstances can lead to no other conclusion.

The decisions to which the learned Counsel for the defendant-appellant has referred, are not applicable. In the first of the two cases referred to by him, the signature was made on behalf of an absent co-sharer by the *patwari* who was found to have had no authority to sign on his behalf. In the latter case no fact appears to have been established or brought to the notice of the Court to justify the Court in presuming that the general agent had the requisite authority to make the acknowledgment. It is unquestionable that no valid acknowledgment can be made by a general agent unless he is expressly or impliedly author-

(5) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

(6) 38 Ind. Cas. 162; 15 A. L. J. 121.

(7) 66 Ind. Cas 394; 20 A. L. J. 359; 44 A. 546; (1922) A. I. R. (A.) 230.

ised in that behalf; but the authority may be presumed from the attendant circumstances, as the Courts below have presumed in this case. The question of authority in each case is one of fact or an inference to be drawn from the surrounding circumstances, and considering the circumstances here established, there is no reason to differ from the view taken by the Courts below.

It is also noteworthy that in the previous suit about this very mortgage it was held between the parties by this Court that the claim was within time and that the acknowledgment made at the time of the verification of the *wajib-ul-arz* saved limitation. That suit included the property now in dispute; and the present claimants were then arrayed as co-defendants with the mortgagees or their heirs, with whom their interest was at conflict. If the suit for redemption was within time as regards the then plaintiff, it cannot be beyond time as regards the present plaintiffs who practically claim immunity on the same grounds as were then urged and accepted.

The appeal, therefore, fails and is dismissed with costs including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2573 OF 1921.

March 24, 1924.

Present:—Mr. Justice Mukerji.

SATISH CHANDRA GHOSE—DEFENDANT—APPELLANT

versus

DEBENDRA NATH DEY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 50—Permanent tenancy—Presumption, applicability of—Ejectment, suit for—Burden of proof—Recognition of tenancy—Duty of Court.

The presumption arising under s. 50, cl. (2) of the Bengal Tenancy Act can be availed of only in a suit or proceeding under the Act. [p. 637, col. 2.]

Where the plaintiff sues for recovery of possession alleging that the defendant is a trespasser and the defendant claims to be a tenant, until the fact that the defendant is a tenant is made out the suit cannot be said to be one under the Bengal Tenancy Act. The fact has to be made out independently of s. 50 that the suit is against the tenant and until that is made out s. 50 has no application. Where a tenure is claimed to be a permanent one the question is one of the true inference from the facts and the burden of proof is on the tenant. [p. 637, col. 2.]

The mere fact that a tenancy has been held by the predecessor-in-interest of the tenants for several generations and that the rent paid has been uniform for over 50 years, may be sufficient for holding that the tenancy is heritable but is not sufficient in law in the absence of any other circumstance, to show that the rent was fixed for ever or that the tenancy was a permanent one. [p. 638, col. 1.]

In a suit for ejectment the initial onus is on the plaintiff to prove his title. As to the right of the defendant to hold the land, when there is no contract between him and the plaintiff or any privity of contract as between the parties, the defendant must also prove his right to remain on the land. [p. 638, col. 2.]

Where a recognition of tenancy is set up the Court should determine in each case whether on a consideration of all the facts, not merely by giving undue weight to words used, a legal inference is or is not to be drawn that there has been a recognition establishing the relationship of landlord and tenant between one who has paid and another who has received rent for a number of years. [p. 640, col. 2.]

(Case-law discussed.)

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 14th of September 1921, reversing that of the Munsif First Court at Chinsurah, dated the 2nd April 1921.

Babu *Ram Chandra Majumdar* and Dr. *Jadu Nath Kanjilal*, for the Appellant.

Babus *Hari Charan Ganguly*, *Kanaidhan Dutt* and *Indu Prokas Chatterjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit by which the plaintiff seeks to eject the defendant No. 1 from two plots of land adjoining one another, the bigger one covering an area of 2 *bighas* 13 *cottas* 10 *chittaks* and the smaller one an area of 11 *cottas* 15 *chittaks* upon the allegation that the defendant No. 1 had purchased the said two holdings without the knowledge and consent of the landlord from whom the plaintiff has taken *mourashi mokarrari* settlement of the holdings. The suit was dismissed by the learned Munsif and decreed on appeal by the learned Subordinate Judge.

The defendant No. 1 has appealed to this Court. It will be convenient to summarise his contentions with reference to the two holdings separately. As to the bigger *jama* it is contended :

1st. That the learned Subordinate Judge was wrong in holding that the tenancy was for horticultural purposes whereas he should have held that it was for residential purposes.

2nd.—If it was for residential purposes, then under the general law of the land as it stood before the Trans-

fer of Property Act came into operation, or under the Transfer of Property Act itself, by one or other of which it must be governed, according as it is found as to when it came into existence, it is transferable, and so the defendant No. 1 has acquired a valid right and is not ejectable.

3rd.—Assuming that it was for horticultural purposes and that it is governed by the Rent Law as it stood before the Bengal Tenancy Act or by the Bengal Tenancy Act itself, the incidents judged by these provisions, showed that the predecessors of the defendant No. 1 had acquired a permanent and transferable right therein, and so the defendant No. 1 is not liable to be ejected.

As for the smaller *jama* the contentions are as follows:—

1st. It should have been held that the tenancy was for residential purposes and not for purposes of horticulture as has been erroneously found by the learned Subordinate Judge.

2nd.—That if it was for residential purposes the defendant No. 1 has acquired a valid right by his purchase.

3rd.—That even if it was for horticultural purposes, its incident pointed to its transferable character, and, therefore, the defendant No. 1 is not liable to eviction.

Then there are two contentions which apply to both the *jamas* and they are these:—

4th.—That the onus of proving the character of the *jamas* has been misplaced on the defendant.

5th.—That the facts found go to show that there was recognition of the tenancy of the defendant No. 1 and the learned Subordinate Judge was in error in holding otherwise.

I propose to deal with the bigger *jama* first. The facts found by the learned Subordinate Judge are that this *jama* was described in the documents as consisting of '*bagat*' land, that trees and vegetables were planted on it, that it was not a part of, nor did it constitute one tenancy along with the homestead of the defendant No. 1's predecessor which lay close by, and that no body ever lived on it. Upon these findings the learned Subordinate Judge came to the conclusion that the tenancy, the origin of which was unknown, must be held, having regard to the surrounding circumstances and the nature of its enjoyment, to have been for horticultural purposes. It is not possible for this Court upon these findings to come to a different conclusion. This ground, therefore, must fail. The second ground also based upon the assumption that the first one is well-founded, also fails with it and it is unnecessary to discuss the authorities to which I was referred on the footing that the *jama* was one for residential purposes.

As to the third contention, the appellant's argument in substance is this: Undisputedly this *jama* has been held by the family of the Santras for a very long series of years, it is said for seven generations, and there was uniformity in the rate of rent; that these two outstanding facts establish its heritability and raises a presumption as to its permanency; that from the uniform payment of rent a presumption either under s. 50, cl. (2), Bengal Tenancy Act or at any rate analogous to it arises; that once it is found that the predecessors of the defendant No. 1 were *ryots* holding at a rent fixed in perpetuity the tenancy should be deemed under s. 18 of the Bengal Tenancy Act to be clothed with all the incidents of a permanent tenure and under s. 11 of the Act it is to be taken as being capable of being transferred and bequeathed in the same manner as any other immoveable property, and under s. 10 of the Act the defendant No. 1 is not ejectable except on the ground that he has committed a breach of a condition of the tenancy. Now it is clear upon the terms of s. 50 cl. (2) of the Bengal Tenancy Act that the presumption arising under that section can only be availed of in a suit or proceeding under the Bengal Tenancy Act; and where the plaintiff sues for recovery of possession alleging that the defendant was a trespasser, and the defendant claimed to be a tenant, until, the fact that the defendant was a tenant was made out the suit could not be said to be one under the Bengal Tenancy Act. The fact has to be made out independently of s. 50, that the suit is against a tenant, and until that is made out s. 50 has no application: *Rasamoy Purkait* v. *Srinath Mayra* (1), *Mahabir Persad* v. *Charles Fox* (2), *Buzlul Karim* v. *Satis Chandra Giri* (3), *Nityananda Pal* v. *Nanda Kumar Chowdhury* (4). It has,

(1) 7 C. W. N. 132.
(2) I Ind. Cas. 112; 9 C. L. J. 467
(3) 10 Ind. Cas. 325; 15 C. W. N. 752; 13 C. L. J 418.
(4) 10 Ind. Cas. 163: 13 C. L. J. 415.

however, been held that although the statutory presumption cannot be availed of directly, the principle involved in that section is a useful guide to the Courts which may sometimes be relied upon. The cases however where this presumption has been relied upon are cases between a landlord and his admitted tenant. For instance in the case of *Nanda Lal Goswami* v. *Atarmani Dasee* (5), the principle was invoked in a case in apportioning compensation money between the landlord and the tenant in a land acquisition proceeding. The principle involved in the section, if it is not invested with the character of a presumption, only amounts to this that the fact that there has been uniformity in the rent that has been paid for a series of years has got to be considered in order to find out what inference it leads to, taken in conjunction with the other facts of the case. I have examined the principles upon which the cases cited at the Bar on this point have proceeded, *viz.*, *Port Canning & Land Improvement Co., Limited* v. *Katyani Debi* (6), *Nilratan Mondal* v. *Ismail Khan Mahomed* (7), and cases which have proceeded on similar lines; and as has been observed by the Judicial Committee in the case last cited "the true question here, as in other similar cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant." The two outstanding features of the present tenancy—and they are the only two that appear in the case—are that the tenancy has been held by the Santras for several generations—let us assume seven as alleged by the appellant and that the rent has been uniform for over 55 years; they may be sufficient for holding that the tenancy was heritable; but they are not sufficient in law, in the absence of any other circumstance, to show that the rent was fixed for ever or that the tenancy was a permanent one: *Jagabandhu Saha* v. *Magnamoyi Dasi* (8) and *Manmoth Nath Mitter* v. *Anath Bandhu Pal* (9). As the holding has not been proved to be one with a fixed rate, the argument based on ss. 11 and 18 of the Bengal Tenancy Act cannot assist the appellant. This contention, therefore, in my opinion fails.

Turning then to the smaller *jama*, the finding of the learned Sub-Judge based on the description of it as "*raiyati bagat*" land, its situation close to other gardens and the payment of landlord's fees payable under the Bengal Tenancy Act, is that the tenancy was not for residential but for horticultural purposes. The reasoning of the learned Munsif based upon the finding of a few bricks on the land and its situation close to human habitation and within the limits of the Municipality have been sufficiently disposed of by the learned Subordinate Judge. It is difficult to say that this finding is wrong or unreasonable and, therefore, the first two contentions put forward with regard to this *jama* cannot in my opinion prevail. It is conceded that nothing in the shape of ancient character or uniformity of rent for any long period has been proved to have existed in respect of it. The only thing that is pointed out is at the time of the transfer in favour of the appellant landlord's fee was paid but it has not been alleged that it has been accepted by the landlord. It may be observed that even if there was such acceptance it would not operate as an admission as to its permanence under the provisions of s. 18-B of the Bengal Tenancy Act, though it would certainly amount to a recognition of the transferee as a tenant. The third ground, therefore, cannot prevail.

Next I shall deal with the two contentions which are common to the two *jamas*. The first one of these relates to the onus of proof. It is true that the plaintiff claiming ejectment has a heavy onus to discharge, he must prove his title and to that extent the onus is entirely on him. As to the right of the defendant to hold the land, when there is no contract as between him and the plaintiff or any privity of contract as between the parties, the defendent also has to prove his right to remaim on the land. The Judicial Committee in the case of *Nilratan Mondal* v. *Ismail Khan Mahomed* (7), has observed, as already mentioned above, "the true question here, as in other cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenant." The same principle has been laid down in the case of *Doya Chand Shaha*

(5) 35 C. 763; 12 C. W. N. 432.

(6) 53 Ind. Cas. 522; 32 C. L. J. 1; 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91; (1920) M. W. N. 160; 24 C. W. N. 369; 11 L. W. 296; 46 I. A. 279; 47 C. 280; 22 Bom. L. R. 437; 27 M. L. T. 195 (P. C.).

(7) 32 C. 51; 31 I. A. 149; 8 C. W. N. 895 (P. C.).

(8) 36 Ind. Cas. 884; 22 C. W. N. 89; 44 C. 555; 24 C. L. J. 363.

(9) 50 Ind. Cas. 222; 23 C. W. N. 201.

v. *Anund Chunder Sen Mozumdr* (10), *Kripamoyi Dabia* v. *Durga Govind* (11), *Raja Saheb Perhlad Sein* v. *Maharajah Rajender Kishore Singh* (12), and *Manmoth Nath Mitter* v. *Anath Bandhu Pal* (9). It is true that the authorities cited above relate to cases as between a landlord and his tenant; but there is no reason why the same principle will not apply to a case between an admitted tenant of a landlord and one whose tenancy is repudiated. The view of onus taken by the learned Sub-Judge does not appear to me to be incorrect; and this ground also in my opinion cannot be sustained.

The other ground relates to recognition. With regard to this question, the matter stands thus—the plaintiff alleged in his plaint that the appellant made the purchases without the consent of the defendant No. 2 who was the lan llord. The appellant's allegation in the written statement was that the plaintiff had got the defendant No. 2 under his influence and got him to execute a *mokarrari mourashi patta* in his favour, that the defendant No. 2 was not entitled to grant such a *patta*, that as far as the appellant had come to know the real owner of the property was the father of the defendant No. 2, that the appellant had made the purchase of the bigger *jama* with the knowledge and consent of the defendant No. 2, that he had cut trees from the bigger *jama* with the knowledge of the defendant No. 2, and his father; that on account of both the *jamas*, the defendant No. 2 and his father had, with the knowledge of their transfer accepted rent from the appellant and, therefore, the suit for *khas* possession was not maintainable. The pleadings, therefore, amounted to an averment on behalf of the appellant that so far as he was aware the father of the defendant No. 2 was the real landlord but that in any case both the defendant No. 2 and his father had accepted rents from him with the knowledge that he was the transferee. The defendant No. 2 in his written statement alleged that the two *jamas* appeartained to his *zemindari*: and were included in *Touzi* No. 267 of the Hooghly Collectorate. An issue was raised in the Court of first instance being issue No. 2 which was worded thus: "whether the defendant No. 2 or his father is the *malik* landlord of the land in suit". This issue was raised presumably to determine the question as to whether the plaintiff had acquired any right by his *patta* from the defendant No. 2. The issue, however, was not pressed and the learned Munsif recorded his finding on this issue in the following words:—"Defendant himself accepted *dakhilas* granted on behalf of defendant No. 2 and this issue is not pressed". Now all the discussion that appears in the judgment of the learned Sub-Judge is confind to acts of the father of the defendant No. 2 and none on the part of the defendant No. 2 has been referred to at all. As this is not sufficient to dispose of the question whether there was recognition by the defendant No. 2, who is the ostensible landlord, I have examined the evidence in the case in order to see whether any specific act or conduct has been alleged with regard to him such as might lead to an interference of recognition of the appellant's tenancy by him. I have not found any evidence of act or conduct on the part of the defendant No. 2 and the appellant's case as to recognition, therefore, rests entirely upon his payment of rent which was accepted by the landlord's *gomastha* and the granting of rent receipts to him by the latter, rent receipts which I shall presently deal with.

The *dakhilas* relied upon on the question of recognition are enumerated and set forth below.

(1) Exhibit B-1—Tenant—Late Panchanan Santra—Possessor Debendra Nath Santra 22 *Pous* 1322—Guzrat Satis Chandra Ghose. For 1324—Rs. 4-12-9.

(2) Exhibit B-2—Tenant—Late Panchanan Santra—Possessor Debendra Nath Santra 12th *Bhadra* 1323—Guzrat Satis Chandra Ghose. For 1323—Rs. 4-12-9.

(3) Exhibit B-4—Tenant—Late Panchanan Santra—Possessor Debendra Nath Santra 30 *Aswin* 1322—Guzrat Satis Chandra Ghose. For 1320 and 1321—Rs. 9-9-6.

(4) Exhibit B-5—Tanant—Late Panchanan Santra—Possessor Debendra Nath Santra 2 *Kartik* 1321—Guzrat Satis Chandra Ghose. For 1318 and 1319—Rs. 9-9-6.

(5) Exhibit B-6—Tenant—Late Panchanan Santra—Possessor Debandra Nath Santra 24 *Assar* 1317—Guzrat Satis Chandra Ghose. For 1315—Rs. 4-12-9.

(6) Exhibit B-40—Tenant—Late Panchanan Pal—Possessor Ekkori Charan Ghose. 27 *Bhadra* 1325—Guzrat Satis Chandra Ghose. For 1325—Re. 1-9. 12½ *gds.*

(10) 14 C. 382; 7 Ind. Dec. (N. S.) 253.
(11) 15 C. 89; 7 Ind. Dec. (N. S.) 645.
(12) 12 M. I. A. 292 at p. 322; 2 Suth. P. C. J. 225; 2 Sar. C. J. 430; 20 E. R. 349.

It will be seen that five of these relate to the bigger *jama* and one to the smaller one. The question is, do they prove recognition by the landlord of the transfer in favour of Satis Chandra Ghose. Recognition being a question of inference as to a state of mind on the part of the landlord it is open to us to enquire in second appeal as to whether the granting of *dakhilas* of the above description by the *gomashta* of the landlord in the absence of anything else, and where the *gomashta* had not been examined and the landlord too—by landlord I mean the defendant No. 2 and not his father—has not been examined on either side, would go to prove recognition.

Now the authorities bearing on this point are numerous and varied and it is unnecessary to refer to them except such as have been cited at the Bar or have a direct bearing on the present case. In the case of *Naba Kumari Debi* v. *Behari Lal Sen* (13) which was cited on behalf of the appellant, the Judicial Committee, dealing with rent receipts which though not expressly describing the transferee of the tenure as a tenant of the holding, stated that the rent paid was the rent of the tenure, and the person paying was the occupier of it, and was paying on her account, held that there was a sufficient recognition of the transferee as tenant. The persent rent receipts are not of that description. Another case relied upon on behalf of the appellant is that of *Baroda Churun Dutt* v. *Hemlata Dasi* (14). There an occupancy *raiyat* executed a usufructuary mortgage in favour of the person and the latter paid rent to the landlord who granted him rent receipts which stated that the rent was being received "through him the mortgagee." This was held to be recognition of the mortgage. The next case referred to by the appellant is that of *Matookdhari Sukul* v. *Jugdip Narain Singh* (15) where it was held that the receipt by the landlord of rent, with or without protest, deposited by the mortgagee as such is a recognition of the rights of the mortgagee. In the case of *Prabhabati Dasi* v. *Taibutannessa Choudhurani* (16). Sir Lawrence Jankins, C. J., observed as follows :—"I am inclined to think that Courts have yielded too freely to the temptation of being blinded to realities by the words *marfatdar* and *guzratdar* and so the true facts have suffered. At the same time I am bound to admit that there are expressions in the cases which would suggest that where these words appear no recognition can be inferred. I think, however, each case must be determined on its own circumstances, and the Courts should determine in each case whether, on a consideration of all the facts—not merely by giving undue weight to words used—a legal inference is or is not to be drawn that there has been a recognition establishing a relationship of landlord and tenant between one who has paid and another who has received rent for a number of years". This to my mind is the true position. Where the landlord has expressly refused to grant receipts in the name of the transferee and granted them in the name of the old tenant describing him as *marfatdar*, it may at once be said there is no recognition. Such a case was the one of *Manmatha Nath Mitter* v. *Anath Bandhu Pal* (9). In that case it was observed (at page 214*) that "the effect of the use of the word '*marfatdar*' may vary according to the circumstances of each case on a consideration of all the facts of the case". In the present case it is not stated in the rent receipts that the appellant was the possessor of the holdings, or that he had any interest therein ; it was not stated that the rent was being paid by him on his own behalf. If that was stated the question would have arisen as to whether the *gomashta* had authority to grant the rent receipts in that way and the presumption would have arisen that he was so empowered unless there was evidence to the contrary. In my judgment the rent receipts, as they stand, without any other evidence at all do not furnish any evidence which may point to recognition of the transfer on the part of the landlord. It is immaterial whether the *gomashta* was authorised to grant rent receipts in that way or whether his action was repudiated by the father of the defendant No. 2. The other facts relied on by the learned Subordinate Judge also support his finding that there has been no recognition. This contention also in my opinion is not substantial.

The appeal, therefore, must be dismissed with costs.

Z. K. *Appeal dismissed.*

(13) 34 C. 902; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433 (P. C.).

(14) 3 Ind. Cas. 561; 13 C. W. N. 833.

(15) 28 Ind. Cas. 343; 19 C. W. N. 1319; 21 C. L. J. 261.

(16) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

*Page of 23 C. W. N.—[*Ed.*]

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 516 OF 1924.

July 25, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

HARENDRA NATH DAS—PETITIONER

versus

JOTISH CHANDRA DUTT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 415, 420—Criminal Procedure Code (Act V of 1898), s. 439—Cheating—Harm to reputation or property, proof of—Intention of accused—Revision—High Court, power of, to quash proceedings.

In a case of cheating the Court has got to see the intention of the accused at the time of the offence and to judge all the consequences of the act or omission itself. [p. 642, cols. 1 & 2.]

Under s. 415 of the Penal Code the damage or harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom. But the law does not take into account remote possibilities that may flow from the act. The proximate and natural result only of the act is to be judged and not any vague and contingent injury that may possibly arise. [p. 642, col. 2.]

Mojey v. *Queen-Empress*, 17 C. 606; 8 Ind. Dec. (N. S.) 943, *Milton* v. *Sherman*, 46 Ind. Cas. 701; 22 C. W. N. 1001; 28 C. L. J. 485; 19 Cr.L. J. 781 and *Legal Remembrancer* v. *Manmatha Bhusan Chatterjee*, 84 Ind. Cas. 554; 51 C. 250; 28 C. W. N. 160; (1924) A. I. R. (C.) 495; 26 Cr. L. J. 330, followed.

Bhagwan Kessew v. *Siba Valji*, 4 Bom. L. R. 76, distinguished.

The charge framed in a case ran as follows: "that you on or about the 19th September 1923 in Calcutta deceived Mr. E. J. Pithia of Birla Jute Manufacturing Co., Ltd. by inducing him to accept a Bought Note signed by your firm as brokers on behalf of Santoke Chand-Manik Chand, who, you represented, were a respectable firm of jute dealers carrying on business at 65, Noormull Lohia Lane, Calcutta, knowing that such representation was false, and further by inducing the said Mr. E. J. Pithia by means of such representations to give a receipt for the said Bought Note, and you thereby committed an offence punishable under s. 420, Indian Penal Code:"

Held, that the charge did not disclose an offence either under s. 420 or under s. 415 of the Penal Code. [p. 643, col. 1.]

Where it appears to the High Court that the continuance of certain proceedings before a Subordinate Court would mean an abuse of the processes of the Court it is the duty of the High Court to interfere and to quash the proceedings. [*ibid.*]

Chandi Pershad v. *Abdur Rahman*, 22 C. 131; 11 Ind. Dec. (N. S.) 89, followed.

Application under s. 435, Cr. P. C., by the accused moving the High Court to call for the records of the Court of the Fourth Presidency Magistrate, Northern Division, Calcutta.

Mr. *Monnier* (with him Babus *Sarat Chandra Mukerji* and *Indu Bhusan Mukerji*), for the Petitioner.

Mr. *S. K. Sen* (with him Babus *Probodh Kumar Das* and *Syamadas Bhattacharjee*), for the Opposite Party.

JUDGMENT.

Mukerji, J.—The charge framed in this case runs in these words "that you on or about the 19th September 1923 in Calcutta deceived Mr. E. J. Pithia of Birla Jute Manufacturing Co., Ltd. by inducing him to accept a Bought Note signed by your firm as brokers on behalf of Santoke Chand-Manik Chand, who, you represented were a respectable firm of jute dealers carrying on business at 65 Noormull Lohia Lane, Calcutta, knowing that such representation was false, and further by inducing the said Mr. E. J. Pithia by means of such representations to give a receipt for the said Bought Note, and you thereby committed an offence punishable under s. 420, Indian Penal Code."

The charge, on a proper analysis, avers that the accused deceived Mr. E. J. Pithia by making a false representation that he or rather his firm was acting as brokers on behalf of Santoke Chand-Manik Chand, who, according to the accused, were a respectable firm of jute dealers carrying on business at 65 Noormull Lohia Lane, Calcutta, that by the said false representation he induced Mr. E. J. Pithia to accept the Bought Note signed by his firm as such brokers and further induced Mr. E. J. Pithia to give a receipt for the said Bought Note.

For the purposes of the present application we must proceed on the assumption that all the facts alleged in the charge have been proved; we take it as proved that the firm of Santoke Chand-Manik Chand has no existence and that the story of the accused's firm acting as broker to that firm is a myth, and further that the accused gave a Bought Note in respect of 2,000 bales of jute purporting to be in the name of Santoke Chand-Manik Chand and induced Mr. Pithia to accept it and give a receipt for it. Do these facts constitute an offence punishable under s. 420, Indian Penal Code?

Section 420, Indian Penal Code, says: "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destory the whole or any part of a valuable security, or anything which is signed or sealed and which is capable of being converted into a valuable security, shall be punished," etc. The receipt for the Bought Note no doubt is property and may also be 'valuable

security.' But then, where is the dishonesty in the transaction ?. The Bought Note has, as a matter of fact, been given by the accused to Mr. Pithia, and that fact is acknowledged by the receipt. So far as the delivery of the receipt is concerned or the making of it is concerned, assuming that it is a valuable security, the transaction is quite fair and square, there is no question of any dishonesty at all. The accused cannot be said to have had the intention of causing wrongful gain to any person or of causing wrongful loss to any person by inducing Mr. Pithia to make out or give him a receipt for the Bought Note which he had, in fact, made over to Mr. Pithia. Taking it at its utmost the accused's intention in getting Mr. Pithia to give him the receipt for the Bought Note was to hold him down to the contract, but by no stretch of imagination can it be said that his intention was to cause wrongful gain or wrongful loss. As observed by Batty, J., in the case of *Bhagwant Appaji* v. *Kedari Kashinath* (1), "the word 'intent' by its etymology, seems to have the metaphorical allusion to archery, and implies 'aim' and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive without which the action would not have been taken."

Learned Counsel appearing on behalf of the complainant appreciated the difficulty of applying s. 420, Indian Penal Code, to the case and he suggested that the proper charge to frame against the accused would be one under s. 415, Indian Penal Code for an offence of simple cheating. He suggested that the charge should be to the effect that the accused deceived Mr. Pithia to enter into a contract with a bogus or non-existent firm which he would not have done if he were not so deceived and the said act caused or was likely to cause damage or harm to Mr. Pithia in reputation or property. He contended that Mr. Pithia did actually sustain damage or harm to property as the contract was not fulfilled and the market went up and so Mr. Pithia suffered loss in money ; and secondly entering into a contract with a bogus firm is itself a disreputable thing and, therefore, it was likely to cause damage or harm to Mr. Pithia's reputation.

Now in a case of cheating we have got to see the intention of the accused at the time of the offence and judge of the consequences of the act or omission itself. The loss to property sustained by Mr. Pithia resulted not from the act which Mr. Pithia was induced to do, *viz.*, the entering into the contract by him, but the non-fulfilment of the contract by the accused. Under s. 415, Indian Penal Code, the damage of harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom, and the law does not take into account remote possibilities that may flow from the act : *Mojey* v. *Queen-Empress* (2). The proximate and natural result only of the act has to be judged and not any vague and contingent injury that may possibly arise : *Milton* v. *Sherman* (3). The prosecution allege in the present case that the accused used the name of a bogus or non-existent firm, with the object of not fulfilling the contract in the event of the market going up, and as the market did go up he did not supply the jute with the result that Mr. Pithia suffered loss. Such remote consequences must, in my opinion, be ignored for the purposes of s. 415, Indian Penal Code.

As for the damage or harm likely to be caused to Mr. Pithia's reputation, that again is too remote a contingency. A case similar to the present one so far as this aspect of the question is concerned was that of *Kashinath*. (Criminal Revision No. 402 of 1909) decided by Chandavarkar and Knight, JJ., of the Bombay High Court. In that case the accused applied to the postal authorities and obtained an appointment in the Postal Department but he had not mentioned in his application that he was dismissed from Government service. He was charged with cheating as loss of reputation might accrue to the Postal Department from the employment of a man of doubtful character. The learned Judge in that case observed as follows: "Such damage or harm must be the proximate and natural result of the act or omission ; and we cannot include in it such vague and contingent injury as might arise from the

(1) 25 B. 202 at p. 226; 2 Bom. L. R. 986.

(2) 17 C. 606; 8 Ind. Dec. (N. S.) 943.

(3) 46 Ind. Cas. 701; 22 C. W. N. 1001; 28 C. L. J. 485; 19 Cr. L. J. 781.

discredit that might attach to that Department from the employment of a man of doubtful character. It has not been suggested that the damage to be apprehended was that which might be caused by the petitioner's dishonesty, and this too would be a consequence too remote for the purpose of the section." The same view was taken by this Court in the case of *Legal Remembrancer* v. *Manmatha Bhusan Chatterjee* (4) in which a damage to reputation for impartiality was held as too remote for the contemplation of the Statute and it was observed that the damage must be direct natural or probable consequence of the act and not the indirect and ulterior result of it.

Learned Counsel appearing on behalf of the complainant has drawn our attention to the case of *Bhagwan Kessew* v. *Siba Valji* (5), but, in my opinion, that case has no application here, the facts being entirely different.

In no view of the facts alleged in the present case is it possible to hold that there way any offence either of simple or of the aggravated form of cheating as defined in the Indian Penal Code. The continuance of the proceedings, therefore, would mean an abuse of the processes of the Court; and under such circumstances as laid down in the case of *Chandi Pershad* v. *Abdur Rahman* (6), it is our bounden duty to interfere.

I would, therefore, make the Rule absolute and quash the proceedings.

Walmsley, J.—I agree.

Z. K. *Rule made absolute.*

(4) 84 Ind. Cas. 554; 51 C. 250; 28 C. W. N. 160; (1924) A. I. R. (C.) 495; 26 Cr. L. J. 330.
(5) 4 Bom. L. R. 76.
(6) 22 C. 131; 11 Ind. Dec. (N. S.) 89.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 510 OF 1924.
July 29, 1924.
Present:—Mr. Justice Daniels.
DANNU SINGH AND OTHERS—ACCUSED
versus
EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 32—Dying statement of dacoit—Admissibility against other dacoits.

The statement of a dying dacoit as to the circumstances of the dacoity resulting in his death giving the names of his associates, is not admissible in evidence against the other dacoits under s. 32 of the Evidence Act. [p. 644, col. 1.]

Criminal appeal from an order of the Officiating Sessions Judge, Bareilly, dated the 12th of May 1924.

The Government Pleader, for the Crown.

JUDGMENT.—In this case seven persons, Dannu Singh, Tulshi, Gajja, Kesho, Daryao Singh, Girdhari Singh and Dilsukh, appeal from their conviction under s. 395; Indian Penal Code, in connection with a dacoity which occurred on the night of 7th October 1923 at the house of Umrao Singh at Nakatpur in the Bareilly District. The Police had been aware for a long time that a gang of dacoits under the leadership of a man named Dhani was carrying on a series of dacoities in the Bareilly District and were endeavouring to surprise and arrest them. They had received information that a dacoity was in contemplation at the house of Umrao Singh on this particular night, and the Circle Inspector Khan Bahadur Muhammad Sayid with a number of Police proceeded to the village secretly after dark and hid in a *chaupal* and other places adjacent to Umrao Singh's house. About 11 P. M. fifteen or sixteen dacoits came to the house, broke in, lit fires of straw at various places and commenced to loot the house. One of them had looked into the *chaupal* but failed to see the Constables who were hiding under the wall and reported it empty. Shortly after the dacoits broke in one of the Constables coughed and revealed their presence. A gun was immediately fired by one of the dacoits. The Circle Inspector and the Police with him came out and returned the fire. One Constable was severely wounded in the thigh by a shot from a gun. Two of the dacoits were shot dead and two others were wounded so seriously that they died shortly afterwards. The other dacoits all escaped. A pistol and other articles belonging to the dacoits were found to have been left behind, and on one of the dacoits who were shot a number of lead pellets were found. The two dacoits who were killed were afterwards found to be Brij Lal Nai and Nanhe Brahman. The two wounded men were Tilko and Dhimmi, the latter of whom was nephew of Dhani, the suspected leader of the gang. Both the two wounded men made statements to the Police giving the names of a number of their associates, and in this way a clue was obtained. The accused were searched for and arrested on different dates. Dhimmi also made a dying statement in hospital in presence of a Magistrate. Dannu Singh was arrested on the morning after

the dacoity under circumstances to be mentioned hereafter.

The prosecution sought to tender in evidence the dying statements made by Tilko and Dhimmi. The learned Sessions Judge rejected their statements to the Police on the double ground that they were barred by ss. 25 and 26 of the Evidence Act as being irrelevant under the provisions of s. 32 of the Evidence Act. He has, however, admitted in evidence the statement made by Dhimmi to a Magistrate and has attached so much weight to it that he treats it as conclusive against the persons whom Dhimmi named. In this the learned Judge was in error. If Dhimmi's statement to the Police was barred by s. 32 his statement to a Magistrate was equally barred by the same section. Dhimmi was not a witness at any stage of the case and he was not examined in presence of the accused nor subjected to cross-examination. There is, therefore, no provision of law except s. 32 of the Evidence Act under which his statement could be admitted. The learned Judge says that this section cannot apply because in the first place the statement does not relate to the cause of Dhimmi's death, and in the second place Dhimmi's death does not come into question in this case. The first of these reasons is hardly correct. Section 32 allows proof of a statement made by a person "as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death".

His statement, therefore, as to the circumstances of the dacoity is in this case a statement as to the circumstances of the transaction which resulted in his death. The second reason is, however, a valid one. Dhimmi's death is not an issue in this case and is only relevant as one of the incidents of the dacoity. The question to be decided in this case is not whether Dhimmi participated in the dacoity but whether the accused who were on their trial took part in it. Dhimmi's statement was, therefore, inadmissible, and the case must be decided without reference to it. It is only in the case of the appellant Dilsukh that this point is material.

The evidence against the appellants consists of the most part of the evidence of witnesses who picked them out as having been present in the dacoity at an identification parade held at the jail and who in their evidence swear to them as having been present together with evidence of the circumstances under which they were arrested. One of the appellants, Kesho, made a confession before a Magistrate, in which he implicated himself, Dhani and three of the appellants, Tulshi, Gajja and Dilsukh. This confession he afterwards retracted, but the learned Judge has accepted it as genuine. Besides this there is the evidence of Balwant Singh who acted the part of an informer and who says that he went with the dacoits to the scene of the dacoity but slipped away just as they were entering the house. With him was the witness Naubat whom the Sub-Inspector had detailed to accompany him. The learned Sessions Judge has not relied on their evidence and has criticized Balwant in particular as a wholly unsatisfactory witness.

Dannu Singh was arrested under the following circumstances. As soon as the dacoits escaped, parties were sent in various directions to try and cut them off. Among other places which were watched was the river crossing at Tirkuniya Ghat, six miles from Nakatpur. Just after sunrise Dannu Singh came that way perpared to cross the river. Catching sight of a *Chaukidar* who was standing by the ferry he ran away when he was still a hundred paces distant. He was pursued and caught in a *bajra* field. He was then taken to the *thana*. There the Circle Inspector recognized him as the man who had come up to the *chaupal* at the commencement of the dacoity while the Police were hiding there and had reported that the *chaupal* was empty and that it was all right. His defence is that he was returning from a visit to his brother-in-law and that he was arrested because the Constable at the ferry demanded Rs. 10 from him and he refused to pay. The evidence against him is sufficient.

Tulshi, Gajja and Kesho have been identified by four, six and four witnesses respectively. Kesho made a confession, in which he implicated Tulshi and Gajja as well as himself. Tulshi and Gajja are brothers. Gajja is a tall man, and, according to the confession of Kesho and the evidence of Balwant, was known among the dacoits by the nickname of "Lamaiya" or the long man. The Circle Inspector confirms the fact that at the time of the dacoity the dacoits were addressing one another by nicknames. He heard among others the name of "Lakkarbaz" which, according to the evidence of Balwant Singh, was the nickname of Dhani, the leader of the gang. It is

right to say, however, that when Kesho after his confession was asked to identify these people on their arrest he identified Gajja and not Tulshi. One or two of the identifying witnesses also named one wrong man, but none of them made more than one mistake. Except that Gajja objected at the identification by Kesho that Kesho had known him before no objection appears to have been made to the identifications at the time. The witness Chokhe says that both Gajja and Kesho had *lathis* in their hands when he saw them at the dacoity. Against Tulshi there is the further damning circumstance that at the time of his arrest a fortnight after the dacoity 22 gunshot wounds were found in his left hand, buttock and thigh. The defences put forward by these appellants are most improbable, and I agree with the learned Sessions Judge and the Assessors that they are clearly guilty.

Daryao Singh is named by Balwant alone, but the learned Judge and the majority of the Assessors have accepted Balwant's evidence as reliable in this instance because it is corroborated by the evidence of the witness Nimmi. This man is a relative, probably the father's cousin, of Brij Lal, one of the dacoits who was shot dead, and was at Brij Lal's house when Brij Lal left home on the night of the dacoity. His evidence is that three men, the accused Daryao Singh, Girdhari Singh and Tilkha or Tilok Barhi, one of the two dacoits who were wounded and afterwards died, came to Brij Lal's house just after dark and whispered to Brij Lal in the court-yard. Brij Lal took up his *lathi* and *chadar* and went away with them. When Nimmi asked Brij Lal where he was going, he said "I am going somewhere, you had better go to sleep." He did not return. Next day the witness learnt that Brij Lal had been killed at the dacoity at Nakatpur. A week later he spoke about the matter to the *zemindar* of the village, and the *zemindar* appears to have informed the Police. Nimmi impressed the learned Sessions Judge as a truthful witness and no reason was suggested either in cross-examination or by Girdhari Singh or Daryao Singh in their statements before the Committing Magistrate as to why he should have given false evidence against them. In the Sessions Court Girdhari Singh suggested that Nimmi was a cousin of one Teja with whom he had enmity, but this suggestion put forward at this late stage does not carry any weight. After considering carefully the evidence of Nimmi I see no reason for overruling the opinion of the learned Sessions Judge in this matter. Against Girdhari Singh in addition to the evidence already considered against Daryao Singh there is also direct evidence of identification by three witnesses. The identifications have been attacked on the ground that Girdhari Singh is a one-eyed man and therefore easy to pick out. But, on the other hand this very circumstance may have served to impress his appearance on the minds of those witnesses who noticed him. As the learned Sessions Judge says, there has certainly not been any wholesale identification in his case, for only three out of fifteen identifying witnesses succeeded in picking him out.

Against the appellant Dilsukh the learned Sessions Judge has relied largely on the dying statement of Dhimmi which I have found to be inadmissible. Putting this aside the only other evidence against him is the statement of Balwant which the learned Sessions Judge has declined to accept where uncorroborated and the fact that he is mentioned in Kesho's confession. The only definite statement regarding this accused is that Kesho agrees with Balwant in saying that this accused is the man known among the dacoits as "*nashabaz*." It appears to me very doubtful whether the learned Sessions Judge would have convicted him if he had not accepted the statement of Dhimmi as conclusive against him. It appears to me that he must be given the benefit of the doubt, and I accordingly allow his appeal and acquitting him direct that he be set at liberty. The appeals of the other accused are dismissed.

K. S. D. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1104 OF 1923.

February 12, 1924.

Present:—Mr. Justice Moti Sagar.

JIMUN SHAH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), ss. 337 (2A), 347, re rospective operation of—Trial with approver—Committal to Sessions—Procedure.

A case under s. 401 of the Penal Code, in which there was an approver, was being tried by a Magistrate with powers under s. 30 of the Cr. P. C. After evidence had been recorded and arguments were heard, but before judgment was pronounced, the amended Cr. P. C. of 1923 came into force. The Magistrate nevertheless pronounced judgment in the case:

Held, that having regard to the provisions of s. 337 (2A) and 347 of the Code, the jurisdiction of the Magistrate to try the case had been expressly taken away, and he was bound to commit the accused for trial before the Court of Session. [p. 646, col. 2.]

Appeal from an order of the Magistrate, First Class, Ambala, dated the 5th September 1923.

Sheikh *Muhammad Monier*, for the Appellant.

Diwan *Ram Lal*, for the Respondent.

JUDGMENT.—The appellants in this case were tried by Chaudhri Sardar Khan, s. 30 Magistrate at Ambala, and arguments were addressed to the Court on the 1st of September 1923. Judgment was pronounced on the 5th of September 1923, five days after the new Cr. P. C. had come into operation, and the appellants were sentenced to various terms of imprisonment under s. 401 of the Indian Penal Code. The principal witness examined on behalf of the prosecution was one Bhura Singh who had been granted a pardon under s. 337 of the Cr. P. C. Now s. 337 (2A) provides that all cases in which there is an approver should be committed for trial to the Court of Session. Section 347 provides that if in the course of a trial before a Magistrate it appears to him before signing judgment at any stage of the proceedings that the case is one which ought to be tried by the Court of Session, he shall so commit the accused. The question for consideration is whether in view of the above two sections the Magistrate had or had no jurisdiction to proceed with the trial of the case after the new Cr. P. C. had come into force. It is admitted by the learned Counsel for the Crown that the provisions of s. 337 (2A) and s. 347 are mandatory in their nature and that the Magistrate was bound to commit and stop the proceedings as soon as the new Act had come into force. I have given a very careful consideration to this matter, and the conclusion at which I have arrived is that the convictions should be quashed and that the Magistrate should be directed to commit the accused for trial to the Court of Session. There can be no doubt that the accused were under trial before the Magistrate within the meaning of s. 347 as long as the judgment was not pronounced and I do not think that in the absence of a specific provision to the contrary, the fact that evidence had been concluded before the new Act came into operation could confer jurisdiction upon the Magistrate when that jurisdiction had expressly been taken away by the Act. As already observed, arguments were heard on the 1st of September and the proceedings were clearly pending before the learned Magistrate till the 5th of September 1923, when final orders were passed. The illegality was not one which could be cured under s. 537 of the Cr. P. C. and the convictions are, therefore, bound to be set aside.

I quash the convictions and send the case back to the learned Magistrate under s. 423 (*b*) of the Cr. P. C. with a direction that he should commit the accused for trial to the Court of Session.

Z. K. *Conviction quashed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 437 OF 1923.
(CRIMINAL REVISION PETITION No. 339 OF 1923).
February 1, 1924.
Present:—Mr. Justice Krishnan.

VELLURI JAGANNADH NAIDU—ACCUSED—PETITIONER

versus

CH. RAMA RAO, SANITARY INSPECTOR, ANAKAPALLI—COMPLAINANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 3 (21), 180, 347, 362—Encroachment on land on side of street—Offence—Limitation for prosecution.

An encroachment upon land by the side of a street, even though such land is uncovered by any pavement or other structure, amounts to an encroachment on the street within the meaning of s. 180 of the Madras District Municipalities Act. [p. 647, col. 1.]

Section 362 of the Madras District Municipalities Act deals with the removal of earth, sand or other materials or depositing such materials or making encroachment by depositing such materials on any land, river, estuary, canal, back-water or water-course. It has nothing to do with encroachment on streets. [*ibid.*]

The proviso to s. 347 of the Madras District Municipalities Act does not deal with a case under s. 362 of the Act, and a prosecution in respect of an act falling

under the latter section must, therefore, be instituted within the period of three months prescribed by s. 347. [*ibid.*]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Vizagapatam, in Criminal Appeal No. 4 of 1923, preferred against that of the Court of the Second Class, Magistrate, Anakapalle, in C. C. No. 391 of 1923.

Mr. *R. V. Rengaram*, for the Petitioner.

Mr. *K. Aravamuthu Iyengar*, for the Respondent.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.

ORDER.—In this case the petitioner has been convicted under ss. 362 and 313 of the District Municipalities Act V of 1920 and sentenced to pay a fine of Rs. 15 with two weeks' simple imprisonment in default. The facts found on which he has been convicted are that he built a buttress wall, to his compound wall, which projected on to the Municipal street adjoining it. This was, no doubt, an encroachment. Taking the definition of the word "street" in s. 3, cl. (21), encroachment upon the land by the side of a street, even though it is uncovered by any pavement or other structure would be an encroachment on the street. Section 180 would certainly apply to this case. But the lower Courts, though the accused was first charged under s. 180, have altered the charge because of the difficulty of the limitation of three months within which the prosecution has to be started for an offence under s. 180, to one under s. 362 of the District Municipalities Act. It is clear that s. 362 cannot apply to this case but that s. 180 is the section that really applies. Section 362 deals with the removal of earth, sand or other materials or depositing such materials, or making such encroachments by depositing such materials on land, river, estuary, canal, back-water or water-course. It has nothing to do with the encroachments on streets. It is not denied in this case that the prosecution under s. 180 must fail on the ground of limitation. Even if s. 362 were to apply, it seems to me that the prosecution will still fail under the three months' rule, as the proviso to s. 347 does not seem to deal with a case under s. 362 at all. The proviso deals with the failure to take out a license, obtain permission, or secure registration for doing certain things for which a license, permission or registration is required. The accused is not prosecuted for any failure to take out any license or obtain permission or secure registration. He has been prosecuted for encroaching upon a Municipal street by building a buttress wall to his compound wall. The case against him, therefore, fails on the ground of limitation and should have been dismissed. What exactly the Municipality should do for the purpose of getting the encroachment on the street removed will be for its own legal advisors to advise.

The petition is allowed, the conviction is set aside, and the fine, if paid, will be refunded.

V. N. V.
Z. K.

Petition allowed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 658 OF 1924.
September 15, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

MOHAN SINGH—APPELLANT
versus
EMPEROR—RESPONDENT.

*Evidence Act (I of 1872), ss. 32 (2), 35—Criminal Procedure Code (Act V of 1898), s. 154—First Information Report, admissibility of—Statement in First Information Report, value of—*Post mortem *report, admissibility of, after death of Doctor—Statements made in previous criminal trial, whether admissible in subsequent trial of different accused.*

A First Information Report is an official record made by a public servant in the discharge of his official duties and is admissible in evidence under s. 35 of the Evidence Act. By itself, however, the report would only prove that a certain person had made that statement and the contents of the report may be used as a corroborative piece of evidence to show that the implication of the persons mentioned in the report in the offence reported is not an afterthought. The probative value of the document does not go further and it cannot be used as a substantive piece of evidence in the case. [p. 648, col. 2.]

A *post mortem* report made by a Doctor who has since died is admissible in evidence under s. 32 (2) of the Evidence Act. [*ibid.*]

Statements of witnesses made in a criminal trial are not admissible in evidence after the death of the witnesses in a subsequent trial against an accused person who had no opportunity of examining the witnesses, nor is the judgment delivered in a previous trial admissible in a subsequent trial of a different accused person in respect of the same offence. [p. 649, col. 1.]

Criminal appeal from an order of the Sessions Judge, Aligarh, dated the 19th of August 1924.

Mr. *Guy P. Boys*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.—This is a criminal appeal from a conviction under s. 302 of

the Indian Penal Code, sentencing the appellant to death. The case is also before us for confirmation.

The murder is said to have taken place on the 7th of February 1916, but it is the prosecution case that the accused has been absconding all this time and hence the delay to bring him on his trial.

The case for the prosecution is that there was enmity between the appellant Mohan Singh and the deceased Baldeo Singh; as well as between the deceased and one Bhagwan Singh. Bhup Singh was a distant relation of these people, and it is said that his wife or mistress had died shortly before the murder and there was a *shradh* ceremony going to be performed. Bhup Singh had invited these men, and Mohan Singh and Bhagwan Singh had refused to join the ceremony unless Baldeo also went there. Ultimately Baldeo consented to go to the ceremony. Mohan Singh, Bhagwan Singh and Baldeo Singh started together, accompanied by Shib Singh, who was then a boy of 14 years. When they got near the village in question they met Bhup Singh and also one Purni barber and Jiwan, a washerman. It is said that in anticipation of the ceremony they had to get their heads shaved. While Baldeo Singh was being shaved Mohan Singh got up and struck *lathi* blows on his head which felled him to the ground. Bhagwan is also said to have given some *lathi* blows; and ultimately Mohan and Bhagwan both ran away. Baldeo Singh died very probably on the spot.

Bhagwan Singh was arrested and put on his trial and was convicted and sentenced to transportation for life, and his conviction and sentence were on appeal upheld by the High Court.

On the day in question a report was made at the Police Station by a man named Shibni, who is now dead, to the effect that he actually saw *lathis* being used, and that Mohan Singh, Bhagwan Singh and Gulab (who is a witness for the prosecution in the present case) were striking Baldeo Singh, Thakur, with *lathis*, and that Baldeo Singh was lying on the ground. This witness was accompanied by a *Chaukidar*, named Dhan Singh, who is also now dead. It is also a fact that the Head Constable, who took down the report, is now dead. The Sub-Inspector, who investigated the original case, has now retired and the prosecution has not been able to find out where he now lives.

It is also unfortunate that some of the witnesses who were examined in the case against Bhagwan Singh are also dead. These are Shibni, Rajwa, Jiawan, and Farid-ud-din who recorded the First Information Report.

It is necessary at the outset to consider the admissibility of some pieces of evidence, which were brought on the record in this case.

As to the First Information Report, it may be noted that the general diary having been destroyed, was not formally proved in this case. Reliance on behalf of the prosecution was placed on the First Information Report, recorded by the Head Constable. Under para. 90 of Ch. IX of the Police Regulations the officer-in-charge of a Police Station is required to take down in triplicate in the check receipt book (First Information Report) any information relating to the commission of an offence. One of these three records is the document which has been brought on the record in this case. It is clear to us that it will be very difficult to exclude it from the scope of s. 35 of the Evidence Act as being an official record made by a public servant in the discharge of his official duties. But this report would at the very best only prove that a certain person since dead had made that statement. The contents of the report may, therefore, be used as a corroborative piece of evidence to show that the implication of the appellant in the murder is not an after-thought. It certainly will be relevant to establish that he was named at the very start. Beyond this it is difficult to rely on it, and the probative value of this document does not go further. It certainly cannot be used as a substantive piece of evidence.

The next piece of document is the *post mortem* report made by the Civil Surgeon, who is also unfortunately now dead. This was done at the hospital when the dead body of the deceased was taken there. The evidence of the witness Nawab Singh proves that he had accompanied the dead body to the hospital and it was the body of the deceased Baldeo Singh which was examined by the Civil Surgeon. Thus there can be no question as to its identity. This report would be admissible under s. 32 (2) of the Evidence Act as being a statement made by a dead person in the

ordinary course of business and in the discharge of his professional duty. As we shall show later, even independently of this report, there is plenty of evidence to show that the head of the deceased was smashed and he died in consequence of these injuries.

The statements of other alleged eye-witnesses made in the previous trial, who are now dead, cannot now be adduced in evidence against the appellant, who had no opportunity of examining them, nor can the judgment delivered in that case be admissible in this case.

We may also note that it has not been proved satisfactorily that any proclamation under s. 88 of the Cr. P. C. had been issued against the appellant. The evidence in support of this consisted of the statement of Mahmud Husain, Constable, who was examined only in the Magistrate's Court and not examined before the Sessions Judge.

Excluding the evidence which is inadmissible, we find, however, that there is plenty of evidence to bring home to the accused the guilt with which he is charged.

As to the actual motive which may have led him to join with Bhagwan Singh in the crime, the evidence of Nawab Singh is very clear. It appears that Mohan Singh and Baldeo Singh were on very bad terms. One Bhajan Brahman who had been an absconding offender, was sheltered by Mohan Singh. Baldeo had him arrested at Mohan Singh's *chaupal* and had given information to the Police about it. This was some five months before the murder. Bhajan was ultimately sentenced to imprisonment.

The second incident is that there was a dacoity at a village some six miles from the village of these persons, and Baldeo Singh gave information which led to the arrest of Mohan Singh and others. The witness Nawab Singh has stated that when arrested Mohan Singh said openly that Baldeo had given that information and he would have revenge on him. Nawab Singh also stated that Baldeo gave evidence against Mohan Singh. Then again there was a quarrel between Mohan Singh and Baldeo Singh as regards some wall between their houses which Baldeo wanted to repair but Mohan Singh would not let him. It is also stated that Mohan Singh had admitted that he gave information that Baldeo Singh and another person had stolen the bricks for building the wall in dispute from a Railway bridge, on which Baldeo was prosecuted for theft but was ultimately acquitted. This was some 7 or 8 months before the murder. Lastly there was some dispute as regards the occupancy tenancy left by one *Musammat* Ramuda. Mohan Singh was anxious that Baldeo Singh should not take it and he declared openly that if Baldeo did receive it he would not long survive it. It is, therefore, apparent that there must have been more than one reason why the accused might have committed the assault on the deceased.

We may at the outset say that we find it difficult not to reject the evidence of Gulab altogether. If the First Information Report is legally acceptable, then it may be used to shake the credibility of the witness Gulab Singh in this way, that he was also one of the persons on whom suspicion had fallen as being one of the three assailants. If this be so, then his statement cannot be safely accepted.

As against the evidence of Nainsukh which is to the effect that he saw from a distance Mohan Singh running away with a *lathi* in his hand, and that when he went to the spot from where he had heard the noise, he found the deceased lying on the ground unconscious, it is alleged that in the First Information Report Gulab was actually named as one of the assailants, whereas according to the evidence of Nainsukh as given now, he and Gulab were at the field of Gulab together.

Even rejecting the evidence of Gulab and Nainsukh there still remains the statements of the lad Shib Singh and the barber Purni. It is strongly urged on behalf of the appellant that Shib Singh has not told the whole truth and that his evidence shows that there has been an attempt on his part to shield Gulab Singh and minimise the complicity of Bhagwan inasmuch as he has said that Bhagwan hit him after Baldeo had died and he also said that Gulab was not there at all. Whether this contention is well-founded or not, we have no doubt in our mind that the story told by Shib Singh is substantially true. There is no doubt that he was in the company of these persons on the day in question, and, therefore, must have been an eye-witness to what happened. His evidence is further corroborated by the barber Purni, who has also stated that he saw Mohan Singh who struck the first blow on the head of the deceased,

What actual part Bhagwan Singh took it is not now necessary for us to say; but there can be no doubt that Mohan Singh struck the first blow, and this blow fell on the head. The evidence of Shib Singh is that the deceased began to blead from the nose and mouth and collapsed on the ground and died, and his head was smashed to pieces. This is corroborated by the medical report, which we have already held to be admissible.

Having regard to this evidence we have no doubt in our mind that the accused was guilty of the offence of murder. From the nature of the injuries inflicted, even if there had been no intention of causing the death of the deceased, which we are far from saying that it was not, the accused must have known that the injuries were imminently dangerous and likely to cause death.

The only other matter which remains for consideration is the question of sentence. We have already mentioned that the other assailant Bhagwan was transported for life, and that sentence was confirmed by the High Court on appeal. The present accused attacked the deceased in the presence of a number of persons, and it is unfortunate that those persons did not come to the rescue of the deceased in time so as to save him from receiving the fatal injuries. The accused has been absent from the village for a long time and, according to the Sub-Inspector, even though search was made for him he was not found. His trial, therefore, has come on after several years. Having regard to the special circumstances of the case we are of opinion that it would serve the ends of justice if we imposed a sentence of transportation for life on the appellant. We may add that we do not think that this would in any way be putting a premium on absconding.

We accordingly uphold the conviction of the appellant, but allow the appeal to this extent, that we set aside the sentence of death passed on him and direct that in lieu thereof he be transported for life.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 502 OF 1924.

September 19, 1924.

Present:—Mr. Justice Sulaiman.

CHITTAR SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 154, 157, 158—Evidence Act (I of 1872), s. 35—First Information Report, what amounts to—Statement recorded during investigation, whether first information—First Information Report, whether substantive evidence—Statement, oral, made to Police during investigation, whether can be proved.

Section 154 of the Cr. P. C. contemplates that the first information of the commission of an offence actually received by the Police should be recorded as such and not a statement made by a witness during investigation after the investigating officer has actually arrived on the scene and has himself seen what has happened. [p. 651, col. 2.]

King-Emperor v. *Daulat Kunjra*, 6 C. W. N. 921, followed.

A First Information Report taken down by a Police Officer amounts to an entry in an official record stating a fact in issue and made by a public servant in the discharge of his official duty and in the performance of the duty especially enjoined upon him under which such record is kept and, therefore, falls within the scope of s. 35 of the Evidence Act and is a relevant fact. But it is not a substantive piece of evidence and is no evidence of the existence of the facts which it mentions. It can be used merely by way of corroboration or contradiction and not any further. [p. 652, col. 1.]

Queen-Empress v. *Ramsukh*, A. W. N. (1897) 47, *Afsar Sheikh* v. *Emperor*, 8 Ind. Cas. 52; 15 C. W. N. 198; 11 Cr. L. J. 557 and *Autar Singh* v. *Emperor*, 21 Ind. Cas. 882; 17 C. W. N. 1213; 14 Cr. L. J. 642, relied on.

Where a person who is alleged to have made an oral statement to the Police during the investigation of a case denies at the trial that he made any such statement, the alleged statement cannot be proved by the evidence of persons who claim to have heard it at the time when it was made, nor is such evidence admissible. [*ibid.*]

Criminal appeal from an order of the Sessions Judge, Farrukhabad, dated the 27th May 1924.

The Government Pleader, for the Crown.

JUDGMENT.—After some hesitation I have come to the conclusion that the appellant must be acquitted. The hesitation has been due to the fact that there is a reasonable ground for suspicion that some witnesses who might possibly have had some definite knowledge appear to have withheld it.

There can be no doubt that Kindar Singh who is an old man of seventy years of age was murderously attacked early on the morning of the 3rd of February 1924 in his cattle-shed in the village Birra Nagla. He receiv-

ed several serious injuries on the head but fortunately recovered. The appellant is the own brother of Kindar Singh who has another brother named Sundar Singh. The three brothers are apparently separate from each other and occupy separate houses. Kindar Singh has two daughters but no son, and the accused has three sons.

The case for the prosecution is that the accused is in debt and that he was angry with Kindar Singh because the latter had refused to bequeathe his *zemindari* to the sons of the accused. The prosecution evidence is that the accused was seen striking Kindar Singh by two young boys Ram Singh and Havildar, who had gone to Bachan, son of the accused, early in the morning to call him to take his cock for fighting with the cock of Munshi Singh. The two boys ran away to Dhanpal Singh, father of the boy Ram Singh, who happened to be sitting on the *chaupal* of Munshi Singh and where two Constables Ram Datt and Bisal were also sitting. They gave information of the murderous attack. The Constables sent Mithu *chaukidar* to inform the Sub-Inspector who was in a neighbouring village. The Constables accompanied by Dhanpal Singh went to Birra Nagla, where many other people were also gathered. They saw Kindar Singh lying seriously wounded. Bachan Singh the accused's son is said to have given them all the facts and told them that he had locked up his father. At the request of the Constables he brought out the accused from inside the house and also gave up a chopper stained with blood. The Constables arrested Chittar Singh and kept him bound. About half an hour after this Gobardhan, Sub-Inspector, arrived. He examined Kindar Singh who could not then speak and went inside the cattle-shed and saw blood lying on the earth. He found the accused under arrest and examined the chopper. He took possession of the blood-stained *kurta* and *dhoti* of the accused. He prepared a recovery note and got it signed by witnesses. He also took possession of other articles which had blood stains on them. He also took down the statement of *Musammat* Mohan Kuar, the wife of Kindar Singh, on plain paper as he had no forms with him. He took her thumb-impression on it and got some witnesses to attest it. He treated the statement of *Musammat* Mohan Kuar as the First Information Report.

The first difficulty in the way of the prosecution was that neither Kindar Singh nor Sundar Singh, nor the sons of the accused, nor even *Musammat* Mohan Kuar, the wife of Kindar Singh was prepared to state anything which would implicate the appellant. The case against the appellant, therefore, rests entirely on (1) the statement of *Musammat* Mohan Kuar as taken down by the Sub-Inspector and treated by him as the First Information Report; (2) certain statements said to have been made by Bachan Singh when the Constables arrived on the scene and the giving up of the chopper by Bachan Singh; (3) the statement of Ram Singh and Havildar Singh and (4) the statement of Bisal Singh Constable that when Chittar was brought out by Bachan Singh, he was grinding his teeth and said "he is not dead," it being implied that he was referring to Kindar Singh. As against this there are the denials by *Musammat* Mohan Kuar, Bachan Singh, Sundar Singh and other witnesses that the assailant had not been recognised and was not named.

It is necessary to examine each of the various pieces of evidence separately, as it seems to me that much which was legally inadmissible has been brought on the record and wrongly relied upon.

The first piece of evidence which requires consideration is the so-called First Information Report. There are two fatal objections to its admissibility. In the first place it was by no means a First Information Report. Ram Datt and Bisal Constables had received information from Ram Singh and Havildar and had deputed Mithu *chaukidar* to inform the Sub-Inspector. The Sub-Inspector who was the officer-in-charge of the Police Station received the first information from Mithu *chaukidar* even though that information was a second hand one. As the offence complained of was a cognizable one, the officer should have treated that information as the first information. Section 154 of the Cr. P. C. clearly contemplates the first information received to be recorded, and not a statement made by a witness during investigation after the Sub-Inspector has actually arrived on the scene and himself seen what has happened. In this connection I may refer to the case of *King-Emperor* v. *Daulat Kunjara* (1).

In the next place it seems to me that even if the statement made by *Musammat*

(1) 6 C. W. N. 921.

Mohan Kuar be treated as the First Information Report, such a report by itself is no evidence of the existence of the facts which it mentions. Technically speaking it may be conceded that a First Information Report taken down by a Police Officer amounts to an entry in an official record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty and in the performance of a duty especially enjoined by law, under which such record is kept, and, therefore, falls within the scope of s. 35. But that would simply make it a relevant fact; and all that it would prove would be that *Musammat* Mohan Kuar made a statement at that early date, implicating the accused and that, therefore, the present mention of his name is not an after-thought. But the First Information Report is not a substantive piece of evidence; it can be used merely by way of corroboration or as a contradiction and not any further. Had *Musammat* Mohan Kuar made a similar statement on oath in Court, the report made by her previously would have been used in evidence to corroborate her. Or if she had made any contradictory statement, the defence might have used the report to contradict her. But when *Musammat* Mohan Kuar has altogether denied that she made any such report and denied that it was the accused who struck Kindar Singh any previous statement made by her cannot be admitted in evidence at all. Sections 157 and 158 of the Evidence Act would be altogether inapplicable. This was the view clearly expressed in the case of *Queen-Empress* v. *Ramsukh* (2). where it was held that a report of the commission of an offence made at a *thana* or even the deposition of a witness previously made would be admissible for the purpose of corroborating him or of throwing doubt on his statement in Court, but would be inadmissible for the purpose of proving that the facts stated in it are correct. The same view has been expressed by the Calcutta High Court. Vide the case of Afsar *Sheikh* v. *Emperor* (3) and *Autar Singh* v. *Emperor* (4).

The so-called First Information Report must, therefore, be altogether rejected. It is curious that although it is said that Bachan also had given out the facts, no statement in writing made by Bachan was taken down. The Sub-Inspector has admitted that *Musammat* Mohan Kuar, like Mithu *chaukidar*, was not an eye-witness of the facts.

Coming to the statements said to have been made by Bachan Singh, it is manifest that they should not have been used in evidence against the accused when Bachan Singh denies that he made any such statements. The prosecution witnesses admit that none of them saw Bachan Singh locking up his father. They can by their evidence prove that when requested by the Head Constables Bachan Singh brought out his father from inside the house but they cannot prove what Bachan told the Constables before the accused were brought out. The fact that Bachan Singh gave up the chopper which was stained with blood merely proves that the chopper was in the house. But it is of very little value in fixing the guilt on the accused. The fact that the accused had blood stains on his clothes might not be of much great importance inasmuch as when so much blood was spilled all around, near relations who might have helped in stanching the blood must have had such stains. In fact, the oral evidence of the relations, including Kindar Singh himself, is that the accused also went to help him.

The direct evidence consisted of the statements of Ram Singh and Havildar Singh. Ram Singh is the son of witness Dhanpal Singh who for sometime before the occurrence had been under a Police surveillance. Havildar is the distant nephew of Munshi Singh of whom Dhanpal is the maternal uncle. Kindar Singh has stated that there was a dacoity committed on him and his brother the present accused many years ago and one Devi Singh and his brother-in-law Ram Prasad were convicted of it, and that Havildar is a nephew of Devi Singh. He also added that the *mukia* of the village had taken his brother's wife as his mistress in the *Magh* before the occurrence and that there had been some enmity with him in consequence of it. Dhanpal Singh in his cross-examination has admitted that Devi and Ram Prasad were convicted of the dacoity which took place at the accused's house but Devi was acquitted. Dhanpal said that Devi was the brother of Havildar's father. He also admitted that some 7 or 8 months before Jhunku Singh *mukhia* had brought the

(2) A. W. N. (1997) 47.
(3) 8 Ind. Cas. 52; 15 C. W. N. 198; 11 Cr. L. J. 557.
(4) 21 Ind. Cas. 882; 17 C. W. N. 1213; 14 Cr. L. J. 642.

widow of Kamta Singh the brother of the accused to his house. In this state of feelings it is apparent that even though the near relations of Kindar Singh including Kindar Singh were prepared to protect Chittar Singh, there were persons in the village who might have had a motive to get him implicated nevertheless.

The first objection to the evidence of the two boys is that the learned Sessions Judge himself has rejected the most important part of it. He felt that there was a possibility that interested persons might have induced these boys to depose to more than what they had actually seen as they remained on the *chabutra* and from the evidence on the record the learned Judge thought it more than doubtful whether standing on the *chabutra* they could have seen what was going on inside the cattle-shed. Further, the statements which these boys made to the Sub-Inspector left it doubtful whether they actually saw the accused striking the blows. For these reasons the learned Sessions Judge thought it safer to reject the evidence of these two boys so far as it went to say that they saw the accused striking the blows. He, however, thought that from the evidence of these boys supported by the evidence of Munshi Singh and the First Information Report there could be no doubt that Bachan Singh promptly shut his father up in his house. I have already rejected the First Information Report. The statement of Munshi is based entirely on what he was told by Bachan Singh as Munshi has admitted that although he had told the Magistrate that Bachan had been holding the accused at the door and that he took him inside his house, it had really happened before the witness' arrival. When the witness arrived, the accused had already been taken inside. Thus there remains nothing but the statement of these boys.

When the main part of the story that they saw the accused striking Kindar Singh is not to be believed what guarantee is there that their evidence that Bachan Singh shut Kindar Singh promptly was true? It seems to me that the story told by the boys that they went to Bachan Singh at that early hour of the morning to ask him to take his cock for a fight is itself a little suspicious. Munshi Singh has admitted that he did not tell Havildar Singh and Ram Singh to fetch Bachan Singh with his cock on any particular date, but that a day or two before the occurrence he had mentioned to them to call Bachan Singh for a cock-fight. If no date had been fixed by Munshi Singh it is not likely that the boys would go out early in the morning with a message to Bachan Singh. Under these circumstances I am not prepared to accept the evidence of these boys when their main story that they heard the alarm and saw Kindar Singh being struck is not to be accepted.

The statement of Bisal Singh Constable that when the accused was brought out he was grinding his teeth and saying that Kindar Singh was still alive is altogether uncorroborated. Munshi, Dhanpal and Ram Datt were examined before Bisal Singh. They all admittedly were present when the accused is said to have been brought out and yet none of these three persons mentions anything of the kind. It is also said that a number of other persons also were present there but no other witness is forthcoming. I, therefore, feel great difficulty in relying on this supposed incriminating conduct of the accused when there is no other evidence to corroborate the statement of Bisal Singh Constable.

The evidence of the Sub-Inspector as well as of the other witnesses for the prosecution is more or less formal, and does not directly implicate the accused.

On the other hand, I have already remarked that Kindar Singh himself has sworn that he was attacked by some one from behind and struck several blows on the head with a sharp instrument, but that he did not know who had struck him. He remembered that his brother Sundar Singh came and picked him up and that Chittar Singh also came after Sundar Singh. He stated that the accused also helped to wipe the blood. I have already noted that none of the relations of Kindar Singh have said anything against the accused in Court. Neither the wife nor the daughters of Kindar Singh stated that Chittar Singh was the assailant, nor does his brother Sundar Singh say so. *Musammat* Mohan Kuar is said to have gone back on the statement made by her to the Police. Bachan Singh denies having made any statements to the Police which would implicate the accused. Two other witnesses Hasan-ud-din, a Railway employee and Dular Singh a *zemindar*, say that Chittar Singh was standing close when Sundar Singh was stanching the blood of Kindar Singh, and that they were told that the assailant had not been recognized.

It may possibly be that for some reason or other Kindar Singh and the other relations of the accused have decided not to say anything against him, and have in fact tried to shield him, assuming of course that he was guilty. Even though one may have a suspicion of this kind it is impossible to uphold the conviction unless there is some reliable legal evidence in support of it.

Having considered the case in detail I am constrained to come to the conclusion that the evidence that remains after rejecting all that is inadmissible, is totally insufficient to establish the guilt of the accused.

I accordingly allow this appeal and setting aside the conviction and the sentence passed on the appellant, acquit him of the charge and order that he be released forthwith.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 590 OF 1923.

January 17, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

ANATH BANDHU NUNDY AND OTHERS—2ND PARTY—PETITIONERS

versus

WAHID ALI PRAMANIK AND OTHERS—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 147—Proceedings under s. 145—Conversion into proceedings under s. 147.

Where proceedings under s. 145 of the Cr. P. C. are instituted on the basis of a Police report which states that there is an imminent risk of a breach of the peace, but the Magistrate subsequently discovers that the question at issue is not one of possession under s. 145, but is one as to a right falling under s. 147 of the Cr. P. C., he has jurisdiction to convert the proceedings from those under s. 145 into those under s. 147. [p. 655, col. 2.]

Rule against an order of the Deputy Magistrate, Shahazadpur.

ARGUMENTS.—Babu *Narendra Kumar Bose* (with him Babu *Dinesh Chandra Roy*), for the Petitioners.—There was a long standing dispute about the present fishery rights. The Magistrate in January 1923 made an *ex parte* order, as he considered a breach of the peace imminent, under s. 144, Cr. P. C. My clients, however, had that order discharged. But that very day proceedings under s. 145, Cr. P. C., were instituted. After sometime curiously enough the Magistrate, turned these proceedings into those under s. 147, Cr. P. C. This procedure is unwarranted in law and very prejudicial to my clients. Your Lordship will kindly consider that at that time there was absolutely no apprehension of the breach of the peace. Moreover this conversion, has confused the whole issue. What the Magistrate ought to have done was to initiate fresh proceedings under s. 147, Cr. P. C. instead of such conversion. Moreover, the learned Magistrate has failed to conduct the proceedings properly inasmuch as he has not allowed my clients to cross-examine the prosecution witnesses after the conversion. This should have allowed because they were to be cross-examined in light of the altered proceedings. This amounted to material irregularity.

If a doubt arised as to your Lordship's power of interference, it is now much wider than that under s. 167 of the Government of India Act.

Mr. *B. Chakravarty* (with him Babu *Hiralal Chakravarty*), not called on to reply.

JUDGMENT.—This Rule was granted on the 11th of January last againat an order passed by the Deputy Magistrate of Shahazadpur ordering that the second party should not take possession of certain water to the exclusion of the enjoyment of the right of use of the first party during the period, *Aswin* to *Chait*. In the month of January 1923 a report was made by the Police to the Magistrate with regard to the likelihood of a breach of the peace as to the fishery which was in dispute in these proceedings. The Magistrate considered on the report that the matter was urgent and that the breach of the peace was imminent and accordingly he issued an order under s. 144 of the Cr. P. C., on the second party to prevent them interfering with the fishery. He made the order *ex parte* and gave the second party leave to come in to discharge the order. This they did on the next day which was the 20th January 1923. The Magistrate thereupon discharged the order which he had made under s. 144 and on the same day, that is, on the 23rd January he drew up proceedings under s. 145 of the Cr. P. C. These proceedings went on for sometime and the first party

examined a considerable number of witnesses, we think, some 11 in all, and one witness was examined on behalf of the second party. On the 16th April 1923 the Magistrate is said to have converted these proceedings under s. 145 into proceedings under s. 147 of the Cr. P. C., because it was then realized that the question at issue was not one of possession under s. 145 but one as to rights falling under s. 147 as the first party were claiming an exclusive right of fishery to the fishery in dispute between the months of *Aswan* and *Chait* each year. The second party proceeded to deluge the file of the Magistrate with a series of petitions. They objected to the change of proceedings, from proceedings under s. 145 to proceedings under s. 147 and said that the Magistrate had no jurisdiction to deal with the matter in this way. Having failed to convince the Magistrate on this point they then proceeded to ask that the Exhibits should be re-numbered. They then apparently filed a petition asking that the first parties witnesses should be re-called for cross-examination. The Magistrate in the order which he has passed seems to have either forgotten or misapprehended this petition because he says that the second party did not want to cross-examine again and they really acquiesced in what has been done with regard to these proceedings. Proceedings then continued, petitions being filed at intervals reiterating the same points and ultimately the Magistrate made the order to which we have referred.

Three main points have been urged before us on behalf of the second party. First, it is said that at the time the 145 proceedings were changed into proceedings under s. 147 on the 3rd *Baisakh* there was no likelihood of any breach of the peace inasmuch as the months of *Aswin* and *Chait* had passed and the first party did not claim to exercise any right of fishery until these months recurred in the next year. Secondly, it is said that the second party have been prejudiced by the fact that when the Magistrate changed the 145 proceedings to proceedings under s. 147 no fresh proceedings were drawn up and it is suggested on behalf of the second party that they did not in consequence realize or know what exactly the Magistrate was going to try and what exactly the dispute was about. Thirdly, it is said that the second party have been prejudiced because they were not allowed to have the witnesses of the first party re-called for cross-examination when the change in the procedure took place. Now having had the facts very fully laid before us by the learned Vakil for the second party and very fairly placed before us if I may say so, it does not seem to me that there is really any substance in any of these three points. Whether you treat the proceedings as really in fact proceedings all along under s. 147, although they were originally drawn up under s. 145, or whether you treat the change on the 3rd *Baisakh* as new proceedings, it seems to us that the Magistrate had jurisdiction, having regard to the fact that at the time the proceedings were instituted there was an imminent risk of a breach of the peace and the fact that he had before him the Police report so stating. So far as the second point is concerned we are not satisfied that the second party have really been prejudiced. We think it is quite evident that they really knew what the real issue was and upon what question the evidence had to be called.

Thirdly, on the question of cross-examination I am not satisfied myself that the question of cross-examination was really pressed on behalf of the second party. If it had been pressed and if they had satisfied the Magistrate that they really had some questions to ask we think that there is no doubt that the Magistrate would have acceded to the request. But after all they are really themselves to blame not concentrating on this point instead of putting in a lot of frivolous petitions which the Magistrate quite rightly took no notice of. Therefore, so far the third point is concerned we do not think that this point was really pressed on behalf of the second party and we think that we should not interfere on this ground.

It is said that under the provisions of s. 439, of the Code our powers are wider than they were under the Government of India Act before the change in s. 439 came in. This is perfectly true but having considered the whole of the facts and circumstances placed before us we do not think that there is really any substance in the complaint of the second party or that they have really been injured by the course that the proceedings took.

In the circumstances we discharge the Rule.

Z. K. *Rule discharged.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 581 OF 1924.
November 5, 1924.
Present :—Mr. Justice Mukerji.
HAJI ALI—APPLICANT
versus
EMPEROR THROUGH ALI ASGHAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144, action under, when to be taken—Nuisance—Remedy of complainant—Civil dispute—Duty of Court.

It is not proper that Criminal Courts should take upon themselves to decide what are really civil disputes. [p. 656, col. 2.]

Action should be taken under s. 144 of the Cr. P. C. only in urgent cases of nuisance or apprehended danger. Action under the section should not be taken at the instance of a party who can easily remedy the consequences of the act complained of and whose complaint is really of a civil nature and can be properly adjudicated upon in proceeding in a civil suit. [*ibid.*]

Criminal reference made by the Sessions Judge, Benares, dated the 30th September 1924.

Dr. *M. Waliullah*, for the Applicant.

Mr. *M. A. Aziz*, for the Opposite Party.

JUDGMENT.—It is a Reference by the learned Sessions Judge of Benares recommending that certain orders passed by two successive Magistrates may be set aside.

It appears that the parties to this Reference, *viz.*, Haji Ali, the applicant and Ali Asghar, the opposite party are close neighbours. Ali Asghar went before the Joint Magistrate of Benares with the complaint that the rain-water of his house used to flow through the house of Haji Ali, that Haji Ali had closed the drainage and that his (Ali Asghar's house) was in danger. He wanted the Magistrate to take action under s. 144 of the Cr. P. C. and order Haji Ali to remove the obstruction. The learned Joint Magistrate called for a Police report and on receipt of it passed an *ex parte* order on the 29th of August 1924 ordering Haji Ali to open the drain. Haji Ali took exception to this order and appeared before another Magistrate, the learned Joint Magistrate being absent from the station. At Haji Ali's request Mr. J. N. Singh, a Magistrate, ordered the Naib Tahsildar to put up a report. The Naib Tahsildar on inspection came to the conclusion that it was impossible for him to say definitely how the water flowed. He, however, discovered that from the remaining portions of the house of Ali Asghar the water found its way out towards the south where there was a main drain and he thought and reported that Ali Asghar could take the same measure with the water of that portion of the house about which the controversy was. Mr. Singh was of opinion that there was no reason to interfere with his predecessor's order and refused to amend it. Thereupon Haji Ali went before the learned Sessions Judge.

The learned Sessions Judge has stated the facts in a slightly different manner but that does not really affect the merits of his recommendation. It appears to me that any urgency in the affair is wanting. An action should be taken under s. 144 only in urgent cases of nuisance or apprehended danger. It is not proper that Criminal Courts should take upon themselves a jurisdiction to decide what are really civil disputes. The Naib Tahsildar's report shows that it was open to Ali Asghar to take measure with the excess water accumulating in his court-yard by draining it off towards the south. He had his remedy open in the Civil Court and that was his proper remedy. If it had been the case that water could not find its egress by any means within the disposal of Ali Asghar, the matter would have been different.

In the circumstances of the case I accept the recommendation of the learned Sessions Judge and set aside the orders of the learned Magistrates dated respectively 29th August 1924 and 11th September 1924.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 350 OF 1922.

August 4, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

Kumar BIRENDRA CHANDRA SINGHA BAHADUR AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

TULSI CHARAN GHOSE AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Stay of execution, surety for—Application against surety, whether saves limitation against judgment-debtor—Application for leave to continue execution proceedings—Step-in-aid of execution.

A person who undertakes, during the pendency of an appeal by a judgment-debtor, to pay a certain sum of money in the event of the appeal being dismissed, as a condition for the stay of execution during pendency of the appeal, does not become a joint judgment-debtor with the principal judgment-debtor within the meaning of the 2nd paragraph of Explanation (1) of Art. 82 of Sch. I to the Limitation Act, and an application for execution against such a person does not operate to save limitation against the judgment-debtor. [p. 660, col. 1.]

An application for permission to execute a decree by the representatives of a deceased decree-holder is a step-in-aid of execution which gives a fresh start to the period of limitation; but where such an application is made against a person who is not a joint judgment-debtor, the application operates to save limitation only as against such person and not as against other judgment-debtors in the case. [p. 659, col. 2.]

Appeal against an order of the Subordinate Judge, Third Court, Hooghly, dated the 17th of July 1922.

Babus *Mohendra Nath Roy* and *Ramani Mohan Chatterjee*, for the Appellants.

Babu *Bhupendra Kumar Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings which originally were instituted in the Court of the Subordinate Judge of Hooghly. The predecessor of the present decree-holders (appellants) obtained a rent-decree in respect of a *putni* against the predecessor of the present judgment-debtors on the 10th August 1909 for Rs. 19,000. Several infructuous proceedings towards execution of these decrees were made to which we need not refer and in 1914 the decree was transferred to the Court of the Subordinate Judge of Howrah for execution. In that Court on the application of the decree-holder in Execution Case No. 1 of 1914, the defaulting tenure was advertised for sale. The judgment-debtors preferred some objections to the execution which were disallowed. They preferred an appeal to this Court and applied for stay of the sale pending the hearing of the same. The order of this Court was that the sale should be stayed on the judgment-debtors obtaining certain persons to stand as sureties for a sum of Rs. 15,000. The surety-bond was duly executed by four persons and the sale was stayed. The judgment-debtors' appeal was eventually dismissed by this Court on the 20th November 1914. The decree-holder then applied for execution against the judgment-debtors in Execution Case No. 7 of 1915. The tenure was sold but the sale was subsequently set aside. In that execution case no relief was sought against the sureties. The next execution was taken against the sureties only in Execution Case No. 14 of 1915. Some amount was realised by the arrest of one of the sureties and after that the execution proceeding was struck off. Thereafter on the 15th May 1915 in a *putni* sale at the Collectorate the decree-holder put this *putni* to sale for rent of a subsequent period (*i. e.*, 1321) and purchased the same for Rs. 1,000. On 7th September 1915 the decree-holder again applied for execution in Execution Case No. 21 of 1915 against the sureties only. The sureties raised various objections to execution proceedings against them and the objections were allowed and the execution case dismissed on the 30th September 1915. The decree-holders appealed to this Court and on 23rd August 1918 it was ordered by consent of parties that the case should be remanded to the Executing Court for ascertaining the amount of damages that the decree-holder might have sustained by the stay of the sale in Execution Case No. 1 of 1914. The Subordinate Judge assessed the damages at Rs. 9,000 and ordered execution for that amount against the sureties. The sureties appealed to this Court against that order and the appeal was allowed on the 2nd July 1920 and it was held that the sureties were not liable for any amount under the surety-bond in view of its nature and wording. The execution against the sureties was accordingly dismissed on 23rd November 1920. In the meantime, on the 18th August 1916 during the pendency of these proceedings against the sureties the decree-holders had applied for execution in Execution Case No. 24 of 1916 against the judgment-debtors. This execution case was dismissed on 14th Feb-

ruary 1917. Further, during the pendency of the appeal in this Court the original decree-holder died and on 11th January 1919; there was an application for substitution in the proceedings against the sureties by the heirs, and substitution was made after notice to them and to the judgment-debtors on 26th April 1919. There was another execution case started by the appellants against the original judgment-debtors on 3rd August 1921. But it was not proceeded with as during its pendency the present application, which gives rise to this appeal, was made on 10th December 1921 for execution of the decree against the judgment-debtors only. The judgment-debtors preferred objections to this execution on the grounds of want of jurisdiction of the Executing Court and of limitation. With regard to jurisdiction, the Court below found against the respondents and as there is no appeal against that finding, that question is now set at rest. On the question of limitation the learned Subordinate Judge held that the present execution case is barred under Art. 182, Limitation Act. Against this decision of the Court below the present appeal is directed.

The grounds on which the Court below has based its decision is that as no step was taken by the decree-holders to execute the decree against the original judgment-debtors within three years from August 1916, the present execution against them is barred by limitation as the execution taken against the sureties and the substitution in the case against them of the heirs of the original decree-holders did not give a fresh start to the period of limitation as against the principal debtors. Against this view the appellants have taken two main objections.

It is argued that the Execution Case No. 21 of 1915 against the sureties which was ultimately dismissed on 23rd November 1920 is effective to save limitation against the judgment-debtors also. It is, therefore, necessary to give a precis of that application. In the first column the names of the appellants-decree-holders and those of the judgment-debtors and the sureties are mentioned. In the next column the date of the decree is given. In another column the amount of decree is mentioned and there is a statement of the several executions taken against the judgment-debtors as well as the sureties. In the next column which requires mention of the person against whom execution is sought it is stated that the execution is prayed against the sureties only. There is no prayer for execution against the original judgment-debtors. In the next column under the heading the amount for which execution is sought it is stated that out of Rs. 21,000 odd (the amount payable under the original decree) execution is prayed for Rs. 15,000 together with Rs. 96 being the costs of the execution in the previous execution case against the sureties. Under the column of reliefs sought, prayer is made for the attachment and sale of properties belonging to the sureties. The argument based upon this execution petition is two-fold. It is first argued that if this application is regarded as an application for execution against the sureties only, it yet saves limitation for execution against the principal debtors under the 2nd paragraph, of Explanation I to Art. 182 of the Limitation Act. It is contended that the decree should be taken as a joint decree against the judgment-debtors and sureties, and under the clause above referred to, execution against the sureties keeps alive the right to execute the decree against the judgment-debtors also. In our judgment this contention is without any substance. By the surety-bond the sureties did not undertake to pay any portion of the decretal amount; they agreed only to hold themselves liable in the sum of Rs. 15,000 if the judgment-debtors were unsuccessful in the High Court. This construction of the surety-bond was accepted by the appellants in their appeal of 1915 before the High Court when they agreed to a remand to the Court below for determination of the amount of damages which the decree-holders had sustained by the stay of the sale. The second appeal to this Court by the sureties was also fought out on the same footing, in which appeal the decision makes it clear that the liability, of the sureties under the surety-bond was a personal liability, as distinct from the decree. It cannot, therefore, be now maintained that the sureties had rendered themselves liable for any portion of the decretal amount or that they are joint judgment-debtors along with the respondent within the meaning of Art. 182 of the Limitation Act. In this view it is not necessary to consider those cases which have gone to hold that where a surety makes himself liable for a portion of the decretal amount, he becomes one of the

persons against whom a joint decree is passed. See *Mohammad Hafiz* v. *Mohammad Ibrahim* (1). If any authority is needed for the plain meaning of the words of the Explanation to Art. 182, reference may be made to the case of *Narayan Ganpatbhat* v. *Timmaya* (2). There the sureties had made themselves liable for the amount of the claim, but the decree that was subsequently passed was only against the defendant in the suit. It was held that the sureties were not joint judgment-debtors and execution against the judgment-debtors did not save limitation for execution against the sureties. A more direct authority is to be found in *Kusaji* v. *Vinayak* (3). There the surety had made himself liable for the principal amount but not for interest. Execution was taken against the surety for both the principal and interest, but the claim for interest was disallowed. The decree-holder more than three years after the deeree applied for execution against the judgment-debtor for the amount of interest. It was held that the execution was barred as the claim for interest was not common to both the surety and the judgment-debtor and the application for execution did not operate to keep alive the order as against the principal debtor.

In this connection a further point taken is that the application for execution in Execution Case No. 21 of 1915 was an application for the execution of the entire decree. Conceding that it was so, the decree not being a joint decree to which Art., 182 of the Limitation Act applies, on the authority of *Kusaji* v. *Vinayak* (3) above referred to, execution against the sureties of the decree under which they were not liable did not keep it alive as against the principal debtors. But the execution taken in this Execution Case No. 21 of 1915 was not for the decretal amount but for the sum of Rs. 15,000 for which the sureties had in certain events made themselves liable under the surety-bond. If by intentional or unintentional mistake the appellants described in that application that sum of Rs. 15,000 as a part of the decretal amount, they cannot take advantage of their own mis-statement. The final decision of this Court that the sureties were not liable even for the Rs. 15,000 for which execution was sought in Execution Case No. 21 of 1915 makes the position of the appellants even worse. The position thus is that it was finally settled that the sureties were not co-judgment-debtors with the principal debtors, or for that matter, judgment-debtors at all.

The second contention of the appellants is based on the application made by them in the above execution case on the 11th January 1919 for substitution for the original decree-holder or to be more precise, for permission to carry on the execution in place of the original decree-holder. It appears that on the 11th January 1919 the appellants as executors of the deceased decree-holder applied for substitution. On 1st February, the following order was passed on this application :—"Let a formal notice be issued on judgment-debtors to show cause why the heirs of the deceased decree-holder should not be substituted." This notice appears to have been served both on the original judgment-debtors and the sureties. On the 8th March 1919 the order was thus recorded:—"Notice duly served and proved; judgment-debtor No. 4 (*i. e.*, a surety) has filed an objection, let it be filed." On these facts it is argued, firstly, that the application for substitution filed on the 11th January 1919 was a step-in-aid of execution of the whole decree and, therefore, the present application having been presented within three years from the date is within time. It is now well-settled by authority and the law is clear that an application for permission to execute a decree where the decree-holder on record is dead (duly followed by service of notice) is a step-in-aid of execution which gives a fresh start to the period of limitation, but in this case the question is, will it, in the facts of this case, enure for the benefit of the substituted decree-holders against the original judgment-debtors or only against those who were parties to the present proceedings at that time before the Court ? The decree was being executed against sureties only and, undoubtedly, the period of limitation began afresh from the date on which the application was presented in respect of any future execution as against them. Does it also operate to keep alive the decree against the principal judgment-debtors ? The answer to this question as to all other questions raised by the appellants depends upon the nature of the decree which we have already dis-

(1) 58 Ind. Cas. 794; 43 A. 152; 18 A. L. J. 988; 2 U. P. L. R. (A.) 376.
(2) 31 B. 50; 8 Bom. L. R. 807.
(3) 23 B. 478; 12 Ind. Dec. (N. S.) 318.

cussed, namely, whether by persons having given security for a certain sum it became a joint decree as contemplated by Art. 182 of the Limitation Act. We have answered this query in the negative and it follows from the opinion we have expressed that any step taken in the above execution case against the sureties cannot be effective against the judgment-debtors. But it is argued, (and this is the second branch of the appellants' contention), that the service of notice of the application for substitution on the original judgment-debtors as appears from the order of 8th March, 1919 should save limitation as against them. But the notice was a notice to the judgment-debtors that the appellants were asking for permission to continue the execution proceedings against the sureties a matter of no concern to them. It is not easy to hold that an act which does not materially affect a party is still effective to give a fresh start of cause of action against such party. Further if it is accepted, (and we hold it was), that the service of notice was a step-in-aid of execution, the same question will arise, namely, execution against whom? To take a concrete example: If a decree is passed against *A* and *B* under which their liabilities are separate and several and execution is taken against *A*, will any step taken in such execution keep alive the decree against B? The question must be answered in the negative. (Art. 182, Limitation Act, Explanation I, first paragraph). If under that Article in the hypothetical case stated by us, *execution* against *A* does not save limitation for execution against *B*, *a fortiori* any step taken in execution against *A* cannot enure to the prejudice of *B*. The fact that the judgment-debtors' names were mentioned in the application for execution in Execution Case No. 21 of 1915 does not, in our opinion, affect the question. We accordingly hold that this contention of the appellants must also fail.

In this view of the law, though, it may be urged that it is a hard decision for the appellants we are unable to come to any other conclusion than that this appeal should be dismissed with costs and we order accordingly. We assess the hearing-fee at five gold *mohurs*.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 40 OF 1924.

July 30, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

FATEH LAL—AUCTION-PURCHASER—APPLICANT

versus

SHER SINGH—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXI, r. 53 (1)—Decree, whether includes decree of Revenue Court—Attachment of decree—Procedure—Execution of decree—Sale—Amendment of decree, effect of.

Under the definition of a decree as given in s. 2 of the C. P. C. a decree may include not only a Civil Court decree but also a Revenue Court decree. [p. 661, col. 2.]

The proper way to attach a decree of a Revenue Court in execution of a decree of a Civil Court is that provided for in O. XXI, r. 53 (1) of the C. P. C. Where the Court proceeds to attach and execute such a decree as if it were a decree other than that covered by O. XXI, r. 53 (1), it commits an irregularity. [*ibid*]

If at the time when an auction sale is held there is a valid decree standing, the sale is perfectly valid and a subsequent event that the decree is amended or even set aside would not necessarily nullify the sale. [p. 662, col. 1.]

The provisions contained in the rules comprised within the Schedules to the C. P. C. are mere rules of procedure and non-compliance with any of those provisions amounts to a mere irregularity. [p. 661, col. 2.]

Civil revision from an order of the District Judge, Aligarh, dated the 2nd of November 1923.

Mr. *M. A. Aziz*, for the Applicant.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.

Sulaiman, J.—This civil revision arises out of certain execution proceedings. A suit was decreed and under the judgment there ought to have been an instalment decree passed against the defendant. Owing to some mistake of the office the decree which was prepared did not specifically mention that the money was payable in instalments. An application for execution of that decree was put in by the decree-holder within one year of the decree and accordingly no notice of it was issued to the judgment-debtor. Among the properties sought to be attached was a Revenue Court decree in favour of the judgment-debtor. It appears from the deposition of the judgment-debtor subsequently made and the record that notices were issued to the Revenue Court requesting it to abstain from executing the decree sought to be attached until such notice was cancelled, and a notice was also sent to the judgment-debtor pro-

hibiting him from transferring or charging the same in any way. Apparently these notices were issued under O. XXI, r. 53, sub-cl. (4). The judgment-debtor took no steps in the matter and kept quiet. Ultimately the Revenue Court decree was put up at auction and sold and purchased by the applicant Fateh Lal for a much smaller sum.

It may be noted that by the time the Revenue Court decree was actually put up for sale one of the two instalments had actually fallen due and the amount so due was more than the amount for which the decree was actually sold. But till then the decree as it stood did not contain any direction as to the payment of the decretal amount in instalments. Subsequently the judgment-debtor put in an application before the Subordinate Judge for an amendment of the decree so as to bring it in accordance with the judgment. That decree was then rightly amended. After having amended the decree the learned Subordinate Judge at the instance of the judgment-debtor set aside the sale of the Revenue Court decree and the only ground mentioned by him was that inasmuch as the original decree had been amended the sale of the attached decree had become *ipso facto* nullified. From that order the auction-purchaser appealed to the District Judge. The District Judge dismissed the appeal.

Speaking personally for myself, I would hold that no revision lies from the order of the District Judge. On an appeal preferred by the present applicant himself, he had jurisdiction to go into the question whether the First Court's order was right or wrong and after having considered the matter he has expressed his opinion one way. I cannot hold that in expressing this opinion and upholding the order of the Court below he has acted with any material irregularity or illegality in the exercise of his jurisdiction. His opinion may or may not be correct. That is after all merely an error of law.

At the same time if the learned Subordinate Judge had no jurisdiction to set aside the sale or if he acted with illegality or irregularity it would be open to this Court to which no appeal lies, to revise his order.

The question we have to consider is whether the sale of the Revenue Court decree was merely irregular or whether it was illegal and without jurisdiction. Under the old Code, having regard to the definition of a decree given in that Code, it was held by this Court that a Revenue Court decree was not a decree within the meaning of the Code and that it was not governed by the first portion of s. 273 *vide* the case of *Aulia Bibi* v. *Abu Jafar* (1). It is possible that at the time when this decree was sought to be attached the Court was under the impression that it being a Revenue Court decree could be attached and sold. It cannot, however, be denied that under the definition of the decree as given in s. 2 of the new Code, the word "civil" has been omitted and, therefore, a decree may include not only a Civil Court decree but also a Revenue Court decree. It follows, therefore, that the proper way to attach such a decree would have been that provided for in O. XXI, r. 53, sub-cl. (1). This does not appear to have been done. The attachment of the Revenue Court decree was, therefore, irregular. But the new Code consists of substantive provisions contained in the first Parts and then the Rules contained in three Schedules attached thereto. Under s. 60 of the Code the Court is given jurisdiction to attach and sell in execution of a money decree all properties moveable and immoveable other than those exempted under it. Provisions contained in the rules comprised within the Schedules are mere rules of procedure and they would not oust the jurisdiction of the Court Non-compliance with any of the provisions contained in the rules would be an irregularity. This has always been held in cases where provisions with regard to the issues of sale, proclamations etc., and have not been complied with. The Court, therefore, in proceeding to attach and execute the decree as if it were a decree other than that covered by O. XXI, r. 53, sub-cl. (1) merely committed an irregularity. I have already pointed out that the judgment-debtor had full notice that the Court was so proceeding. He did not intervene and take any objection. He allowed the execution to be carried out after the property had been sold. I am, therefore, unable to hold that the sale was a nullity and without jurisdiction. The utmost that can be said is that the sale had taken place with some irregularity.

The learned Subordinate Judge was of opinion that if property has been sold in execution of an incorrect decree then as soon as the decree is amended the sale must *ipso facto* be set aside even if though a third party has purchased the property. In my opinion this view is erroneous. So

(1) 21 A. 405; A. W N. (1899) 157; 9 Ind Dec. (N. S.) 966.

long as at the time when the sale took place there was a valid decree standing, the execution was perfectly valid and the subsequent event that the decree was amended or even set aside would not necessarily nullify the sale. It must, therefore, be said that the learned Subordinate Judge has not acted legally in setting aside the sale. He has also acted with material irregularity in not directing his attention to the main question before him, but has simply set aside the sale as if no option was left to him.

It is, however, necessary to note that under s. 115 of the C. P. C. this Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. In the present case the Revenue Court decree was sold for a small value and purchased by a third party. Under s. 93, cl. (*i*) of the Tenancy Act no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become vested in such an assignee. It is not suggested that this auction-purchaser has in any way acquired an interest in the tenancy in respect of which the Revenue Court decree for arrears of rent was passed. It is apparent, therefore, that the Revenue Court would not entertain an application for execution at the instance of the auction-purchaser. Had the application been made by the attaching creditor before the Revenue Court decree had been sold the position would have been different. On the other hand the judgment-debtor has suffered considerable loss inasmuch as his Revenue Court decree has been sold for a much smaller amount. It also appears from the record that he has, as a matter of fact, paid off the entire sum due to the decree-holder and has also deposited the full amount with interest payable to the auction-purchaser in case the sale is to be set aside. Having regard to all these circumstances I am of opinion that we should not interfere in this case and the application in revision should be dismissed.

Mukerji, J.—I agree that the circumstances of the case are such as do not call for any exercise of our revisional powers.

By the Court.—The application is accordingly dismissed but without any order as to costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 115 OF 1921.

August 1, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

NALINAKSHYA GHOSAL—PLAINTIFF—APPELLANT

versus

RAGHUNATH GHOSAL—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Partition—Separate acquisitions after partition—Presumption—Partition suit—Persons interested in some properties not joined, effect of—Procedure.

Where on a partition among the members of a joint Hindu family one member separates from the others, and thereafter conveyances of property are taken in the name of one or the other of the other members, the mere fact that the conveyances are so taken, is not conclusive of the fact that the property acquired by means of such conveyances constitutes separate acquisitions of the members in whose names the conveyances respectively stand, nor is the fact of separate acquisitions inconsistent with the fact that such members continued joint after the partition. [p. 664, col. 2.]

In a suit for partition the fact that persons interested in some of the joint properties are not made parties to the suit does not debar the plaintiff from getting a decree with respect to properties which belong exclusively to the parties to the suit. [p. 666, col. 1.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 18th of March 1921.

Babus *Sarat Chandra Roy Choudhury* and *Krishna Kamal Moitra*, for the Appellant.

Dr. *D. N. Mitter* and Babu *Manindra Nath Banerjee*, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiff against a decision of the Subordinate Judge of Burdwan dated the 18th March, 1921 dismissing the suit. The suit was one for an account and for partition and the main grounds upon which the Subordinate Judge dismissed the suit was that there had been a previous partition and that as to certain properties which had been acquired out of joint funds subsequent to the previous partition there could be no decree for partition in the present suit as all the joint properties had not been included. The Subordinate Judge held that there was a further bar to the suit as the plaintiff was not in possession of any of the joint properties and that as the suit was one for partition and not for recovery of possession and partition, the

plaintiff could get no relief in the present suit.

The material facts are as follows: One Kenaram Ghosal had by his wife Hara Sundari, five sons Madhu Sudan, Hari Nath, Troilakhya, Raghu Nath and Nabin Gopal and a daughter Bindu Basini. Hari Nath predeceased his father, Kenaram and died childless, Kenaram died in 1859 leaving him surviving his widow Hara Sundari and four sons Madhu Sudan, Troilakhya, Raghunath and Nabin Gopal. Nabin Gopal died unmarried in 1863 or 1864 leaving his mother Hara Sundari as his heir.

Madhu Sudan died in 1277 but prior to his death arrangements were in progress for an amicable partition between himself and his brothers Troilakhya and Raghunath. The partition was not completed at the time of Madhu Sudan's death but it was completed by his two sons, who were his heirs, and on the 25th June 1872 Madhu Sudan's sons completely separated from Troilakhya and Raghunath and took their share of the joint family properties to which they were entitled as heirs of Madhu Sudan. Certain properties which Hara Sundari had inherited from her father Shiba Prosad Roy and also the properties which she inherited from Nabin Gopal were also included in the partition although Hara Sundari was still alive and did not die until 1883 but it has been found that this was done with her consent and the finding is not disputed in this appeal and has been accepted by both parties subject to a contention raised by the respondent to which I shall presently refer. One question which arises in this appeal is whether the partition of the 25th June 1872 effected a separation between Trailakhya and Raghunath, the respondent contends that this was so and the Subordinate Judge has so found but the appellant contends that they remained joint after the separation of Madhu Sudan's branch. It is common ground that after the separation of Madhu Sudan's sons, who removed to Sijua, the village of Hara Sundari's father, Trailakhya lived jointly with Raghunath and Hara Sundari at Rautgram, the ancestral home, but the respondent contends, and as already stated the Subordinate Judge has so found, that their properties were separate and that they were joint in mess alone. It has, however, been found by the Subordinate Judge that they had some joint funds and joint cultivation. Trailakhya died in March 1882 leaving two widows him surviving. He left a Will made on the day of his death (15th *Falgun* 1288 B. S.) It was addressed to his brother Raghunath whom he appointed executor. The Will states that the testator had been living in joint mess with Raghunath and had been performing the *seba* of the deities, the ceremonies of the ancestors as well as the daily and occasional rites from the proceeds of all that he had jointly with Raghunath namely, *lakheraj*, and *mokarrari jamas*, tanks, *ghars*, doors, *pucca* buildings and other moveable and immoveable properties, paddy, cash money, money-lending business etc. The testator authorised his elder wife Sm. Sarada Sundari Devi to adopt a son to him and directed Raghunath to cause her to adopt his (Raghunath's) second son, the plaintiff Nalinakshya. The testator then directed his executor to look after, manage and settle the properties in the same way as they had been managed during their jointness until the adopted son attained his majority. The testator then provided that his adopted son after attaining majority and receving to his satisfaction properties, etc., namely, the properties left by the testator should as his representative, enjoy and possess the same, being invested with the right of sale and gift.

The Will was proved on the 2nd August 1882 before the District Judge of Burdwan and Probate thereof was granted by the then District Judge of Burdwan to Raghunath, the executor named in the Will on the 27th September 1882.

On the 14th *Magh* 1293 (1886) Sm. Sarada Sundari Devi adopted the plaintiff as Trailakhya's son. The validity of the adoption was questioned in the written statement but the defendant did not question it in his evidence and the Subordinate Judge has held that the plaintiff is the adopted son of Trailakhya. The finding has not been questioned on appeal to this Court.

The main question to be decided in this appeal is, as already indicated, whether on the partition of 1872 a separation was effected between Trailakhya and Raghunath. The learned Subordinate Judge in arriving at the conclusion that there was a separation has mainly relied,

(1) On certain partition papers Exs. 21, 21(*a*), 21 (*b*), 68 and 69.

(2) Upon the acts and conduct of Raghunath and Trailakhya subsequent to 1873 which, he says, showed that they acquired properties separately and dealt with their properties separately although they remained joint in mess and for that purpose had some joint transactions.

(3) The deposition of the defendant.

It is, therefore, necessary to examine into these three matters to see if the Subordinate Judge's conclusion is correct. With regard to (1) the partition papers were tendered in evidence by the plaintiff and their admission was strenuously opposed by the defendant. They are really lists showing the allocation of the properties between the two brothers and Madhusudan's sons and the allotments to them individually are in the case of Exs. 21 (*a*) and 21 (*b*) signed by the others. Some point has been made of the fact that a certain amount of land was excepted from the allotments to provide for the maintenance of Sm. Khetramoni, a daughter of Khudiram, a son of Shiba Prosad who predeceased him as showing the accuracy with which the partition was made and a similar inference was sought to be drawn from Ex. 21 which shows the division of the cash.

But after all these papers do not carry things very far; if the estate was to be partitioned for the purpose of ascertaining the share of Madhusudan's heirs, it was necessary to divide the estate into three parts for this purpose and I cannot, therefore, but consider these documents colourless for the purpose of the point which arises for decision.

With regard to (2) there is no doubt that subsequent to the partition properties were acquired in the separate, names of Trailakhya and Raghunath and the instances of this to which we have been referred are numerous. They are to be found in Exs. Nos. 70 and 71, Ex. R, Ex. S. and in numerous Exhibits of the T series namely, T.-19, T-5, T-10, T-12, T-2, T-8, T-20, T-9, T-21, T-6, T-30, T.-15, T-24, T.-26, T-3, and T-11, especial stress was laid by the respondent on Exs. T. 9 and T. 21 as being sales of land in the same *mouza* and *pargana* on the same date by the same person to Raghunath and Trailakhya respectively. And it was said that except as regards Ex. 70 there was no evidence of any of the properties being treated as joint.

There is no doubt that these Exhibits of the T series and others are pieces of evidence upon which the respondent is entitled to rely as evidence of separation but I do not think they are in any way conclusive. After all, even assuming that there were separate acquisitions, such acquisitions are not inconsistent with the brothers having remained joint and moreover the fact that the conveyances were taken in the name of one or other brothers is not necessarily conclusive of the fact that they were separate acquisitions.

A further point was made by the respondent that after Trailakhya's death the same method of acquisition continued and reference was made to Ex. A-C, to Ex. 55 where Raghunath's position as executor and as a separate owner is said to be recognised, to Ex. 76, Ex. 75, Exs. 5 and 6, Ex. 72, Ex. 8, Ex. 14, Ex. 16 and reference was also made to Ex. I rent decrees between 1884 and 1916 in the name of Raghunath alone and to Ex. A-B as showing that 14 suits of 1915 were brought in the name of Raghunath alone.

With regard to (3) the Subordinate Judge states that the entire deposition of the defendant very satisfactorily shows that there was a complete separation between him and Trailakhya but that thereafter he and Trailakhya remained in joint mess and for that purpose they had some joint fund and joint cultivation but in respect of acquisitioned properties and in their dealings with their respective properties one had no connection with the other and in another passage the Subordinate Judge states that the entire deposition of the defendant, read between the lines, shows that he meant that they were only joint in mess.

It is necessary to examine the deposition of the defendant to ascertain if it bears out the construction put upon it by the Subordinate Judge.

In this connection it is necessary to state that the Subordinate Judge who saw the witnesses and recorded the deposition is not the Subordinate Judge whose judgment is under appeal and that consequently we are in the same position as he was with regard to the evidence.

The defendant who at the time of his examination was 84 or 85 years of age stated in Examination-in-chief that there was a parti-

tion between himself and his other brother in 1276 B. S. and that thereafter he and Trailakhya continued to live in the same mess and that they had separate money-lending business after the partition but he admitted a joint purchase of one Biswambhur's property after the partition.

In cross-examination he stated that he lived in the same mess with Trailakhya during his lifetime and his widow and adopted child till the institution of this suit and that the lands of Trailakhya and himself had all along been cultivated jointly in spite of the partition. Later he stated that he and the plaintiff had got joint cultivation only in Rautgram and none in Shijna and Lohar. He further stated that there was never any separate *jama-kharach* of Trailakhy's estate, and that all collections from *mehals* were entered in the Rautgram *jama-kharach*. He stated that certain lands of Basantapur, Koromda and Kaigram were in the joint possession of himself and the defendant and that the defendant had a share in the Rautgram *tahabil*. And he made this significant statement that he and Trailakhya had everything joint but he added that there was separate *jama-kharach* of each of them.

In re-examination he stated that he and Trailakhya had separate *tahabil* as well as separate *jama-kharach* although their cultivation was joint. He stated that the Rautgram *tahabil* was his but that plaintiff's money was also kept in that *tahabil*.

With all respect to the Subordinate Judge I should not be prepared to draw the inference which he has drawn from the deposition of the defendant. The deposition contains at least one unequivocal statement that the defendant and Trailakhya had everything joint and there is the further statement that all collections were paid into the Rautgram account in which the plaintiff had a share.

But in determining the question as to whether there was a separation or not it seems to me that there are other matters to which the Subordinate Judge has omitted to give full weight.

The first of these is the written statement of the defendant. This is a confused and badly drawn document but it sufficiently shows the nature of the original defence which was (see paras. 4 and 19) that there had been no adoption of the plaintiff by Trailakhya, that (see para. 9) Madhusudan alone separated and the others were members of a joint Hindu family and lived in joint mess, that (see para. 19), the Will of Trailakhya was a mere paper transaction. I cannot find in the written statement, unless perhaps the statement in p. 24 can be taken as such, any suggestion of a complete separation of the joint family in 1872. Indeed, I think, the whole tenour of the written statement, which is verified by the defendant as true to his knowledge is against any idea of separation. I think the whole story of separation is an afterthought based on the partition papers and put forward when it was seen that the original defence could not stand.

The second point to which I think the Subordinate Judge has not paid sufficient attention is the significance of the single account into which all collections, etc., were paid and from which, it seems, all payments were made, except, perhaps the original sum for starting the Calcutta business which I cannot find in the accounts. If the defendant's story were true you would certainly expect to find three separate accounts one of the admittedly joint properties, another of the defendant and another of the plaintiff, or before him, of Trailakhya. A faint suggestion was made by the defendant that other accounts existed but none have been produced and the only account is the Rautgram account from which, as I have stated, all payments were made and into which all sums were paid. The story of the Rautgram account put forward by the defendant, namely, that it was his and that the plaintiff paid money into it for convenience seems manifestly untrue. There is this additional fact that when Raghunath filed an inventory of Trailakhya's properties on applying for Probate the properties included in the inventory do not accord with those said to have been allotted to Trailakhya in 1872. Some of them are the same but even where this is so the areas in many cases do not agree with the areas of the properties in the partition lists. The points upon which the Subordinate Judge has relied seem, for the reasons which I have given, inconclusive and his deductions therefrom erroneous and I think it is abundantly established from the mouth of the defendant himself and from his written statement and from the surrounding circumstances and from the facts which I have indicated that only Madhusudan's branch separated in 1872 and that Trailakhya until his death

remained joint with the defendant and that after his death the same state of affairs continued.

This being so it remains for us to consider whether there is anything to prevent the plaintiff obtaining a decree for partition in the suit as framed. I think that there is no obstacle to the passing of such a decree. The learned Subordinate Judge thinks that there could be no such decree in the suit as framed even as to properties admittedly joint and unaffected by the previous partition which he has found because the plaintiff was out of possession. This conflicts with his previous finding that the plaintiff was the sole manager of the family consisting of the plaintiff and defendant and defendant's sons from 1310 till the date of suit, upon the evidence of the plaintiff, that of Kali Prasanna Mukherjee, Niranjan Mondal, Sashi Bhusan Mullick and of the defendant himself. I think it is established that the plaintiff was not out of possession when the suit was brought and that there is no bar to his obtaining a decree for partition in the present suit.

The learned Subordinate Judge has found yet another bar to such a decree in the fact that there are joint properties in which other persons are interested who are not parties to the suit, this apparently is so and there can be no partition in respect of these properties in the present suit but this is not, I think, a bar to the decree which is sought.

It was suggested on behalf of the respondent that if there was no partition between Raghunath and Trailakhya in 1872, the joint family after Madhusudan's branch separated consisted of Hara Sundari (the mother), Trailakhya and Raghunath and that there was no division of Hara Sundari's properties which it is said passed to Raghunath on her death. This, I think, is clearly not so and is contrary to the facts. In 1872 Madhusudan's branch separated and with Hara Sundari's consent her properties were divided one-third going to Madhusudan's branch and two-thirds to Trailakhya and Raghunath jointly. Hara Sundari from that time forward had parted with her interest in favour of her sons and lived with Trailakhya and Raghunath and was maintained by them but she had no property of her own and no share in the joint undivided property.

The result is that, in my opinion, the decision of the Subordinate Judge is wrong and the appeal must be allowed with costs. There will be an enquiry by the Subordinate Judge as to which of the properties comprised in the Schedules to the plaint are joint properties of the plaintiff and defendant and a declaration that the plaintiff is entitled to an 8-annas share in such of the properties as shall be found to be joint properties of the plaintiff and defendant and that the defendant is entitled to the remaining 8-annas. There will be the usual decree for partition and the Commissioner to be appointed will take an account on the footing of existing assets of the income of the joint properties from the date of the institution of the suit when the plaintiff was deprived of joint possession to the date when the plaintiff is put into possession of his share.

Chakravarti, J.—I agree.

Z. K. *Appeal allowed; Case remanded.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1504 OF 1924.

July 9, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Hazarat Kibulai Sayyad GULAM GOUSE SHA SAHIB KADVI—RESPONDENT—PETITIONER

versus

DOST MOHAMMAD KHAN SAHIB (DEAD) AND ANOTHER—APPELLANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. XXII, r. 3—Scheme suit—Appeal—Death of one appellant—Abatement.

A suit once instituted by two or more plaintiffs duly authorised under s. 92 of the C. P. C. does not abate in consequence of one of the plaintiffs dying during the continuance of the suit, and the case of one of two or more appellants dying after the filing of an appeal against a decree in such a suit is *a fortiori* a case of abatement not resulting from the death of a party.

Parameswaran Munku v. *Narayanan Namboodri*, 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279, followed.

Alagappa Chettiar v. *Muthiah Chettiar*, 41 Ind. Cas. 745; 41 M. 237; 33 M. L. J. 173; (1917) M. W. N. 740, relied on.

Chhabila Ram v. *Durga Prasad*, 28 Ind. Cas. 681; 37 A. 296 at p. 298; 13 A. L. J. 379, not followed.

Darves Haji Mahamad Sidik v. *Jainudin*, 30 B. 603; 8 Bom. L. R. 751, referred to.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to dismiss with costs Appeal No. 135 of 1923, preferred to the High Court against a decree of the Court of the Subordinate Judge, Tanjore, in O. S. No. 33 of 1922.

Mr. *E. Vinakaya Rao*, for the Petitioner.

Mr. *P. R. Ganapathi Iyer*, for the Respondents.

ORDER.—*Parameswaran Munku* v. *Narayanan Namboodri* (1) is a direct authority for the view that a suit once instituted by two or more plaintiffs duly authorised under s. 92, C. P. C. does not abate in consequence of one of the plaintiffs dying during the continuance of the suit.

It seems to us that the case of one of two or more appellants dying after the filing of an appeal against a decree in a suit of the nature referred to in s. 92 is *a fortiori* a case of abatement not resulting from the death of a party.

The observations in *Chhabila Ram* v. *Durga Prasad* (2) to the effect that it is necessary that there should be two persons interested in the trust and holding the Advocate-General's sanction for *carrying on the litigation* have not been accepted by the Bench which decided the case in *Parameswaran Munku* v. *Narayanan Namboodri* (1) and in view of the strict interpretation which has been put upon the expression "instituted" by Sir Lawrence Jenkins in *Darves Haji Mahamad Sidik* v. *Jainudin* (3), we do not think that they should be followed. *Alagappa Chettiar* v. *Muthiah Chettiar* (4) is an additional authority for the correctness of the view taken by this Court in *Parameswaran Munku* v. *Narayanan Namboodri* (1) which we have decided to follow (*vide* the judgment of Sadasiva Iyer, J., at pages 239-40). The present application does not come within the scope of O. XXII, r. 3 (1), C. P. C. which deals only with applications made by legal representatives of deceased plaintiffs. Rule 3 (2) deals only with the result of such applications not being made within the time limited by law on the interest of the deceased plaintiff.

This application is dismissed with costs. The regular appeal will be posted for hearing in due course.

V. N. V. *Petition dismissed.*

Z. K.

(1) 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279.

(2) 28 Ind. Cas. 681; 37 A. 296 at p. 298; 13 A. L. J. 379.

(3) 30 B. 603; 8 Bom. L. R. 751.

(4) 41 Ind. Cas. 745; 41 M. 237; 33 M. L. J. 173; (1917) M. W. N. 740.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 175 OF 1922.

February 8, 1924.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

TARINI KUMAR DUTTA AND OTHERS—DEFENDANTS Nos. 2 TO 7—APPELLANTS

versus

SRISH CHANDRA DAS—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 29, 31, 47, 48—Minor—Sale of minor's property—Sanction of Court—Duty of Court—Sanction, whether can be withdrawn—Interests of minor—Prior agreement for sale—Specific performance, suit for—District Judge, order of, whether can be questioned—Specific performance with variation—Specific Relief Act (I of 1877), s. 26.

A guardian appointed by the Court under the Guardians and Wards Act is prohibited from transferring any property of the minor without obtaining the previous permission of the Court and the Court must not grant any such permission to the guardian except in case of necessity or for an evident advantage of the ward. In granting such permission to the guardian, it is the duty of the Court to see that the transaction confers the highest benefit on the minor. [p. 673, cols. 1 & 2.]

If on account of competition between intending purchasers the minor gets a higher value for the property which is intended to be sold, it is not the business of the District Judge to enquire into the motive which leads the rival purchasers to offer higher bids. It is to the advantage of the minor that there should be such a competition between purchasers. [p. 673, col. 2.]

Where a sale of a minor's property is proposed to the District Judge and he is of opinion that a higher value than that proposed by the guardian is obtainable for the property intended to be sold, it is open to him to direct the *Nazir* to hold an auction of the property in order to obtain the best value for the property. There is nothing wrong in such procedure being followed. [p. 673, col. 2.]

A District Judge who makes an order on the representation of a statutory guardian for sale of the property of his ward for the value suggested by the guardian may withdraw that order if it is brought to his notice that a higher value can be obtained for the minor's property than the value for which the guardian proposes to sell it; it may not be due to the guardian's improvidence, it may be due to his in-

ability to find proper purchasers with his best endeavours to do so that he suggests a lower value. [p. 674, col. 2.]

Where a person purchases the property of a minor under a sanction granted by the District Judge, the Court will not grant a decree for specific performance of a prior contract for the sale of such property entered into by the guardian of the minor in favour of a third person as against such purchaser. [p. 675, col. 2.]

An order made by a District Judge concerning the sale of the property of a minor cannot be quashed in a suit for specific performance of a contract to sell such property entered into by the guardian of the minor. [p. 674, col. 1.]

Courts in India will not allow a bargain made by an improvident guardian to be enforced against the interests of the minor if it be shown to be a bargain made to the detriment of the minor. [p. 674, col. 2.]

A contract can be specifically enforced with variation under certain circumstances only which are given in detail in the Specific Relief Act. [p. 675, col. 2.]

Quære.—Whether a contract of sale of the property of a minor which has been sanctioned by a District Judge can be specifically enforced after the District Judge has cancelled or withdrawn his sanction.

(Case-law discussed.)

Appeal against a decree of the Subordinate Judge, Jessore, dated the 4th of May 1922.

ARGUMENTS.—Babu *Dwarka Nath Chakravarty* (with him Dr. *Dwarkanath Mitra* and Babus *Hira Lal Chakravarty* and *Hem Chandra Sen*), for the Appellants.—The important materials for consideration in this suit, which is one for specific performance of the contract for sale and certain orders of the District Judge are:—The properties are those of a minor, who had been given away in adoption and whose natural father was appointed his guardian under the Guardians and Wards Act. The minor had some debts and a contract for sale of some properties was entered into by the guardian, subject to an anticipation of the permission of the District Judge. The contract was made on the 13th July 1920. Some earnest-money was paid by the intending purchaser Sris Chandra Das. On the 28th a petition was made to the District Judge who after enquiries gave permission. Thereupon the adoptive grandmother petitioned the Court, that her maintenance be a charge on the properties to be sold. The guardian informed the District Judge that the purchaser was not willing to purchase subject to the maintenance charge and permission to sell a certain particular property to be sold free of charge, was asked for. The lady put in objection to it. On 4th September 1920, an order was passed after hearing all sides, by which general permission was given by the District Judge to sell all properties free of maintenance charge, which was transferred to the surplus sale-proceeds. On the 11th September 1920, the present appellant put in his petition stating he was willing to purchase the property at a much higher price than that offered by the plaintiff. Thereupon a sale-proclamation was issued and the properties were sold to the highest bidder. In the meantime, Srish Chandra Das filed a suit for the specific performance of the contract of the guardian with him. The suit was decreed in part for the sum for which highest bidder purchased the property. This appeal is from that decree. My submission before your Lordships is that the contract was not validly created. The contract entered into by the guardian was in anticipation of the District Judge's sanction, which was never in fact given. The order that was given was a very general permission given to the guardian to sell the properties. Hence the plaintiff does not get any right of specific performance. Moreover he refused to purchase the property subject to the maintenance charge and thereby rescinded his own contract. The Judge himself explains his order on a late date and says that he did not give particular permission. His subsequent orders were, therefore, justifiable.

Under s. 29 of the Guardians and Wards Act the contract would have no effect whatsoever, because it was without the previous sanction of the District Judge. The District Judge's orders were not *ultra vires*. He was acting for the benefit of minor and the guardian never complained of it. If the contract was not binding there could be no other objection. Moreover the orders could not be contested in a suit; see s. 48 of the Act. No specific performance can be granted in a case like this. The later transactions are all for the benefit of the minor without doubt and that is what should be the primary consideration of the Court. The conduct of the plaintiff also negatives his right of specific performance: cited *Chhitar Mal* v. *Jagannath Prasad* (1), *Jugul Kishori Chowdhurani* v. *Anunda Lal Chowdhuri* (2), *Nagardas Vachraj* v. *Anandrao Bhai* (3), *Mir Sar-*

(1) 29 A. 213; 4 A. L. J. 24; A. W. N (1907) 25.
(2) 22 C. 545; 11 Ind. Dec. (N. S.) 363.
(3) 31 B. 590; 9 Bom. L. R. 495.

warjan v. *Fakhruddin Mohamed* (4) and *Innatunnessa Bibi* v. *Janki Nath Sircar* (5). Even if specific performance can be decreed, the variation cannot be explained. Either there was valid contract or there was not.

Babu *Sarat Chandra Roy Chaudhury* (with him Babu *Nakuleswar Mukherjee*), for the Respondent.—When a contract has been entered into on behalf of the minor with the sanction of the Judge, the contract should be held binding even if another offers, what in this case was, a fancy price: *Innatunnessa Bibi* v. *Janaki Nath Sircar* (5) and *Babu Ram* v. *Saidunissa* (6). The Judge having once granted his sanction, can no longer go behind his order. There is absolutely no authority by which he is permitted to do so: s. 31, sub-s. (3) of the Guardians and Wards Act. As regards the order given to the *Nazir* to sell the property by public auction, the Subordinate Judge is perfectly right when he holds that it is *ultra vires* altogether. Sections 25, 26 all consider the guardian the proper person to hold the sale, only it is necessary that sanction of the Judge should be obtained. How the *Nazir* can be authorised to sell is beyond comprehension. The Judge is wrong to think that he could take such a step, on the application of a rival purchaser, without reference to the guardian. The law requires that a guardian alone can sell. The presence of the *Nazir* is to ensure that it is done *bona fide*. The whole proceedings have been irregular. Section 48 makes the order of a Judge final. The first permission was final. The Judge was not authorised by s. 48 to revise or revoke his own order which was itself final for all purposes: *Nagardas Vachraj* v. *Anandrao Bhai* (3) and *Rashmoni Dasi* v. *Ganada Sundari Dasi* (7). Following the English practice he can re-consider his order only in exceptional circumstances. For example in the case of an order passed *ex parte* in Chamber or on misrepresentation. It is an inherent jurisdiction. Here he has not re-called his order but has made an altogether new order for sale: s. 52 of the Transfer of Property Act. The Judge should have remembered that if the civil suit succeeded, the entire proceedings and the sale would become futile. He should have stayed the sale. Another question was whether the original sale would have been for the benefit of the minor. The lower Court has decided it in my favour. The price that I was going to pay was more than fair. The guardian himself mentioned that in his petition. The present purchaser did not come forward to pay more when the guardian executed the contract. Now when the sale was practically complete, he comes and offers fancy prices to throw obstacles in the way of any purchaser out of rivalry in trade. If the offer was fair and for the benefit of the minor, as the Trial Court has found, there is no ground why specific performance cannot be granted. All the cases cited by my learned friend become irrelevant.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract for sale of certain immoveable property belonging to a minor, the defendant No. 1 in the suit. The contract was entered into by his guardian one Ratikanta Saha who is the natural father of the minor defendant. The minor was given in adoption by his father and, therefore, under the law he has no further connection with the minor after the adoption. He was, however, appointed guardian, under the Guardians and Wards Act, of the properties of the minor. The defendants Nos. 2 to 6 had subsequently purchased the property with the sanction of the District Judge in the name of defendant No. 7. There was some question in the Court below as to whether defendant No. 7 was the *benamdar* for defendants Nos. 2 to 6. It has been so found by the Subordinate Judge and that finding has not been questioned before us. The Subordinate Judge made a decree in favour of the plaintiff varying to some extent the contract upon which the plaintiff sued. Very little depends upon the oral evidence in this case, as, in our opinion, it will be decided mainly upon the documentary evidence which has been produced by the parties.

The guardian entered into the contract on behalf of his ward on the 13th July 1920. After reciting the necessity for sale it is stipulated in the contract that 9 *jamas* belonging to the minor specified in detail would be sold, on 8 of which, it

(4) 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 I. A. 1 (P. C.); 11 M. L. T. 8.

(5) 40 Ind. Cas. 490; 22 C. W. N. 477.

(6) 20 Ind. Cas. 966; 35 A. 499; 11 A. L. J. 783.

(7) 26 Ind. Cas. 275; 20 C. L. J. 213; 19 C. W. N. 84.

was stated, there were brick-built factory houses. It was stated that the plaintiff was desirous of purchasing the property at the highest price of Rs. 16,500 and the document concludes thus:—"I do, in receiving to-day Rs. 500 as earnest-money out of the aforesaid price, execute this deed of agreement and do hereby promise that I shall obtain permission of sale from the District Judge of Nadia and shall after executing and getting the document registered within two months of this day receive from you the balance of Rs. 16,000 out of the consideration money.....If for any special reason the District Judge does not grant permission then I shall return the amount taken as earnest-money. To this effect I execute this agreement of sale on receipt of Rs. 500 mentioned in the deed of agreement." On the 28th July 1920 the guardian filed a petition before the District Judge in which he stated that the minor had certain debts amounting to about Rs. 7,000 which it was necessary to pay. It was stated in the petition that the minor has got five old dilapidated houses used as sugar-factories at Kotchandpur and it was also mentioned that if these houses were sold then their price might come up to Rs. 16,500, that Sris Chandra Das was ready to purchase these properties at the said price of Rs. 16,500; and it was also mentioned that the guardian had taken Rs. 500 as earnest-money from the said Sris Chandra Das on the promise of selling the property to him after obtaining permission from the Court. On that application the District Judge asked for a report from the *sheristadar* who made a report which concludes thus:—"His (this guardian's) prayer may be granted on condition he files proof of transaction and produces proof to the satisfaction of the Court that the balance has been profitably invested." Then on the 31st July 1920 one Garabini Dassi appeared before the Court and prayed for time to file her written statement. This lady is the mother of the deceased adoptive father of the minor. Her petition was filed on the 7th August 1920 which came up for hearing on the 21st August next. The material part of the order with regard to this matter on the 21st August is this:—"Pleaders for the guardian and the objector heard. The petitioner's Pleader stated that the intending purchaser is willing to purchase the property subject to the charge of maintenance. The intending purchaser to apply in Court to the effect that he is willing to purchase the property subject to the maintenance charge of Garabini Dassi to the property." The intending purchaser is evidently the plaintiff.

It is apparent that the contract executed by the guardian in favour of the plaintiff was not placed before the District Judge. The petition which was filed by the guardian did not state the *jamas* which he had contracted to sell, nor did he state that on each of the eight *jamas* there were brick-built factory houses.

Subsequent to the 21st August the guardian put in another petition before the District Judge on the 28th August 1920. It runs thus:—"On the last date of hearing the Court was informed on my behalf that a purchaser was willing to buy the sugar-factory houses situate in Kotchandpur, with the charges thereon. As the purchaser made a statement to the aforesaid effect the Court was accordingly informed on my behalf. Now the purchaser says that he is not willing to purchase the said property with the incumbrances thereon. But Babu Sris Chandra Das of Kotchandpur is willing to buy one sugar-factory house at Solimanpur adjacent to Kotchandpur.....I, therefore, pray that you will be pleased to pass an order granting permission to sell the aforesaid house at Solimanpur to the said purchaser, or in the alternative to pass an order for sale of the houses at Kotchandpur free from incumbrances for the purpose of clearing off the debts of the minor with the purchase money directing the balance to be invested in Government Securities for the benefit of the minor, subject to the declaration of the charge of the monthly allowance of Garabini Dassi upon the same." The intending purchaser, that is to say, the plaintiff did not appear before the District Judge in pursuance of the order of the 21st August. The learned District Judge passed the following order on the 28th August in the petition of the guardian:—"The petitioner puts in a petition today praying that permission be granted to him to sell a house at Solimanpur to one Sris Chandra Das for Rs. 4,500", and it was ordered to be put up on the 30th August next. On the 30th August 1920 it was ordered:—"The opposite party puts in a petition to-day praying that if the petitioner be permitted to sell the

property of Solimanpur that may be sold subject to her maintenance charge." The opposite party here referred to is the lady Garabini Dassi. The learned Judge had then before him with regard to the proposal for sale of the property of the minor these facts, that a purchaser was willing to buy a sugar-factory at first, with charges thereon; on the 28th August the guardian stated that he was not willing to purchase the property with incumbrance; the plaintiff on that day expressed willingness to purchase another property for Rs. 4,500 which was not the subject of the suit; the guardian made an application either to sell the other property of Solimanpur or Kotchandpur properties which he first intended to sell free from incumbrance; and it is, therefore, evident that the learned Judge had not to deal with any application of the guardian for sale which had been made prior to the 28th August 1920. Order was passed on the petition of 28th August 1920 on the 4th September 1920 and it runs thus:—"Heard Pleaders on both sides. Permission is granted to the guardian to sell the property originally mentioned in the petition. The sale-proceeds after payment of debts shall be invested in six per cent Government Loan and deposited with the Accountant General, Bengal subject to the maintenance charge of the objector. The charge is transferred from the property to the Government Securities and the purchaser will get the property free of charge." The evident meaning of this order is not that the Judge sanctioned the sale of the Kotchandpur properties to the plaintiffs for Rs. 16,500 free of the charge of maintenance of Garabini Dassi, but it was a general order given to the guardian to sell the property free from incumbrance according to the prayer made by him in the petition of the 28th August.

Then the following order appears on the 11th September 1920:—"One Tarini Kumar Dutta intending purchaser of the Kotchandpur property appears to-day and puts in a petition stating that he is willing to purchase the property for Rs. 19,000. Heard the Vakil for the petitioner. Let a proclamation be issued at once for the sale of the properties in auction-sale to the highest bidder fixing 18th September 1920 for sale by *Nazir* of the Court. Petitioner is prohibited from making any arrangement of sale with Srish Chandra Das." Srish Chandra Das filed the suit for specific performance of contract on the 9th September 1920 in the Court of the Subordinate Judge of Jessore. On the 18th September this order is recorded by the District Judge:—"Srish Chandra Das puts in a petition praying that the sale may be postponed till the disposal of the Suit No. 519 in the Sub-Judge's Court, Jessore. Pleaders heard. Prayer refused as permission to sell the property to the petitioner particularly was not granted. *Nazir* to sell the properties at once." Subsequently there were bids before the *Nazir*. Defendant No. 7 Rasharaj Nandi offered the highest price Rs. 19,100 and apparently under the orders of the District Judge the guardian of the minor executed a conveyance in his favour of the Kotchandpur properties on receipt of Rs. 19,100.

The defendants Nos. 1 to 7 contested the suit before the learned Subordinate Judge, but apparently the guardian of the minor considered that he was himself the defendant and his written statement shows that he filed the written statement on his own behalf. Nothing, however, turns upon that. The Subordinate Judge has made a decree in favour of the plaintiff to this effect, "that the suit be decreed in part; that plaintiff do deposit a sum of Rs. 18,600 in Court within 15 days from the date of the decree, that on plaintiff's depositing the money in Court Rati Kanta Shaha the father and guardian of defendant No. 1 do get a *kobala* for the 8 *jamas* and the houses standing thereon registered." It is unnecessary to recite the rest of the decree. The variance between the decree asked for by the plaintiffs and that made by the Court is this, that a *jama* mentioned in the agreement bearing rental of Rs. 9-12-0 was omitted, and instead of the purchase-money being Rs. 16, 500 which the plaintiffs offered to pay including Rs. 500 already paid as earnest-money, it was increased to Rs. 19,100, that is, the sum for which the defendants Nos. 2 to 7 have purchased the property.

A large number of issues were raised before the Subordinate Judge. But the arguments which have been addressed to us as regards the controversy between the parties were covered in the lower Court by issues Nos. 5, 6, 9, 10 and 11. The 5th issue runs thus:—Is the *bainama* as alleged in the plaint duly executed with the permission of the District

Judge of Nadia and is it a valid document? The Subordinate Judge found this issue in favour of the plaintiff. We must state at the outset that the agreement was not executed with the permission of the District Judge at all. It was executed in anticipation of the permission of the District Judge about 15 days prior to the date when the permission was asked for by the guardian for sale of the property. The 6th issue is this: Is the agreement aforesaid specifically enforcible against the minor? Has the plaintiff waived his right to have the agreement specifically enforced? This also the Subordinate Judge has decided in favour of the plaintiff. The 11th issue overlaps the question mentioned in the 6th issue which runs thus :—Is the plaintiff's claim for specific performance maintainable especially against the minor in view of the order of the District Judge to sell the property in auction? The 9th issue runs thus:—Was any permission granted by the District Judge of Nadia to Rati Kanta Saha to sell the property in question to the plaintiff? If so was it revoked by the same District Judge? If revoked can the plaintiff claim any specific performance on the basis of such a permission? The 10th issue is:—Is the order of the District Judge of Nadia for auction-sale of the property in suit illegal and *ultra vires*? The learned Judge has decided all these issues in favour of the plaintiff.

The defendants Nos. 2 to 7 have appealed against the decree of the Subordinate Judge. The defendant No. 1, the minor has been made a respondent and there has been no appearance on his behalf. The plaintiff preferred a cross-objection with regard to the sum of Rs. 2,600 which is the excess amount which the Subordinate Judge directed him to pay over and above the sum entered in the agreement. But the learned Vakil for the respondent has not very properly pressed the cross-objection on the ground that his Pleader in the lower Court had consented to pay this sum in which the Subordinate Judge made his decree.

The points raised by the appellants are, first, that there was no sanction by the District Judge for the sale of the properties to the plaintiff for Rs. 16,500, but that the order of the 4th September properly construed was only a general permission to the guardian to sell the property of the minor and not a permission to sell it to the plaintff; and the original contract for purchase of the property for Rs. 16,502 was given up by the plaintiff on his being informed that the property was subject to the maintenance charge of Garabini Dassi. The second point urged is that assuming that the permission by the learned Judge amounted to a permission to sell the property for Rs. 16,500 to the plaintiff, it was competent to the Judge to vary that order and give fresh directions on new facts, if he considered that it was for the benefit of the minor to do so. The third point pressed is that this is not a case in which specific performance of the contract should be granted because (*a*) it is against a minor, (*b*) that the discretion of the Court in granting specific performance should be exercised on the facts of this case against the plaintiff and (*c*) the decree of the Court below granting specific performance with the variation mentioned before is wrong in law. The fourth question urged is that defendants Nos. 2 to 7 had purchased with the sanction of the District Judge after the District Judge had recorded the order that he had not granted any permission for sale to the plaintiff, and having done so he is a *bona fide* purchaser against whom a decree for specific performance of the contract ought not to be granted.

We have set out all the orders of the learned Judge with regard to the permission relating to the sale of this property. It appears to us that the substance of the proceedings is that the permission was asked for to sell five old dilapidated houses used as sugar-factories at Kotchandpur for Rs. 16,500. The only objection that was raised before the learned Judge was with regard to the maintenance of Garabini Dassi. The Judge enquired whether the intending purchaser would accept the property subject to the encumbrance. He was informed that he was not so inclined. On the other hand it was stated before him that the plaintiff was desirous of purchasing some other property for Rs. 4,500 only and when Garabini Dassi again appeared and prayed that the other property should be sold subject to her encumbrance the learned Judge made the order that the more valuable property of Kotchandpur should be sold free from encumbrance and the maintenance charge was to be transferred from the property to the purchase money. We are of opinion that this could have only one meaning that the

Judge made a fresh order on hearing that the intending purchaser of Kotchandpur had declined to purchase it subject to encumbrance for the price he had offered. That the purchaser had so declined is also apparent from the evidence of Babu Lalit Kumar Chatterjee, a Vakil practising at Krishnagore. He says: "I know Srish Chandra Das.....I remember that the District Judge told me to ask Sris Chandra Das whether he (Sris Chandra Das) was agreed to purchase the properties in suit subject to the charge. Accordingly I asked him (Srish Chandra Das) in the *ejlash* (Court room) of the Judge about the same and he informed me that he was not agreed to purchase the said properties subject to the charge, and accordingly I informed the District Judge about the same." There cannot be, therefore, any doubt that the plaintiffs' unwillingness to purchase the property subject to the charge came to the knowledge of the District Judge by the petition of the guardian on the 28th August and by the information given by Lalit Kumar Chatterjee, and we consider that the learned Judge was quite right when he interpreted his own order of the 4th September in his order of the 18th September that the "permission to sell the property to the petitioner particularly was not granted." It was, therefore, perfectly open to the Judge to ask the guardian to sell the property for the best value obtainable, and when he found that another purchaser Tarini Kumar Dutta appeared before him and offered to pay Rs. 19,000 for the properties in question he naturally thought that the property was capable of fetching a higher value, and he directed the *Nazir* of the Court to issue a proclamation of sale of the properties to the highest bidder, and at the same time he prohibited the guardian from making any arrangement of sale with Srish Chandra Das, probably because the intending purchaser Tarini Kumar Dutta had mentioned it before the Judge that the guardian was going to sell the property to Srish Chandra Das. We are, therefore, of opinion that the District Judge was quite justified in not permitting the sale of the properties to the plaintiff for Rs. 16,500 but to the man who offered the higher price Rs. 19,100 for the properties. The guardian appointed by the Court under the Guardians and Wards Act is prohibited under s. 29 of the Act from transferring any property of the minor without obtaining the previous permission of the Court and s. 31 enacts that the Court shall not grant any such permission to the guardian except in case of necessity or for an evident advantage of the ward. In granting such permission to the guardian it is the duty of the Court to see that the transaction confers the highest benefit to the minor.

It is contended before us that the evidence shows that Rs. 16,500 is much more than the proper value of the property and that is what the plaintiff promised to pay. The plaintiff has given evidence for the purpose of proving that Tarini Dutta and other purchasers did not offer anything like the value which the plaintiff promised to pay when the guardian approached them for selling this property. It is urged on behalf of the respondent that because the defendants are rival merchants of the place they offered more than the legitimate price of the property in order to do some harm to the plaintiff. Assuming that to be so, we are of opinion that the motive of the defendants for offering a higher value for the property is perfectly immaterial. If on account of the competition between the purchasers the minor gets a higher value for the property which was intended to sell, it is not the business of the District Judge to enquire into the motive which led the rival purchasers to offer higher bids. It is to the advantage of the minor that there should be competition.

Exception has been taken to the procedure of the learned District Judge in directing issue of proclamation of sale and directing the *Nazir* to sell the property. It is urged that the District Judge had no jurisdiction to make such an order and the Subordinate Judge holds that the order of the District Judge is *ultra vires* by which we think he means that it was without jurisdiction. But the real matter is that the District Judge was not making any order superseding the authority of the guardian. It is for the sake of convenience only and for the purpose of finding a purchaser who would offer the highest value for the property that he directed that procedure to be followed. His evident intention was that after finding a purchaser who would pay the highest value he would grant permission to the guardian to sell the property to such purchaser. The guardian did not complain about it. We do not find that there is anything wrong in the procedure that the learned Judge follow-

ed nor do we consider that it was made without jurisdiction. Assuming for the sake of argument that this order of the learned Judge was not according to law, we consider that his order is final. Under s. 48 of the Guardians and Wards Act which lays down that save as provided by s. 47 which gives the right of appeal against certain orders and by s. 115, C. P. C., that is the section authorizing this Court to interfere in revision, an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise. These orders therefore of the learned Judge cannot be contested as illegal in the present litigation.

Having regard to the opinion we have expressed as regards the nature of the permission granted by the learned Judge we do not consider it necessary to give any detailed judgment with regard to the various other questions raised. But we ought to state the arguments advanced by the learned Vakils and the various authorities on which they have relied in support of their contentions. With regard to the right to obtain specific performance of a contract against a minor, appellants urge that assuming that such a contract is enforcible in law the Court must see whether the contract is for the minor's benefit and where it is clearly not so the Court would be justified in rejecting the claim for specific performance. This has been laid down in the case of *Jugal Kishori Chowdhurani* v. *Anunda Lal Chowdhuri* (2), where the learned Judges observe: "No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant unless the contract was shown to be for the infant's benefit." Reference has also been made to the case of *Chhitar Mal* v. *Jagannath Prasad* (1), where a contract was entered into with the permission of the District Judge but when the District Judge found that the price for which the property was sought to be sold was one hundred rupees less than the price offered by another purchaser, he granted permission to sell the property of the minor to the person who offered the highest value. The learned Judges did not go into the question whether the District Judge had the power to act as he had done, but they refused specific performance of the contract on the ground that it was manifest that if the plaintiff-appellant succeeded the result would be a loss of at least a hundred rupees to the minor. The learned Judges proceeded thus:—"We think that Courts in this country, as in England, will not allow a bargain made by an improvident guardian to be enforced against the interests of the minor, if it be shown to be a bargain made to the detriment of the minor." Reliance has been placed by the learned Vakil for the respondent on this passage, and it is argued that in the present case it is not the bargain of an improvident guardian but a guardian entering into the contract for the best value he could obtain. The answer to that is that it is not the question whether the guardian acted properly or not, but the real question is what would be for the benefit of the minor and as it is clearly against his interest to enforce the contract, it seems to us that on that ground also this contract cannot be enforced specifically, even assuming that the contract was entered into with the permission of the District Judge, which assumption, however, there is nothing on the record to support.

Attention has also been drawn on behalf of the appellants to the case of *Nagardas Vachraj* v. *Anandrao Bhai* (3), where the learned Judge deciding the case held that it is always open to the Judge to revise orders made in Chambers on *ex parte* applications if he considers that that should be done. It is argued on behalf of the respondent that the order in the present case was made upon a contested application. There is no room to suppose that it is so. The only objector was the grandmother who asked for safeguarding her charge of maintenance. Apparently she was not concerned with regard to the value of the property for which it ought to be sold; and if the Judge makes an order on the representation of a statutory guardian for sale of the property of his ward for the value suggested by the guardian, he may withdraw that order if it is brought to his notice that a higher value can be obtained for the minor's property than the value for which the guardian was going to sell it. It may not be due to the guardian's improvidence; it may be due to his inability to find proper purchasers with his best endeavours to do so, that he suggested a lower value.

The learned Vakil for the appellants relied upon the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (4) for the proposition that such a contract cannot be enforced. He relies upon the following observations of their Lordships of the Judicial Committee: "They are, however, of opinion that

it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract". Although their Lordships refer to a contract for purchase on behalf of the minor it is contended that the rule laid down by their Lordships is not confined to a contract for purchase only but to contracts for sale also. With regard to this proposition there have been some cases in India in which it has been held that that case is confined to a contract for purchase, *e. g.*, the case of *Innatunnessa Bibi* v. *Janaki Nath Sircar* (5). The learned Judges, one of us being a party to the judgment, held that in that case the agreement was clearly for the benefit of the minor, and the guardian of the minor who had entered into a contract of sale did so with the sanction of the District Judge under the Guardians and Wards Act, and so specific performance of the contract was held to be enforcible against the minor. In the case of *Babu Ram* v. *Saidunissa* (6), the learned Judges held that the Privy Council case mentioned above does not apply to a guardian appointed by Statute and they held that certificated guardian's powers are regulated and defined by Statute. In that case also the contract was entered into by the certificated guardian after receipt of the Court's sanction. That suit was not a suit for specific performance of the contract and it is, therefore, really no authority with regard to the question now before us.

Another case has been cited on behalf of the respondent [*Walidad Khan* v. *Janak Singh* (8).] That case, however, has no bearing on the question, because in that case a suit was brought by the plaintiffs some of whom were minors who had purchased certain property and paid the price for it, they had been afterwards dispossessed by another person having a superior right. The plaintiff sued for refund of the purchase-money: It was held that they were so entitled. Having regard to our findings that here the alleged agreement had not been entered into by the guardian with the permission of the Court and the Court never granted any permission to the guardian to sell the properties to the plaintiff for the price offered by him, it is not necessary for us to give any decided opinion on the question whether the suit for specific performance of a contract for sale entered into by the guardian of the minor's property with the permission of the Court is maintainable or not. There is no doubt whatever that if a sale is effected with the permission of the District Judge it is a good sale, but when the matter only remains under contract whether the District Judge may authorize the guardian not to complete the sale under certain circumstances and if he does so, whether the guardian can be compelled to perform the contract specifically or not, is a question which we leave open for decision.

With regard to the contention of the appellant that specific performance with variation of the contract made in the decree of the Subordinate Judge is erroneous, we are of opinion that that contention should be upheld. A contract can be specifically enforced with variation under certain circumstances only which are given in detail in the Specific Relief Act. Here a variation has been made on the ground that the petition of the guardian for permission did not mention a *jama* which had been omitted from the decree. It may be urged very reasonably that the whole contract not having been placed before the Judge for his sanction, but only a part of it, any permission granted on that petition cannot relate to the contract in suit. The order of the Subordinate Judge that the plaintiff should pay Rs. 2,600 in excess of the price agreed upon is also wrong in law.

With reference to the last point urged that the defendants Nos. 2 to 7 had purchased the property with the sanction of the District Judge after the order of the District Judge had been recorded that he had not sanctioned the sale to the plaintiff, no decree for specific performance should be passed as against them. We are of opinion that that is also a sound contention. Whether they can be considered as *bona fide* purchasers for value without notice or not, they can rely upon the order of the District Judge as having been correctly made, and under such circumstances the Court would not be justified in granting a decree for

(8) 10 Ind. Cas. 610; 35 A. 370; 11 A. L. J. 512.

specific performance in the exercise of its discretion against such purchasers.

We have dealt with all the grounds urged before us and, in our opinion, this appeal should be allowed and the plaintiff's suit dismissed with costs in this Court and in the Court below.

There is one matter which was not pressed before us, but we think we should make an order regarding it. The plaintiff would be entitled to get the Rs. 500 which he had paid to the guardian as earnest-money. This sum was deposited by the guardian in the Court below and the guardian in his written statement has alleged that he had offered to pay the money to the plaintiff but he had refused to take it. This money, we are informed, is still in deposit in Court. The plaintiff will be entitled to take out that amount. The sum which the plaintiff may have deposited in Court in pursuance of the decree of the lower Court he will be also entitled to withdraw.

The plaintiff-respondent will pay the costs of the appellants in this Court. The cross-objection is dismissed without costs.

Appeal allowed;
Cross-objection dismissed.

Z. K.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 110 OF 1923.

August 1, 1924.

Present:—Mr. Justice Jackson.

GANGADHARA MUDALIAR—DEFENDANT No. 2—APPELLANT

versus

EKAMBARA MUDALIAR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Satisfaction of decree, application to record—Receipt given by decree-holder—Discretion of Court.

Where a judgment-debtor has obtained from the decree-holder a receipt reciting satisfaction of the decree on a promise by the former which he has never attempted to discharge, it is within the discretion of the Court to refuse to record satisfaction of the decree under O. XXI, r. 2 of the C. P. C.

Appeal against a decree of the District Court, Chingleput, in A. S. No. 303 of 1922 (M. P. No. 167 of 1922, in O. S. No. 105 of 1917) on the file of the Court of the District Munsif, Conjeevaram.

Messrs. *K. Rajah Iyer* and *V. Ramasami Iyer*, for the Appellant.

Mr. *M. P. Sundara Raja Iyer*, for the Respondents.

JUDGMENT.—In 1921 the decree-holder passed the receipt Ex. A. to the judgment-debtor in O. S. No. 105 of 1917 to the effect that on payment of Rupees one thousand and three hundred (Rs. 1,300) he had cancelled his decree. The judgment-debtor has applied to record satisfaction under O. XXI, r. 2, both the lower Courts have rejected his application; hence this appeal.

It has been found that no cash consideration actually passed for Ex. A; the consideration was the judgment-debtor's undertaking to satisfy the decree debt of one Raja Iyer, P. W. No. 4 which was owed him by the present respondent. This promise has never been performed. It is now argued before me and this is the point for determination, that Ex. A was not without consideration in asmuch as there was an enforceable promise and that being so the lower Appellate Court had no discretion to refuse certification under O. XXI, r. 2. I think that the Court may apply its discretion to all the circumstances of the case and where the judgment-debtor has obtained a receipt on a promise which he has never attempted to fulfil the Court is justified if at the instance of the decree-holder, it refuses to record satisfaction. No other point was raised on appeal or appears to be valid.

The appeal is dismissed with costs.

V. N. V.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 623 OF 1922.

November 18, 1924.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

RAM CHARAN—DEFENDANT—APPELLANT

versus

LAL BIHARI VARMA—PLAINTIFF—RAM CHANDRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence, admission of—Reasons recorded in judgment.

Where an Appellate Court does not record at the time when it admits additional evidence, the reasons for the admission of such evidence, but records those reasons in its judgment, this amounts to a substantial compliance with the provisions of O. XLI, r. 27 of the C. P. C.

Second appeal from a decree of the Additional Judge, Cawnpore, dated the 28th February 1922.

Mr. *Iqbal Ahmad*, for the Appellant.

Messrs. *G. W. Dillon* and *N. P. Asthana*, for the Respondents.

JUDGMENT.—We think that this appeal is concluded by the findings of fact.

The plaintiff brought a suit for a declaration that the goods in the shop of his brother really belonged to him and, as such, were not liable to attachment and sale in execution of a decree obtained by a creditor of his brother.

The First Court dismissed the suit but on appeal the learned Additional District Judge of Cawnpore has allowed it. It is really purely a question of fact whether the alleged sale by one brother to another was a real sale and not a sham transaction in order to defraud or delay the creditors. Now the learned Judge has noted some very suspicious circumstances in the case which would lead one ordinarily to infer that the transaction was not a genuine one, but, bearing all these circumstances in mind, he has come to a very definite conclusion that the sale was a perfectly valid transaction. What happened was this, one brother agreed to buy the property of his brother and to pay all his creditors six-annas in the rupee and did, as a matter of fact, pay them that amount with the exception of one of the creditors who refused to accept it. This was the defendant respondent.

Objection is taken to the procedure adopted by the learned Judge in appeal. It appears that the Trial Court refused to accept certain accounts which the plaintiff tendered in evidence while he was under examination on the ground that they had not been tendered at the porper time. The learned Judge held that these documents which had been tendered originally in the execution department ought under the circumstances to have been received in evidence by the Trial Court and he decided in his discretion to admit them. He also admitted certain pass-books and so forth. He admitted these not with the object of assisting the plaintiff but with the object of giving the defendants material, from which they could test the genuineness of the plaintiff's case. It seems to us that the Appellate Court has a wide discretion in the matter as has been recently pointed out by the Privy Council and in this case we think that that discretion was rightly exercised. In our opinion there was nothing illegal in the procedure of the learned Judge. It is true that he did not record at the time when he admitted the additional evidence the reasons why he was admitting it but he did record those reasons very fully in his judgment. We think this is a substantial compliance with the law which requires that the Appellate Court when admitting fresh documents should give its reasons. In our opinion the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 64 OF 1924.

August 18, 1924.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Jackson.

NALLAGATTI GOUNDAN—PETITIONER-DEBTOR—APPELLANT

versus

RAMANA GOUNDAN AND OTHERS—RESPONDENTS-CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 5—Interim protection, grant of—Inherent power of Court.

Under s. 5 of the Provincial Insolvency Act, the District Judge has inherent powers to grant *interim* protection to a person who has applied to be adjudicated an insolvent.

Abdul Razak v. *Basiruddin Ahmed*, 6 Ind. Cas. 95; 14 C. W. N. 586; 11 C. L. J. 435, followed.

Appeal against the order of the District Court, Coimbatore, dated the 2nd October 1923, in I. A. No. 320 of 1923, in I. P. No. 99 of 1923.

Mr. *W. S. Subrahmanya Iyer*, for the Appellant.

Dr. *T. C. K. Kurup*, for the Respondents.

JUDGMENT.—The appellant who had filed an application for adjudication as an insolvent applied for *interim* protection and this application was rejected by the District Judge. This appeal is against that order refusing such protection. In our opinion the District Judge has inherent powers under s. 5 of the Provincial Insolvency Act to grant the appellant the protection he has claimed: See *Abdul Razak* v. *Basir-ud-din Ahmad* (1). On the

(1) 6 Ind. Cas. 95; 14 C. W. N. 586; 11 C. L. J. 435.

merits of the application we are not satisfied that the discretion vested in the District Judge has been wrongly exercised by him. In these circumstances we dismiss this miscellaneous appeal with costs.

V. N. V. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 204 OF 1919.

April 17, 1924.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

Kumar GOPIKA RAMAN ROY—PLAINTIFF—APPELLANT

versus

ATAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Adverse possession by tenant, whether possible—Construction of decree—Decree in ejectment suit directing defendants not to be ejected on compliance with certain conditions, effect of—Defendants, whether constituted tenants—Civil Procedure Code (Act V of 1908), O. XXII, r. 2, O. XXIII, r. 3—Compromise by some of parties to suit—Court, whether can reject compromise—Appeal—Death of one of several respondents, effect of—Abatement.

In a suit for ejectment and mesne profits which was decreed, the decree provided that the defendants should not be ejected if they continued to pay rent at the prevailing rate. The defendants did not take advantage of the condition and were formally ejected from the lands in dispute in execution of the decree. After execution of the decree they retained or regained possession of the lands. In a second suit for ejectment:

Held, that the condition in the decree had not the effect of making the defendants tenants of the plaintiffs and that their possession after the execution of the decree was that of trespassers and that the plaintiffs must prove attornment by the defendants subsequent to the execution of the decree in order to establish that the status of the defendants was that of tenants. [p. 681, col. 2.]

Where some only of the parties to a suit join in a petition of compromise the other parties are entitled to object to the compromise being recorded, and if they show good cause the Court has discretion to refuse to grant a decree in terms of the compromise. [p. 683, col. 2.]

Per *B. B. Ghose, J.*—A tenant cannot, during the term of his tenancy, by any act or declaration of his disseise the landlord. He may, by repudiating the landlord's title, during the term, forfeit the term but the landlord is not bound to take advantage of the forfeiture and his estate cannot be affected thereby. A tenant cannot cause the Statute of Limitation to run against his landlord by giving notice to him of an adverse title during the term. The Statute runs against the landlord only when the relationship of landlord and tenant is determined and the landlord is entitled to take possession. This principle is also applicable to cases where the tenants claim not an absolute title in themselves but only an interest higher than that to which they are entitled. [p. 688, col. 2.]

A lease is not determined on a forfeiture until the landlord does some act showing his intention to determine the lease. It is the privilege of the landlord to take advantage of a forfeiture or not and adverse possession of the tenant does not commence against the landlord from the date on which the tenant renounces the tenancy. [p. 689, col. 1.]

Where during the pendency of an appeal by the plaintiff in a suit for ejectment against several sets of tenants who hold distinct plots of land which are separately described in the plaint, some of the tenant respondents die and their legal representatives are not brought on the record within the period of limitation, the appeal does not abate *in toto*, it abates only with respect to the interests of the deceased tenants and those respondents who were joint with the deceased respondents. [p. 689, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the 24th of March 1919.

Babus *Dwarka Nath Chakravarti, Surendra Nath Guha, Harendra Kumar Sarbadhikari, Apurba Charan Mukherjee*, for Babu *Pramatha Nath Bandopadhya*, for the Appellant.

Mr. *S. R. Das* (Advocate-General), Babus *Mahendra Nath Ray, Gobinda Chandra De Roy, Ramesh Chandra Sen, Birendra Chandra Das, Santimoy Majumdar* and *Nripendra Chandra Das*, for the Respondents.

Babu *Shib Chandra Palit*, for the Deputy Registrar.

JUDGMENT.

Newbould, J.—The plaintiff Kumar Gopika Raman Ray who is the appellant before us, sued for *khas* possession of a large area of land about 20 square miles in village Patharkandy in the Karimgung Sub-Division of the District of Sylhet. He claimed the land as appertaining to permanently settled Estate No. 85 of the Sylhet Collectorate of which he owns a 1/7th share. In Sch. I of the plaint the lands of *Mouza* Patharkandy in Estate No. 85 are described. Schedule II specifies the lands which were allotted to this 1/7th share by an amicable partition between the predecessor-in-interest the Maharaja of Manipur and his co-sharers. In Schs. III and IV are set out certain lands which though parts of the land of Sch. II are not included in the claim of the present suit. The lands of Sch. III were acquired by Government under the Land Acquisition Act. The land of Sch. IV was the subject of the previous suit in which the plaintiff's father obtained

a decree for *khas* possession after ejectment of the tenant defendant, Abjal Ali.

The suit was brought against 187 defendants. The first 160 were sued as tenants in occupation of the lands in suit but it was alleged that their tenancies had been determined by reason of 120 suits brought by the plaintiff's father against these defendants or their predecessors-in-interest in the years 1903 and 1904. The majority of these defendants are Manipuris but among them are a few Muhammadans and one Hindu of Patni caste. Defendant No. 161 Molay Chand Thakur was joined as a defendant on the allegation that defendant No. 148 Dinamani Singh had executed a collusive and fictitious deed of conveyance in his name. Defendants Nos. 162 to 186 were joined as *pro forma* defendants being the plaintiff's co-sharers in Estate No. 85. Defendant No. 187 Juramal Tushniwal was the purchaser of the 1/7th share of the Estate which had belonged to the Maharaja of Manipur and the plaintiff's father bought the rights of the defendants.

The suit was instituted on the 7th October 1912 and was dismissed on the 24th March 1919. The appeal was filed on the 13th August 1919. In addition to the time taken in the actual hearing of the suit, much delay was unavoidable owing to the necessity of making substitution on the deaths of several of the original defendants. As it is, necessary substitutions have not been made in all cases of death among the first 160 defendants both during the hearing of the suit and the pendency of this appeal.

The history of events according to the case for the plaintiff-appellant is as follows: About 1840 the *zemindars* of the permanently settled Estate No. 85 known as *Taluk* Muhammad Jalal were some persons described as the Chowdhuries of Chayabari. A number of Manipuris settled and cleared of jungle portions of the land of this estate. There was a dispute between the *zemindars* and these Manipuris which was the subject of proceedings before the Revenue Authorities. The Manipuris were at first successful and obtained orders of a Deputy Collector in 1844 declaring that the land held by them were not lands of *Mouza* Patharkandy appertaining to the permanently settled Estate No. 85 but lands to which Government had a right of Settlement as *ilam* lands There was long litigation, the *zemindar* being successful before the Collector and Commissioner and the Manipuris being at first successful in an appeal to the Board of Revenue but this decision was reversed on review and a final order was passed in the *zemindar's* favour on 12th February 1852. The rents paid by those Manipuris who had taken Settlement from Government were refunded to the *zemindars*. Then in Suit No. 9 of 1854 some of the Chayabari Chowdhuries sued the tenants on the lands for recovery of possession and mesne profits. They were successful in this suit but it was ordered in the decree dated 30th July 1855 "that as long as the defendants are ready and willing to pay the rents according to the legal rates of the village, they should not be ousted from their right as *jotedar*." The defendants in this suit were the predecessors-in-interst of defendants Nos. 1 to 160 in the present suit. At the time of the *thak* Survey the dispute broke out again and was decided on the 29th August 1863 in favour of the Chowdhuries of Chayabari. In 1867 the interest of one of these Chowdhuries Krishna Prosad Das, 1/8th share of Estate No. 85 was sold in execution of a decree against him and was bought on behalf of the Maharaja of the Native State of Manipur. In addition to their 1/8th share another undivided 1/56th share was purchased and the Manipuri State thus became the owner of an undivided share 1/7th share of Estate No. 85. There was a partition by amicable arrangement between the Maharaja and his co-sharers by which the specific lands of Sch. II were allotted to the Manipuri Estate. While the Maharaja was in possession of these lands by collection of rents from the tenants, Government again claimed these lands as *ilam* lands and rents were realised from the occupants by Government Tehsil Officers. These rents were refunded to those who had paid them under an order of the Deputy Commissioner of Sylhet dated 22nd December 1882. After that rents were collected by the Maharaja's Officers until the rebellion in Manipur in 1891. In consequence of this rebellion the reigning Chief was deposed and all the properties of the Manipur State including the lands in suit were confiscated and became the property of the British Government by an Act of State. The British Government then placed Chura Chandra Singh, a minor on the throne of Manipur and restored to him the properties which had formerly belonged to that State. An Administrator

of the State was appointed and he, under the orders of the Government of India sold the Sylhet properties of the State by public auction. At this sale Juarmal Tushinwal bought the property of the Second Schedule to the estate and a deed of conveyance in his favour was executed by the Administrator of the State as guardian of the minor on the 5th March 1896. On the 6th June in the same year, Juarmal sold this property to Raja Girish Chandra Roy the father of the plaintiff. The plaintiff's father applied under the provisions of s. 38 of Act VIII of 1869 for a measurement of the lands but these proceedings were dropped in consequence of objections taken by Dinamani Singh, defendant No. 148. In 1903 some land of *Mouza* Patharkandy was acquired under the Land Acquisition Act, claims to the compensation money were put forward by several of the Manipuri defendants in the present suit but these claims were rejected and the compensation awarded to the plaintiff's father and his co-sharers the Chayabari Chowdhuries on the 26th August 1904. The 120 suits against the first 160 defendants or their predecessors, to which reference had already been made, were instituted in batches on five different dates, the earliest being 28th January 1903 and the latest 11th April 1904. These suits were all tried together and dismissed in the Munsif's Court on the 21st May 1906. Appeals to the District Judge were dismissed on the 24th July 1907. Second appeals were preferred to this Court and on the 26th August 1910 the present plaintiff, who had succeeded to his father's interest, obtained permission to withdraw the suits with liberty to bring fresh suits on the same cause of action or any other causes of action as he might be advised. The sale to defendant No. 161 to which reference was made in the plaint appears from the defence evidence to have been by the deed Ex. F dated 8th September 1904. This deed has been executed not only by Dinamani Singh defendant No. 148 but also by eighteen other Manipuris including defendants Nos. 16, 52, 88, 89, 91, 125 and 148.

At the trial in the lower Court 29 issues were framed. Nine of these including the most important issues as to title and limitation were decided against the plaintiff. Though we are unable to agree with the learned Subordinate Judge on several of his findings we hold on a full consideration of the case after a very lengthy hearing that the issue of limitation must be decided in the respondents' favour. We accept the contentions of the learned Government Pleader that the plaintiff has established his title to 1/7th share of *Taluk* No. 85 Muhammad Jalal. It was not necessary for the plaintiff to trace back the title of the Chayabari Chowdhuries to Muhammad Jalal after whom the *taluk* was named at the time of the Permanent Settlement. Though there is no evidence to show how the 1/8th share purchased from Krishna Prosad Das was increased to 1/7th, there is satisfactory evidence that since 1887 the Maharaja of Manipur and subsequently the plaintiff's father and the plaintiff have been asserting their right to a 1/7th share without any opposition from their co-sharers. We differ entirely from the learned Subordinate Judge's finding as to the effect of what was done by Government in consequence of the Manipur rebellion in 1891. In the first place we are unable to accept his finding that the original purchase by the Maharaja of Manipur was made in his private capacity and not as head of the State. Further we hold that the Crown did, by an Act of State, confiscate all property of the former Maharaja including his interest in the *Tuluk* No. 85. The Crown waived its right to annexation and vested the property in the Raja appointed by it, Chura Chand Singh. By the indenture Ex. 3 there was a valid conveyance to Juarmal the plaintiff's father's vendor of the right of the infant Raja to a 1/7th share of the *taluk*. We are unable to accept the contention of the learned Government Pleader that the effect of this Act of State was to give the new Raja a better title than the former Maharaja. As the Government never exercised any acts of possession over this land after the annexation of the Maharaja's property the proprietary rights, if any, obtained by others by adverse possession would not be affected. We further hold that the issue of title was raised and decided as between the plaintiff's father and those Manipuri defendants who were parties to the Land Acquisition Proceedings decided by the District Judge of Sylhet in his judgment Ex. 5-A dated 26th August 1904. It is, therefore, *res judicata* as between the plaintiff and those defendants and also defendant No. 161 since he claims by purchase from these defendants. The

plaintiff's evidence to prove his title to a 1/7th share of *Taluk* No. 85 is unrebutted. The contesting defendants do not claim any right in that *taluk* and the other sharers in that *taluk* do not dispute the extent of his share. The omission to join two persons Benod Behari and Bon Behari, who according to plaintiff's witness No. 5 have still their share in *Taluk* No. 85 is not fatal to the plaintiff's case on this issue. From the evidence of this witness it appears that their share is a part of the 1/7th share in which defendants Nos. 174, 175, 178, 186 and 177 also have an interest. Also their father Bepin Krishna was a party to the suit in which the plaintiff's father's right as owner of 1/7th share to eject Abjal from the land of Sch. IV was established.

But though we hold that the plaintiff has established his title to a 1/7th share of *Taluk* No. 85 we hold that his claim to the lands in suit as appertaining to his share of that *taluk* is barred by limitation. Admittedly the plaintiff, his father and his father's vendor Juarmal never collected rents from any of the first 160 defendants, after the latter's purchase of the property on the 29th October 1895, nearly seventeen years before the institution of this suit. We agree with the learned Subordinate Judge that having regard to the provisions of r. 2, O. XXIII of the C. P. C. the appellant cannot take advantage of the provisions of s. 14 of the Limitation Act and include the time occupied in the litigation of the former 120 suits. The point that was most strongly pressed before us was that the defendants or their predecessors having once been tenants of the owners of the proprietary right in these lands, their possession could not be adverse until the tenancy was determined. On behalf of the respondents it is contended that the first 160 defendants or their predecessors never were tenants of the plaintiff or his predecessors. It was also argued in the alternative that the general rule, that the possession of a tenant is that of his landlord does not absolutely preclude one who enters as a tenant from subsequently holding adversely to his landlord and that the facts of the present case are sufficient to bring it within the exception to which reference is made in *Giris Chandra Gangopadhya* v. *Krishna De Nag* (1). It is further argued that if there was the relationship of landlord and tenant between the parties it terminated; if not earlier, on the 15th December 1896 the date given as the cause of actions in each of the previous 120 suits, the cause of action being stated to be "the possession of the principal defendant in the land claimed alleging his own right therein and denying that of the plaintiff."

Therefore, on this issue of limitation the first question to be decided is whether the existence of the relationship of landlord and tenant has been proved by the plaintiff. The plaint and decree in Suit No. 9 of 1854, Exs. 19 and 19 (*a*) though relied on by the plaintiff do not assist him on this point. The result of this litigation was that the plaintiff's predecessor obtained a decree in ejectment. We agree with the lower Court's finding that the defendants in that suit must be held to have been the predecessors-in-interest of the defendants Nos. 1 to 160 in this suit. The result of that suit so far from creating a relationship of landlord and tenant between the parties would have been to destroy such a relationship if it had existed previously. The provision in the decree that the defendants should not be ousted from their right as *jotedars* if they were willing to pay rent is of no assistance to the plaintiff's contention that they became tenants after the decree. This provision would have enabled the defendant to prevent the decree from being executed by attorning to the decree-holders. The allegation in para. 10 of the plaint that the Chowdhuries got possession of the decretal lands through the Court is inconsistent with the statement in the following paragraph that the defendants in Suit No. 9 of 1854 were allowed by the decree to retain possession of the land as tenants under the Chowdhuries. The fact that the decree-holders got possession through the Court shows that the judgment-debtors did not take advantage of the condition in the decree which would enable them to avoid ejectment. If after the execution of the decree they retained or regained possession, such possession would be the possession of trespassers and the plaintiff must prove attornment by them subsequent to the execution of the decree.

The next piece of documentary evidence in chronological order on which reliance is placed by the plaintiff-appellant to prove

(1) 75 Ind. Cas. 325; 38 C. L. J. 266 at p. 271: (1924) A. I. R. (C.) 168.

tenancy is Ex. 5. This is a certified copy of the award under Regulation VII of 1882, dated 29th August 1863. This award was made on an objection by the Chowdhuries to the *thak* proceedings of 1862. In deciding the issue of title in favour of the Chowdhuries the Deputy Collector made some remarks about their possession by realisation of rents through tenants and also about the nature of the defendant's possession which are favourable to the case for the appellant. But in the *thak* proceedings the only question for decision was who had the proprietary right and all that was judicially decided was that those defendants who were predecessors of some of the first 160 defendants in this suit, had not proprietary rights. It was not a judicial decision that they were tenants of the Chowdhuries and there are other remarks in the award which support the respondents' contention that those defendants were then holding the land not as tenants but in assertion of their own right. I hold, therefore, that this document is of very slight value as evidence of the alleged tenancy.

The oral evidence of the plaintiff's witness to prove realisation of rents from the defendants Nos. 1 to 160 and their predecessors by the Manipur Raj up to the Manipur War of 1891 has been disbelieved by the learned Subordinate Judge in whose presence the witnesses were examined. After hearing the evidence read to us we have come to the same conclusions. The evidence of these witnesses is contradicted by facts established by reliable evidence. There can be no doubt that the Manipur Raj was out of possession during the time that Government treated these lands as *ilam* lands from 1877 to 1882. In the judgment of the lower Court good reasons based on the evidence of independent witnesses examined by the plaintiff are given for holding that no rents were collected by the Manipur Raj after the release of the lands by Government in 1882. In addition to the evidence considered by the lower Court there is also a document which for reasons recorded on the order sheet, we have admitted in evidence at the hearing of the appeal though it was rejected at the trial. This is a certified copy of a petition dated 13th *Baisakh* 1293 B. S. There is an obvious mistake in date which should be 1294 and the corresponding correct date is the 25th April 1887. The document was relied on by the plaintiff to prove the alleged partition but it contains an admission which is so favourable to the defendants on the question of possession that we are surprised that objection should have been taken to it being made a part of the record. This petition was filed on behalf of the Maharaja of Manipur and some of the Chowdhuries asking for a general proclamation to inform the tenants, that rents were to be paid to the petitioners in consequence of the lands being relesed from being *ilam* lands. This petition makes it obvious that for some years after the Government ceased treating the lands as *ilam*, the Manipur Raj was unable to collect rents. This strongly corroborates the other evidence on which the lower Court has based its finding that the plaintiff-appellant's predecessor-in-interest was not in possession by receipt of rent from 1887 to 1891.

This document also supports the respondents' case that there was no effective partition between the co-sharers of the Estate No. 85 which resulted in the Manipur Raj obtaining separate possession of the lands in suit. The description of the pieces of land allotted to each co-sharer indicates that the partition was a paper transaction and not an actual division of the land. The portions of land of each share are exactly equal in area. In a real partition there would have been some differences in area dependent on such considerations as the quality of the land, whether it was in occupation of tenants or not the nature of the tenancies and other matters. Further the boundaries given, except where they are the external boundaries of the land of the *taluk*, are not described by natural features or the names of the persons in occupation but as the land allotted to one of the other co-sharers. Such a partition could be demarcated by lines drawn on a map but if these lines were shown by boundaries put up on the land the result would be that the lines would frequently cross holdings of the tenants. This would not have been the case if there had been a real partition between co-sharer landlords who were in possession by collection of rent. Reliance is placed on the Land Acquisition Proceedings of 1903. The partition was then admitted by the plaintiff's father and his co-sharers but it was not in issue between them and the other claimants. This finding cannot operate as *res judicata* on the question of partition as

between the plaintiff and defendants in the present suit. It is unnecessary to add anything to the remarks in the judgment of the lower Court as to the unsatisfactory nature of the oral evidence to prove the alleged partition. For the reasons above given, I agree with the findings of the lower Court that since the passing of the decree in Suit No. 9 of 1854 there was no relation of landlord and tenant between the plaintiff's predecessors and the predecessors of defendants Nos. 1 to 160. It follows from this finding that the plaintiff's suit is barred by limitation and that this appeal must be dismissed.

I will, however, refer shortly to the more important of the other points that were argued before us. There were long and able arguments on the alternative plea of the respondents that if a tenancy were proved nevertheless the possession of the principal defendants became adverse more than twevle years before suit. The respondents having denied that they ever held the land as the tenants would find it difficult, if they had failed in this contention, to establish conduct on their part which would have the effect of ouster and disseisin of their landlord. But they would have a strong case on their contention that the tenancy if it ever existed came to an end by disclaimer accepted by their landlord as was admitted in the plaints in the former 120 suits. In para. 33 of the plaint in the present suit it is pleaded that the plaintiff's father wrongly and erroneously based his cause of actions on an alleged denial of his title by the defendants and their predecessors. It appears to me that this admission was more than a mistake of law but included an admission from which an inference of fact can be drawn that the tenants disclaimer had been accepted on the 15th December 1896. There is nothing to rebut this inference and would hold, therefore, that this alternative plea of the defendants also succeeds on this ground.

Even if our finding on the main issues had been in favour of the appellants we should have had to dismiss the appeal against several of the first 160 defendants. In the case of some, the appeal has abated owing to their deaths during the pendency of the appeal without an order being obtained setting aside the abatement. This appeal was heard in part before another Divisional Bench and during that hearing the appeal was dismissed as against the first 160 defendants on the 4th July 1922. On 27th July 1923 that order was reviewed and the dismissal set aside as against all those respondents on whom the rule was served. The order of dismissal still stands as against some respondents who were not served with notice of the rule. It is contended that as the plaintiff in para. 3 of the plaint alleged joint possession by the tenant defendants, the appeal when dismissed against some must be dismissed against all. But reading the plaint as a whole and more particularly having regard to the fact that the land held by each of the first 160 defendants is specifically descrided in the Second Schedule, we hold that the appeal should not be dismissed on this ground against all these defendants though it would fail in respect of those specific plots where a respondent against whom the appeal is dismissed is shown as holding the land with another respondent. But the learned Government Pleader who appeared for the appellant stated in his reply that he did not ask for a decree in ejectment against any of the first 160 respondents but would be content with such a decree against defendant No. 161 in the presence of those respondents who are still parties to this appeal with a declaration of title.

On the findings of the lower Court as to issues Nos. 17 and 23 it would appear that even if others were successful, the plaintiff would not have been entitled to a decree to the whole of the land described in Sch. II of the plaint.

It is finally contended that the plaintiff should at any rate have been granted a decree against those defendants who filed *solenamas* in the lower Court. The facts as found at the conclusion of the judgment in respect of these *solenamas* were not disputed but it was urged that the provisions of O. XXIII, r. 3 of the C. P. C. are mandatory and that the Court cannot refuse to record a compromise except where it is unlawful. We hold that in a case like the present where some only of the parties to the suit join in a petition of compromise the other parties are entitled to object to the compromise being recorded and if they show good cause the Court has discretion to refuse to grant a decree in terms of the compromise. On the facts found in the present case we hold that that discretion was properly exercised.

For the above reasons we dismiss this ap-

peal with costs to those among to principal defendants Nos. 1 to 161 who have entered appearance in this appeal.

Ghose, J.—The facts on which the suit was brought are briefly these: The lands in dispute are within *Mouza* Patharkandy appertaining to Estate No. 85 called Mahomed Jalal of the District of Sylhet. The predecessors of the defendants, who were Manipuris, occupied the lands sometime early in the last century, when they were covered by jungle, and brought them under cultivation. The owners of Estate No. 85 were the Chowdhuries of Chayabari. The Local Government Officials claimed the lands as appertaining to *ilam* lands falling outside the ambit of Estate No. 85. After protracted proceedings the Revenue Authorities released the lands as appertaining to the estate of the Chowduuries. Some of the Chowdhuries then brought a Suit No. 9 of 1854 against the predecessors of defendants Nos. 1 to 160 and obtained a decree. Plaintiff alleges that under that decree the defendants became the tenants of the Chowdhuries and paid them rent. Disputes again arose at the time of the *thak* Survery when some of the Manipuris claimed the lands as *ilam* lands appertaining to *Mouza* Tatirband and not to Patharkandy. This dispute was decided in favour of the Chowdhuries by the Award dated the 29th August 1863 (Ex. 5). In 1870-71 the Raja of Manipur State purchased 1/8th share of the estate in execution of a decree against one of the Chowdhuries named Krishna Prasad, and he purchased another 1/56th share afterwards, by which the Raja became owner of 1/7th share in the estate. It is alleged that there was an amicable partition among the co-sharers of the estate and the Raja became solely entitled to the lands in Sch. II of the plaint by reason of the partition. The Government again took possession of the lands in 1877 as *ilam* but subsequently released it in 1882. The Raja of Manipur continued in possession by realizing rents till 1891, when he rose in armed rebellion against the British Government, as the result of which the territories of the State of Manipur as well as all the properties of the Raja were confiscated and conferred upon a new Raja, selected by the Goverament, who was then a minor. During the minority of the Raja an Administrator of the State was appointed by the British Government who took possession of all the properties including the share in Estate No. 85 belonging to the former Raja. The Administrator sold the 1/7th shars in the Estate No. 85 with the sanction of the British Government to one Juarmal Tushniwal by a conveyance dated the 5th March 1896. Juramal again sold that share to the father of the plaintiff by a *kobala* dated the 6th of June 1896. Plaintiff's father then applied for survey of the lands under the provisions of the Bengal Rent Act VIII of 1869, but that had to be abandoned on account of the resistance of the defendants who denied his right. Then in 1903 some lands were acquired under the Land Acquisition Act and plaintiff's father claimed a share of the compensation money. This was resisted by some of the defendants in this case who alleged that they were the owners of the land. The learned Judge decided in favour of the plaintff's father. Plaintiff's father brought 120 different suits in 1903 and 1904 against the defendants separately for possession of the disputed lands which were subsequently withdrawn with liberty to bring fresh suit. On the 16th September 1904 some of the defendants alleging that the lands are *ilam* lands of which they were the proprietors sold them to defendant No. 161. Plaintiff says that the act of his father in bringing those 120 suits determined the tenancy of the defendants and their predecessors and he, therefore, brings this suit in ejectment. It is sufficient to say that the defendants deny plaintiff's title and plead limitation, and they also deny that they were ever the tenants of the Chowdhuries of Chayabari or that they ever paid rent to them or to the Raja of Manipur. It is unnecessary to state other minor facts alleged. A large number of issues were raised in the Court below but the principal questions really fall into two groups :—(1) whether plaintiff's title has been established and (2) whether the suit is barred by limitation.

The questson of title was argued under several heads. It can hardly be disputed that the lands in Sch. I of the plaint appertain to State No. 85 and fall within *Mouza* Patharkandy. Next, as the Subordinate Judge says, according to both parties the lands in suit are included within Sch. I of the plaint. His opinion that some of the *dags* cannot fall within the bonndaries of Sch. I is based upon his view of the map prepared by the Commissioner, without any other evidence or explanation from the Commissioner, and

should not, therefore, be accepted. The disputed lands must, therefore, be held to be within Estate No. 85. The Civil Court Commissioner reports that all the lands in suit (*i. e.*, Sch. II) are included in Sch. I of the plaint except part of *dags* Nos. 70, 125, 52, 8, 23 and almost the whole of *Dag* No. 71. The plaintiff cannot, therefore, claim those *dags*, and he does not do so before us. The Commissioner also reports that the lands of Sch. II with those exceptions are the lands included in the decree in Suit No. 9 of 1854. The Subordinate Judge has refused to accept this part of the report on insufficient grounds. No one appears to have taken any serious objection to the report of the Commissioner nor did the defendants examine him in Court and in the absence of any other evidence the Subordinate Judge ought to have accepted the report. If the lands in suit are the same as those in Suit No. 9 of 1854, the question of title would be *res judicata* if the parties were identical. The Subordinate Judge has found that the defendants in Suit No. 9 of 1854 were the predecessors of the principal defendants Nos. 1 to 160 in this case and I must accept that finding, which was not seriously controverted before us. The question is whether the plaintiff derived his interest from Krishna Prasad from whom he traces his title, and who was a plaintiff in Suit No. 9 of 1854. Krishna Prasad's name also appears as one of the owners of Estate No. 85 in the *thak* Statement (Ex. 18). The Raja of Manipur purchased the interest of Krishna Prasad which was said to be a 1/8th share of the Estate (Exs. 9, 9A 9B, 15). Then it is alleged that the Raja of Manipur purchased another 1/56th share making his total of 1/7th. It is true that no document has been produced to prove the purchase of the 1/56th share, but in all proceedings down to the present suit, the share acquired by the Raja of Manipur has been asserted to be 1/7th in the presence of all the co-sharers in the estate without objection by any co-sharer. In the land acquisition case before the District Judge in 1903, plaintiff's father clamed 1/7th share in the estate which was admitted by the co-sharers who also claimed a share of the compensation money, and the learned Judge found that plaintiff's father was entitled to that share. In this case also the co-sharers who gave evidence, (plaintiff's witness No. 5 and No. 32) admitted that the share of the plaintiff is 1/7th and there is no objection by any other co-sharer. Under these circumstances the Subordinate Judge seems to be wrong in holding that plaintiff has not been able to prove that the Raja had acquired 1/7th share in the estate. It must, therefore, be held that plaintiff has succeeded in showing that if he has got a good title, his share is 1/7th. Defendants urged that plaintiff has not legally obtained the interest of the Raja of Manipur and the Subordinate Judge has accepted that contention. There is no doubt that the Raja of Manipur was deposed on account of rebellion and a new ruler of Manipur was selected. There can be no question that the Administrator took possession of these properties under the authority of Government with all other properties owned by the previous Raja of Manipur. Whether the act of the British Government be called annexation and regrant or it amounted to simply depriving the previous Raja of his property and conferring it on another, this was an act of State, the legality or validity of which cannot be questioned in a Civil Court. The Administrator, therefore, gave a good title to Juarmal Tushniwal by his conveyance of 5th March 1896 and the plaintiff's father acquired a good title by his purchase from Juarmal to 1/7th share of the estate.

The plaintiff, however, cannot succeed in this suit unless he proves that he is solely entitled to the lands by reason of a partition among the co-sharers. This I think he has failed to do. The earliest document in support of the partition is the petition by the co-sharers of 1887 to the Deputy Commissioner, a certified copy of which was admitted as Ex. 1 in this Court but which had been rejected by the Trial Courts. That petition, however, does not show any partition by metes and bounds nor does it contain the names of the tenants on the lands allotted to each co-sharer. This I think is not sufficient to prove that the lands in dispute fell to the share of the Raja of Manipur by partition. Besides in the conveyance by the Administrator in favour of Juarmal there is no mention of any partition and an undivided 1/7th share was purported to be sold. It is contended by the plaintiff that the judgment of the District Judge in the land acquisition case operates as *res judicata* on the question of partition in that case the plaintiff's father was 2nd party claimant and some co-sharers in Estate No 85 were 3rd party

claimants and some of the defendants in this suit were 4th party claimants. The 2nd and 3rd party claimants agreed that there was a partition. The 4th party claimants claimed the compensation money on the allegation that the lands appertained to their *Mouza* Tatirband. This was found against them and in favour of the 2nd and 3rd parties. The 4th party were not in any way interested in the question of partition and no issue was raised as regards that as between those parties to the proceedings. The question cannot, therefore, be *res judicata* as against the defendants. Besides all the defendants were not parties in those proceedings. It is next urged by the plaintiff that in the present suit two of the co-sharers examined by the plaintiff prove partition and the others do not object and, therefore, this should be accepted. But the difficulty in the plaintiff's way is that in seeking to eject tenants (assuming for this purpose the existence of a tenancy) on the ground of forfeiture he must show that he was the sole landlord. There is no evidence that the tenants ever accepted the plaintiff as their sole landlord by attornment or that they were bound by the alleged partition, on which they became the tenants of the plaintiff alone. These defendants were admittedly on the land from long before the alleged partition and they cannot be bound by any amicable partition as allaged without their consent. If they were not so bound the denial of the plaintiff's right cannot operate as a forfeiture of the tenancy nor can the plaintiff alone seek ejectment. This is, of course, assuming that the alleged denial of the title of the plaintiff, who was an assignee of the interest of one of the owners, could operate as a forfeiture, about which there may be difficulty. The plaintiff, therefore, in my judgment is not entitled to ejectment and on that ground his suit must fail.

The question of limitation must then be dealt with. This question as raised may be divided into two heads. First, whether defendants Nos. 1 to 160 were tenants on the land; and secondly, if so, whether the plaintiff's right to the land has been barred by limitation on account of the events which have taken place. With regard to the first point, it cannot be disputed that if those defendants were not tenants the suit is barred by limitation as against all the defendants. The plaintiff's case is that the relationship of landlord and tenant was established between the predecessor of the plaintiff and the predecessors of the defendants Nos. 1 to 160 by the decree in Suit No. 9 of 1854. The relation of landlord and tenant having been once established no limitation can commence to run against the plaintiff by reason of any alleged adverse possession by those defendants, as the possession of the defendants could not have been adverse to the plaintiff. Adverse possession against the plaintiff only commenced from the date when the defendant No. 161 purported to purchase the proprietary interest in these lands on the 16th September 1904 and the suit being within twelve years from that date is not barred by limitation. The effect of the decree in Suit No. 9 of 1854 requires careful consideration. That suit was brought by some of the proprietors having 11-annas odd share in *Mouza* Patharkandi against the predecessors of defendants Nos. 1 to 160 in which the other co-sharers of Patharkandy were made defendants on the allegation that the co-sharer defendants were in collusion with the main defendants. In the plaint after stating the history of the disputes with regard to the property they asked for possession of a ceratin quantity of land as their share of the total area and for mesne profits. They valued the suit according to the actual value of the disputed lands and claimed Rs. 2,781 as mesne profits. The ordering portion of the decree runs thus:—That the suit be decreed, awarding the plaintiffs Rs. 1,235-6-6 as mesne profits for the years 1258 *B. S.* to 1260 *B. S.* till the time they do get possession. It is also ordered that as long as the defendants are ready and willing to pay the rents according to the legal rates of the village they should not be ousted from their right as *jotedar*, and that the defendants do pay to the plaintiffs the mesne profits due to them (the rest deals with costs). It seems to be reasonably clear upon a proper construction, that this decree did not constitute the relationship of landlord and tenant between the parties. The suit was for ejectment and mesne profits. This was decreed but the condition as to ejectment was that as long as the defendants are ready and willing to pay rent they should not be ejected. There is absolutely no evidence that the defendants expressed any willingness to pay rent to the plaintiffs or that they had ever paid rent. The plaintiff relies on the observations in the award in the *thak* pro-

ceedings (Ex. 5, dated 29th August 1863) and contends that his predecessors did collect rents from the defendants. The observations are these:—"Then they (the plaintiffs) instituted a suit in Court for possession and mesne profits and after obtaining decree got possession through the Court *amin* and realised rent from nearly all the tenants according to Act X of 1859, which were all confirmed by the Appellate Court. The above boundaries all agree on local enquiry. The plaintiff's right and possession are, therefore, undoubtedly established." The dispute which the *thak* Authorities had to decide was whether certain lands were to be included in the *thak* map of *mouza* Patharkandy or Tatirband, to which latter *Mouza* defendants allege the lands appertain. The dispute was raised between the owners of the two *mouzas* and apparently two ancestors of some of the defendants claimed the lands as within Tatirband. This claim was negatived. But assuming that the observations in the decision of the Deputy Collector are evidence against the defendants, it is not shown that the plaintiff had recovered rents from the predecessors of these defendants. On the other hand it shows that the plaintiffs got possession through the Court *amin* or in other words executed the decree for ejectment as against the predecessors of the defendants. There is the further evidence on which the plaintiff relies that the Raja of Manipur had a *catchari* there and rents were realised on his behalf. But there is no definite evidence that rent was ever realised from the any of these defendants. Admittedly the plaintiff or his immediate predecessors had never collected rents. The evidence, therefore, does not establish the relationship of landlord and tenant between the parties. It is true that in this country the relationship of landlord and tenant is not constituted only by express contract. It was observed in the case of *Nityanund Ghose* v. *Kissen Kishore* (2): "Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many Districts in Bengal, commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the premission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it." In the present case, however, neither of the parties averred a tenancy in Suit No. 9 of 1854 but the Court directed that the defendants should not be ejected if they were willing to pay rent. It is stated in para. 10 of the plaint in this suit that the Chowdhuries (*i. e.*, the proprietors) got possession of the decretal lands through Court and in the next paragraph it is alleged that the defendants were allowed under the decree to retain possession as tenants and they and their friends and relations whom they brought on the lands of Sch. I of the plaint were holding the lands as tenants under the proprietors and had been paying them rents. There is no documentary or any other reliable evidence as to the payment of rent by any of the defendants and in my judgment the effect of the decree is not what the plaintiff contends. If the option given to the defendants in the decree was never exercised, and there is no evidence that the relationship of landlord and tenant was never established. If that is so the defendant's possession would be adverse all along and the plaintiff's suit is barred by limitation.

It is contended on behalf of the plaintiff that the defendants throughout claimed a *raiyati* interest in the lands and never the proprietary right. They alleged that they were tenants under Government and as Government released the lands in favour of the plaintiff's predecessors, plaintiff stands in the same relation to the defendants as the Government was according to them, and, therefore, the defendants cannot set up an adverse title as proprietors against the plaintiff. In other words it is contended that the defendants have at most acquired the limited interest of *riayats* which they had set up and plaintiff is, therefore, entitled to the proprietary interest. But the defendants claimed they were proprietors directly under Government of the lands which were claimed as *ilam* and it appears that the money due to Government for *ilam* lands is considered as revenue and not rent. This contention of the plaintiff does not appear to be sustainable. The plaintiff relied on the case of *Jugdeo Narain Singh* v. *Baldeo Singh* (3) and contended that the possession of

(2) W. R. (1864) Act X Rul. 82.

(3) 71 Ind. Cas. 984; 49 I. A. 399; 36 C. L. J. 499; 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 32 M. L. T. 1; (1923) M. W. N. 361; 2 Pat. 38; 27 C. W. N. 925; 45 M. L. J. 460 (P. C.).

the defendants could not be adverse to the plaintiff. It was, however, found in that case that there was no *malikandari* which the defendants claimed and as the *mehal* had all along been held in *thika*, if the *thikadar* failed to collect the rent from any individual tenant it would not create adverse possesssion against the proprietor (see page 412). Mere non-payment of rent by a tenant would not create adverse possession even if the *mehal* had not been let out in *thika*, but the tenancy must first be established. That case, therefore, has no application to the present case.

This is sufficient to dispose of the appeal. But it is necessary to deal with another point which has been elaborately argued before us and about which there seems to be some divergence of judicial opinion. It is contended by the learned Vakil appearing for defendants Nos. 1 to 160 that even if those defendants were originally tenants of the plaintiff's predecessors, adverse possession would commence as against the landlord when the tenant set up an independent title in themselves to the knowledge of the landlord. In support of this proposition several cases have been cited where this opinion seems to have been expressed, but which need not be referred to in detail as appears that none of them is a binding decision on the point, if analysed. It is, however, urged that the Judicial Committee has laid down the law as contended in the case of *Ram Chunder Singh* v. *Madho Kumari* (4). In that case it does not appear that any relationship of landlord and tenant was found to have existed between the parties when the defendant set up an adverse claim. It was held in a previous suit brought by the plaintiff against the predecessor of the defendant for compensation money deposited in Court that the defendant had no valid right to the land and that he was allowed to hold the subordinate tenure by the mere sufference of the superior holder. This decision was held to be binding on the question of title between the parties in the subsequent suit for ejectment. When the defendant pleaded advers possession in the subsequent suit their Lordships were of opinion that no adverse possession was proved to have existed until the institution of the previous suit when the claims of both parties were undoubtedly adverse. It does not seem to me that that case lays down the rule that if a tenant during the continuance of the tenancy sets up a claim adverse to the landlord to his knowledge the Statute of Limitation would begin to run against the landlord from that time on the question of title. Reliance is next placed on the observations in *Giris Chandra Gangopadhaya* v. *Krishna De Nag* (1) where at page 271* this passage occurs: "When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term." With the gretest respect, I find myself unable to accept that proposition. In my judgment the true view is that the tenant himself cannot during the term by any act or declaration of his disseise the landlord. He may by repudiating the landlord's title during the term, forfeit the term, but the landlord is not bound to take advantage of the forfeiture, and his estate cannot be affected. In my opinion the principle that a tenant cannot cause the Statute of Limitation to run against his landlord by giving notice to him of an adverse title during the term, is illustrated by the decisions of the Judicial Committee in *Beni Parshad Koeri* v. *Dudhnath Roy* (5) and in *Raja Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (6). It is argued that those cases do not apply as there the tenants claimed only an interest higher than what they were entitled to and did not claim title in themselves. But to my mind that does not make any difference in principle and I think that the Statute of Limitation runs against the landlord only when the relationship of landlord and tenant has determined and the landlord is entitled to take possession.

It is next contended by the defendants that limitation should commence to run from December 1896 when the defendants denied the relationship of landlord and tenant and so incurred a forfeiture. It must be borne in mind that no rule of forfeiture is enacted by Bengal Act VIII of

(4) 12 C. 484; 12 A. 188; 9 Ind. Jur. 474; 4 Sar. P. C. J. 666;16 Ind. Dec. (N. S.) 329 (P. C.).

(5) 26 I. A. 216; 27 C. 156; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Dec. (N. S.) 103 (P. C.).

(6) 74 Ind. Cas. 476; 50 I. A. 202 at pp, 208,209;(1923). A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.).

*Page of 38 C. L. J.—[*Ed.*]

1869 by which the tenancy in the present case is governed. In the absence of any such provisions the rule of English Law has been applied to such cases: *Nizamuddin* v. *Mamtazuddin* (7). This case has been referred to with approval by the Privy Council in the case of *Maharaja of Jeypore* v. *Rukmini Pattamahadevi* (8), where their Lordships observe (at page 118) that the Law of England is embodied in s. 111 of the Transfer of Property Act. Assuming that the tenants renounced their character as such in 1896 and that worked as a forfeiture of the tenancy, the question is when the tenancy determined. The answar to this in my judgment is, when the plaintiff's father brought the previous 120 suits in ejectment in 1903 and 1904, which act showed his intention to determine the leases. That a lease is not determined until the landlord does some act showing his intention to determine the lease is supported by *Naurang Singh* v. *Janardan Kishore Lal Singh* (9) and *Moti Lal Pal Chowdhury* v. *Chandra Coomar Sen* (10), and as it is the privilege of the landlord either to take advantage of a forfeiture or not it cannot be held that adverse possession of the tenants commences against the landlord from the date of renouncing the tenancy. The suit having been brought within 12 years from 1903 would not, therefore, be barred. There is, however, one aspect of the question of limitation which I think we need not consider in detail. It is whether under Art. 143 of the Limitation Act plaintiff's suit for possession should fail as having been brought more than 12 years after the forfeiture was incurred. It seems that the suit for possession would be barred under that Article. But the plaintiff says that he does not want to eject the tenant defendants and would be satisfied if his title is established as against defendant No. 161 and a declaration is made that he is entitled to rent from defendants Nos. 1 to 160. If it had been found that the defendants. Nos. 1 to 160 were tenants of the plaintiff the question whether such a decree might have been made would have to be considered. The appeal, however, fails on other grounds.

There remains one other point to dispose of and that is whether the appeal abated in its entirety as some of the defendants had died and their representatives were not brought on the record in time and also because the appeal was given up against some other defendants. As the defendants hold distinct plots of land which have been separately described in the plaint I do not think that the whole appeal should abate on those grounds but the claim with regard to some plots must be dismissed. The appeal against the heirs of defendants Nos. 73, 115 and 119 was given up in June 1920. Defendants Nos. 54, 82, 116 and 133 had died, the appeal against them abated. Their heirs were brought on the record by an *ex parte* order on application made by appellant on the 18th December 1922. The abatement was not set aside. The appeal, therefore, against them must fail. On the 4th July 1922 the appeal was dismissed against all the defendants Nos. 1 to 160 by another Division Bench. On review the order of 4th July 1922 was set aside by an order dated the 27th July 1923 except with regard to some of the defendants on whom the notices of the application for review were not served. Those defendants are 17 (*ka*), 27, 37, 44, 48, 76 and 121. The appeal against them also must stand dismissed on that ground. For the above reasons the appeal as well as the suit must stand dismissed with regard to plots Nos. 56, 92, 118, 45, 64, 112, 19, 28, 36, 41, 60, 98 on this ground alone.

I agree that the appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 232 OF 1923.

February 18, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

CHINNAKOZHANDAI NAINAR AND OTHERS—DEFENDANTS Nos. 1, 2 AND 4—APPELLANTS

versus

ANANTA VIJAYA NAINAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI,

(7) 28 C. 135; 5 C. W. N 263.

(8) 50 Ind. Cas. 631; 46 I. A. 109; 36 M. L. J. 543; 7 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; (1919) M. W. N. 271; 23 C. W. N. 889; 26 M. L. T. 16; 49 M. 589; 10 L. W. 381 (P. C.).

(9) 41 Ind. Cas. 952; 45 C. 469; 22 C. W. N. 312; 27 C. L. J. 277.

(10) 60 Ind. Cas. 312; 24 C. W. N. 1.

r. 63—Claim suit—Judgment-debtor impleaded as party—Finding as to title, whether res judicata *between claimant and judgment-debtor.*

In a suit under O. XXI, r. 63 of the C. P. C. the claimant objector, who was the plaintiff, impleaded the execution-creditor and also the judgment-debtor as parties to the suit, and prayed for a declaration that the property in dispute which had been purchased by him from the judgment-debtor belonged to him and was not liable to be attached in execution of the decree obtained by the execution-creditor against his judgment-debtor. The judgment-debtor admitted the plaintiff's claim but the execution-creditor contested it and the suit was dismissed, it being held that the sale in favour of the plaintiff was not valid. In a subsequent suit between the plaintiff and the representative of the judgment-debtor:

Held, that the validity of the sale-deed in favour of the plaintiff had been put in issue in the previous suit and that the question having been decided against the plaintiff the finding operated as *res judicata* between the plaintiff and the representative of the judgment-debtor.

Dwarka Das v. *Kameshar Prasad*, 17 A. 69; A. W. N. (1895) 3; 8 Ind. Dec. (N. S.) 369 and *Narayan Singh* v. *Aiyasami Reddi*, 31 Ind. Cas. 188; 39 M. 602; 29 M. L. J. 728, relied on.

Phul Kumari v. *Ghanshyam Misra*, 35 C. 202; 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T 506; 10 Bom. L. R. 1 (P. C.), distinguished.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated the 14th April 1923, in Appeal No. 25 of 1923, presented against the decree of the Court of the District Munsif, Gingee at Tindavanam, in Original Suit No. 73 of 1921.

Messrs. *C. Padmanatha Iyengar* and *T. E. Ramabhadhrachariar*, for the Appellants.

Mr. *K. S. Krishnaswami Iyengar*, for the Respondent.

JUDGMENT.—We think that the Subordinate Judge was wrong in holding that Bhadrabahu was merely a *pro forma* defendant in the prior suit (No. 1021 of 1915). In this suit brought by plaintiff under O. XXI, r. 63 of the C. P. C., Bhadrabahu was added as defendant and after setting out the sale by the latter to plaintiff the plaint asked for a declaration that the properties belonged to plaintiff and that they were not liable for the decree in execution of which they were attached. The suit was valued for purposes of jurisdiction at the market value of the properties. We are, of opinion, that plaintiff put in issue the validity of the sale-deed in his favour, and an issue to this effect was actually framed. It was open to either defendant to impeach the validity of the deed and we cannot hold that the question was not in issue between the plaintiff and Bhadrabahu, merely by reason of the fact that Bhadrabahu admitted plaintiff's claim, which was disputed successfully by the attaching creditor. If plaintiff did not wish to put in suit his title against his vendor, he should not have impleaded him and asked for a declaration of title. The case in *Phul Kumari* v. *Ghanshyam Misra* (1) relied on by respondent was one in which the judgment-debtor was not a party and the distinction between such a case and one in which the judgment-debtor is also impleaded is pointed out very clearly by Sir John Edge, C. J., and Banerji, J., in *Dwarka Das* v. *Kameshar Prasad* (2) and we may also refer to *Narayan Singh* v. *Aiyasami Reddi* (3).

In our view the prior decision is clearly *res judicata* as between plaintiff and Bhadrabahu and appellants-defendants are the latters' representatives-in-interest and consequently it is also *res judicata* as against them.

The appeal must, therefore, be allowed and plaintiff's suit dismissed with costs throughout.

V. N. V.

Z. K. *Appeal allowed.*

(1) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1 (P. C.).

(2) 17 A. 69; A. W. N. (1895) 3; 8 Ind. Dec. (N. S.) 369.

(3) 31 Ind. Cas. 188; 39 M. 602; 29 M. L. J. 728.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 578 OF 1923.

August 1, 1924.

Present:—Mr. Justice Mukerji.

LALLU SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHUNANDAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Trees planted by mortgagee, whether can be removed by him—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decision on issue not arising on pleadings.*

A mortgagee is entitled to make any use he likes of the land in his possession. If he grows any crop on it he can cut it away before handing over the land to the mortgagor. Similarly, if he plants any trees on the land he is entitled to remove the trees before handing over the land to the mortgagor on redemption. [p. 691, col. 1.]

Where a particular issue does not arise on the pleadings of the parties and is not framed in express words and the parties are not aware that they have to adduce evidence in support or rebuttal of such issue, a decision arrived at on such issue does not operate as *res judicata*. [p. 691, col. 2.]

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 2nd of January 1923.

Mr. *Kumuda Prasad*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—This appeal raised somewhat important questions of law. The plaintiffs are the respondents Nos. 1-4. The remaining respondents were more or less *pro forma* defendants in the suit, out of which this appeal has arisen. The principal defendants are the appellants sued for redemption of a mortgage made in 1889 which was supplemented by a mortgage of 24th July 1895. The total mortgage-money for the two mortgages is a sum of Rs. 100. The original mortgagors were two persons Sahai and Jokhu. Sahai's line is extinct. The plaintiffs are the son and grandson of Jokhu. The mortgage was made in favour of one Shiv Kumar whose son and grandsons are the defendants Nos. 1 to 3.

Various defences were raised. It has been found by the Court below that the plaintiffs are entitled to redeem, but the appellants are entitled to cut away the trees that they have planted after the mortgage. The defendants contended that they being the *zemindars*, the tenancy which was mortgaged has lapsed to them and that no right of redemption is left. For the respondents it is contended that the trees should be handed over with the land. Taking the respondents' case first, it seems clear that the mortgagees were entitled to make any use they liked of the land they had in their possession. If they grew any crop they could cut it away before handing over the land. Similarly, if they planted any trees they would be entitled to remove the trees before handing over the land to the plaintiffs. The cross-objection, therefore, has no force.

Coming to the defendants' appeal, the facts seem to be these. Jokhu and Sahai were the original mortgagors and Sahai's line is extinct. It appears that in 1915 Jokhu's sons Raghunandan and Rama took forcible possession of the lands from the mortgagee. The mortgagee, Shiv Kumar, brought a suit for possession. The defendants Raghunandan and Rama, being sons of Jokhu, thought it best to raise a plea of want of legal necessity for the mortgages. The case was heard by a learned Munsif and he framed the following issue among others :—

"Is the mortgage dated 1889 genuine ? What was the necessity for which it was made "?

In deciding this issue he came to the conclusion that Sahai was the sole tenant of the holding mortgaged and, therefore, the sons of Jokhu could not impeach the mortgage made by Sahai. As to Jokhu's mortgage the learned Munsif remarked that the mortgage had been made by two persons and it is not likely that it would be made for any immoral purposes or as a reckless transaction. It will be noticed that there is no issue as to whether Jokhu or Sahai was the sole tenant of the land. No such issue arose on the pleadings. It does not appear from the judgment that Shiv Kumar, in any way, had denied in the suit the right of Jokhu to the tenancy. The issue quoted, in any case, does not indicate that the parties knew that they had to adduce any evidence as to whether Sahai was the sole tenant or Sahai and Jokhu were both tenants of the land. Under the circumstances the finding of the learned Munsif does not operate are *res judicata*. The learned Subordinate Judge was wrong on this point. Such being the case, it follows that we must take it that Sahai and Jokhu were both tenants of the land. Further, it is to be noted that the mortgage was taken from both and it does not lie in the mouth of the mortgagee or his descendants to dispute the title of the mortgagors at the date when mortgage was made.

The next point urged is that Sahai having died, his tenancy lapsed to the *zemindar*. For, it appears that the mortgagee was also the land-holder of the land mortgaged to him. It is urged that on the death of Sahai, his brother's son Jokhu, who died after him, could not succeed to the tenancy as he was not sharing in the cultivation of the holding at the time of Sahai's death. It has been found that Jokhu and Sahai died before the present Tenancy Act came into force. When Sahai died the land constituting the holding was held by the mortgagee. It is, therefore, argued that at the date of the death of Sahai Jokhu cannot be said to have been *sharing in the cultivation of the holding*. In my opinion this contention is not correct. It is true that even Sahai himself was not cultivating the tenancy at the time he died. But the possession of the mortgagee was the possession of both Sahai and Jokhu. It must,

therefore, be taken that at the time of Sahai's death Jokhu was sharing in the cultivation of the holding with the deceased. In this view, there would be no difficulty in the way of Jokhu's succeeding to the interest of Sahai

In my opinion there is no substance in this appeal and it must fail.

The appeal and the cross-objection are both dismissed with costs which will include Counsel's fees in this Court on the higer scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2329 OF 1921.

February 21, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

CHANDI CHURAN LAW—PLAINTIFF—APPELLANT

versus

HAMID ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 52 (6)—Abatement of rent—Reduction in area settled—Burden of proof.

In a suit for rent where the defendant claims abatement of rent, he must prove what the area settled with him was and the reduction therein. He can claim abatement only to the extent of the reduction proved by him. [p. 692, col. 2.]

Raj Kumar Protap Saha v. *Lal Singh*, 5 C. L. J. 538, relied on.

Ajeb Mullick v. *Felai Mullick*, 28 Ind. Cas. 498; 21 C. L. J. 309, distinguished.

Appeal against a decree of the Subordinate Judge, First Court, Tipperah, dated the 27th July 1921, affirming that of Munsif, Fourth Court at Camilla, dated the 22nd of December 1920.

Babus *Norendra Chandra Bose* and *Sytendra Nath Mitter*, for the Appellant.

Babu *Satindra Nath Roy Choudhuri*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a rent-suit. The defendant claimed abatement and this was granted by both the Courts below. The Munsif allowed a reduction of 4 annas from the amount of the annual rent and the Subordinate Judge granted a total reduction of Re. 1-14-9. The learned Judge pointed out in the course of his judgment that the onus of proving that he was entitled to abatement was upon the defendant and that what he was required to prove was firstly the area on which the present rent was assessed, and secondly, the area now in his possession. Both these facts were established by the plaint itself, so it was open to the defendant to avail himself of the admission therein made. In para. 2 of the plaint it was stated that the rent was assessed on a reputed area of 4 *kani* 1½ *gds* while in the schedule it was said that the present area was 3 *kani* 13 *gds* and 2 *kags*. It, therefore, followed that the defendant was on these admissions entitled to abatement as indicated above. On appeal it is contended that the area as given in para. 2 of the plaint was estimated by guess and that on the principle laid down in the case of *Raj Kumar Protap Saha* v. *Lal Singh* (1) the plaintiff was entitled to realise the rent claimed. It is further pointed out that in para. 4 of the written statement the defendant admitted that there was no measurement at the time of settlement and, therefore, in the absence of any evidence to show that there has been any decrease in the area he should not have been given any abatement. On behalf of the respondent reliance is placed upon the case of *Ajeb Mullick* v. *Felai Mullick* (2) where upon the interpretation of the *kabuliyat* it was held that the landlord was entitled to obtain additional rent for access land. That case is, however, distinguishable, for the simple reason that the decision was founded upon the construction of the *kabuliyat*, but here there is no such document. Section 52 (*b*) of the Bengal Tenancy Act provides for cases where the tenant is entitled to reduction of rent. In the present case it is plain from the defendant's own admission that he has not succeeded in showing what the area settled with him was or that there has been any reduction in that area except in so far that a portion of the land had been acquired by the District Board. To that extent only, therefore, can he claim abatement.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Courts

Z. K. *Appeal allowed.*

(1) 5 C. L. J. 538.
(2) 28 Ind. Cas. 498; 21 C. L. J. 309.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 454 OF 1924.
November 27, 1924.
Present:—Mr. Dalal, J. C.
Musammat DILAN—PLAINTIFF—APPLICANT
versus
RAM BHAROSEY AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal presented beyond time—Negligence of Counsel—Extension of time—Sufficient reason.

The fact that an appeal is presented beyond time owing to the negligence and forgetfulness of Counsel is not a sufficient reason for indulgence under s. 5 of the Limitation Act.

Appeal against a judgment and decree passed by the District Judge, Fyzabad, dated the 30th July 1924 in Civil Appeal No. 6 of 1924, modifying that of the Additional Subordinate Judge, Sultanpur, dated the 29th November 1923.

Messrs. *A. P. Sen* and *S. M. Ahmad*, for the Applicant.

Mr. *M. Wasim*, for the Opposite Party.

ORDER.—I take a very strict view of the law of limitation because if a point is stretched once there will be no limit as to how far it should be stretched. In the present case admittedly the appeal was presented after the period of limitation. The period of limitation expired on 30th October and it was not presented till the 4th November. The explanation is that the learned Counsel gave it in the office for a report on 24th October and forgot all about it until the 4th of November, mainly because the 24th October till the 30th October were holidays. This is not a sufficient reason for indulgence under s. 5 of the Limitation Act. I hold that the petition of appeal is time-barred and dismiss both the petition of appeal and this petition. However, I make no order as to costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1855, 2236, 2266, 2372, 2427, 2428, 2604, 2605 OF 1921 AND NOS. 329, 330, 395, 412, 413, 451, 956, 957, 1062, 1063, 1476, 1477, 1801, 1802, 1893, 1894 OF 1922, 419, 420, 450, 463, 1811 TO 1814, 1874, 1180, 1209 AND 1210 OF 1922 WITH (CROSS-OBJECTIONS IN NOS. 419, 420 AND 450).
July 17, 1924.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Graham.
PRASANNA KUMAR RAY AND OTHERS—DEFENDANTS—APPELLANTS
versus
Kumar ARUN CHANDRA SINGHA BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 105A—Suit for settlement of fair and equitable rent—Duty of Judge—Rate mentioned in kabuliyat, *whether binding—Question of principle decided—Appeal, whether lies—Construction of document—Language of document not in suit, whether can be considered.*

To construe the words of a particular document which is in suit, the language of other documents not in suit cannot be called in aid. [p. 695, col. 1.]

Where the decision of the Special Judge arising out of a suit under s. 105 of the Bengal Tenancy Act does not merely settle a rent but involves some question of principle as to the basis upon which rent is to be settled it is appealable to the High Court. [p. 698, col. 2.]

The provisions of s. 105 of the Bengal Tenancy Act are applicable not only where no rent has been fixed but also where the rent has been fixed by an agreement of parties. [p. 698, col. 2.]

Aktowli v. *Tarak Nath Ghose*, 17 Ind. Cas. 266; 16 C. L. J. 328; 17 C. W. N. 774 and *Jogendra Mohan Das* v. *Janaki Nath Saha*, 36 Ind. Cas. 795; 21 C. W. N. 427, followed.

Where the landlord has invoked the provisions of s. 105 of the Bengal Tenancy Act he cannot contend that the Judge is necessarily bound in fixing the rent to adhere to the rate mentioned in the *kabuliyat*. The Judge must take this rate into account; but if he finds that a strict adherence to the rate mentioned in the *kabuliyat* would make the rent in excess of what he considers a fair and equitable rent, he is bound by the terms of the section to so adjust the rent, irrespective of any contract between the parties, as to make it just and equitable. [p. 699, col. 1.]

Matungini Dassi v. *Ram Das Mullick*, 7 C. W. N. 93, distinguished.

Appeal against a decree of the Special Judge, Noakhali, dated the 21st of April 1921, affirming that of the Assistant Settlement Officer of that District at Feni, dated the 24th of April 1919.

Babus *Charu Chandra Biswas, Panchan Ghose, Giris Chandra Banerjee, Hemendra Kumar Das, Jogesh Chandra Ray, Bhagirath Chandra Das, Suresh Chandra Taluqdar, Mohendra Kumar Ghose, Jitendra Kumar Sen Gupta Suresh Chandra Taluk-*

dar, *Santosh Kumar Bose*, *Bepin Chandra Bose*, *Subodh Chandra Ray Choudhury*, *Mahendra Kumar Ghose* and *Ram Deyal De*, for the Appellant.

Babus *Charu Chandra Biswas*, *Girija Prosanna Ray Choudhury*, *Jitendra Kumar Sen Gupta*, *Nagendra Chandra Choudhury*, *Bhagirath Chandra Das Maity*, *Apurba Charan Mookeriee*, *D. L. Kastgir*, *Radha Benode Pal*, *Suresh Chandra Talukdar* and *Mahendra Kumar Ghose*, for the Respondents.

JUDGMENT.

IN S. A. NOS. 242 OF 1921 AND S. A. NOS. 419 AND 420 OF 1922, 2236 OF 1921, 2372 OF 1921, 412 AND 413 OF 1922, 1855 OF 1921, 329 AND 330 OF 1920, 2427 OF 1921, 2605 OF 1921, 1801 AND 1802 OF 1922, 395 OF 1922, 1476 AND 1477 OF 1922, 1893 AND 1894 OF 1922, 956 AND 957 OF 1922, 1062 AND 1063 OF 1922.

Greaves, J.—These appeals are appeals by the tenants in suits by their landlord, under the provisions of s. 105 of the Bengal Tenancy Act, claiming additional rent in respect of additional area. The Assistant Settlement Officer in the First Court decreed the suits and held that for measuring the additional lands a pole or *nal* of 16 cubits should be employed, the landlord appealed against the decisions of the Assistant-Settlement Officer in so far as he decided that the pole or *nal* to be employed for measurement should be a pole or *nal* of 16 cubits. The landlord's contention was that according to the true construction to be placed upon the *dowl* in the various suits the pole or *nal* to be employed was one of 14 cubits and the Special Judge who heard the appeals has agreed with this contention. These appeals are directed against this decision and this is the only point which arises in these appeals. The Special Judge disposed of all these appeals by reference to a judgment which he gave in another case, which is not under appeal, in which the same point arose and he has incorporated that judgment in his judgments in all the cases from which these appeals arise. The *dowls* in all the cases are, we are told, substantially the same and the appeals have been argued on this basis but the *Dowls* bear different dates between the years 1259 *B. S.* and 1280 *B. S.* and in Appeals Nos. 1476, 1477, 1801, 1802 and 1893 of 1922 the *dowls* bear date before the year 1267 B. S. The two appeals first argued before us were Nos. 419 and 420 of 1922 so it will be convenient to refer to the Dowls of these two appeals.

Those who appeared in the other appeals all adopted the arguments advanced on behalf of the appellants in Appeals Nos. 419 and 420 of 1922 and in some cases supplemented these arguments but although in some cases reference was made by them to the *dowls* of their particular appeals it was not suggested that there was any material difference in the *Dowls* so as to affect the point arising in these appeals.

The *dowl kabuliyat* in Appeal No. 419 of 1922 is dated the 11th *Magh* 1259 (23rd January 1853) and the interest thereby created is a *taluki* interest. The *Dowl* refers to the land being settled as being *khas mehal* in own cultivation (*mehal khas khod khasta*) in possession of self and measuring, according to the measurement of 1249-1256 *B. S.* made by a pole of 16 cubits of 18 inches each, 4 *kanis* odd. Some discussion arose as to the meaning of the words *khod khasta* "in own cultivation" and it was suggested that it meant that the intermediate interest, that of the *talukdar*, having come to an end the tenants on the land were paying their rent direct to the *zemindar* but there is no evidence of this and we must, I think, take the words as meaning that the lands were being cultivated by the *zemindar* either through *ryots* or by hired labour. The words cannot be strained to mean of necessity cultivation by *ryots*.

The document further states that the land was surveyed by the *Amin* during the Ekandaz Survey as appertaining to *khod khasta* and that it was measured by a pole of 16 cubits of 18 inches each, and found to measure 5 *kanis* odd. The document concludes with these words which have caused the present controversy.

"If on fresh measurement excess land be found I (that is the tenant of the *taluk*) shall pay separate rent for the same according to the *khod khasta nal* and *khod khasta* rate of the *Pergana*."

It will be convenient to state again the point in controversy which arises on these words. The appellant tenants contend that "*khod khasta*" *nal* means the *nal* or pole of 16 cubits used in the previous measurement of 1249-1256 and also used at the time this *dowl* was executed; the landlord-respondent contends that the words "*khod khast*" *nal* mean a *ryoti nal* or pole of 14 cubits.

The Special Judge has, as already stated, accepted the landlord's contention finding that the words "*khod khast*" in the expression "*khas khod khast*" in the early part of the *dowl* has not the same meaning as the word "*khod khast*" appearing in the concluding words of the Dowl before the words "pole" and "rate." He says that if it had been intended to measure excess lands for the purpose of assessing additional rent with a 16 cubit *nal* (which was the *nal* used for measuring *taluks*) there would have been no need to use the words that the excess area would be measured with *khod khat nal* and assessed at *khod khasta* rate and he holds that these words mean the pole and rate applicable in the case of cultivating *ryots*.

He concludes his judgment by recording this finding "on a consideration of the entire evidence, oral and documentary, I hold that *khod khast nal* meant the *nal* applicable to *ryots* and such *nal* was 14 cubits of 16 inches." It was not suggested before us that if evidence was admissible to prove the meaning of "*khod khast*" there was no evidence to support this finding although it was suggested that there was no finding that in 1259 *B. S.* there was any *ryoti nal* in their *zemindari*. Of course in second appeal, not having ourselves seen the evidence, we must in default of any contention to the contrary assume that there was evidence to support this finding. I cannot, however, but think from a perusal of the judgment of the Special Judge that he has relied on some evidence which should not have been relied on. I mean by this to refer to his reference to other *dowls*, for clearly the language of other documents not in suit cannot be called in aid to construe the words of a particular document which is in suit.

If the question to be decided in these appeals is a question of fact this finding is binding on us in second appeal but if the question is one to be determined on the construction of the *dowls* alone this is a question of law and falls for us to decide.

The Special Judge has referred in his judgment to a previous decision of this Court in Appeal from Appellate Decree No. 2468 of 1886 and this has been pressed on us on behalf of the appellants as having already decided the point arising in these appeals and it will be convenient to refer to it now.

The question there was the same as arises in these appeals, namely, the size of the measurement pole to be used in measuring excess lands held in Talukdari Seltlement. The *dowl* in that case which was of 1267 *B. S.* contained this provision.

"Should upon fresh measurement the area of the land be found to be in excess of that specified in the lease, we shall pay rent for the same separately at the *Pergana khod khast* rate and standard of measurement."

It was contended in that case on behalf of the landlord that the standard of measurement used for *ryots* should be applied whilst the tenant-defendant contended that the standard of measurement should be the same as that applied in ascertaining the area of the *taluk*.

This Court accepted the tenant's contention. The Court was influenced in its decision by the fact that the acceptance of the landlord's contention involved applying one standard of measurement to ascertain if in fact there was excess area and if excess area was found another measurement in order to ascertain the area to be assessed to rent but the main ground for the decision was the finding of fact of the District Judge that the standard of measurement for *ryots* was not settled in the *zemindari* until some years after the *dowl* in suit which was dated 1267. It seems to me, therfore, that this decision does not help us as it was really arrived at upon the finding of fact arrived at on the evidence in that case. Moreover we have not the *dowl* which was in suit before us and we do not know what it contained apart from the passage cited in the judgment. The main contention urged on behalf of the tenants in these appeals was that the Special Judge was wrong in saying that the word *khod khast* at the end of the *dowl* meant something different from the meaning to be attributed to the word in the earlier part of the *dowl* and it was urged that as a 16 cubits pole was used in measuring what was described as *khod khast* land at the time the *dowl* was executed, the words "according to the *khod khast nal*" must mean that the same standard of measurement was to be applied for the purpose of measuring any excess land for the purpose of assessing additional rent. It was further argued that there was no evidence and no finding that in 1259 *B. S.* there was any *nal* of 14 cubits in use in the *zemindari* and that in the absence of any

such evidence or finding the words "*khud khast nal*" must refer to the *nal* of 16 cubits which was used for measurement at the inception of the tenancy. On behalf of the landlord it was said that the appeals were concluded by the finding of fact to which, I have already referred, and we were referred to the cases of *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh* (1) and *Kristo Das Law* v. *Abdul Karim* (2) as to the disability of this Court, in second appeal, in interfering with this finding. The applicability of these cases depends on whether the matter before us is merely a question of construction of the *dowls* upon the documents themselves or whether evidence was necessary and, therefore, admissible to determine the meaning to be attributed to the words "*khod khasta nal*" in the *dowls*. The cases above referred to did not depend upon the construction of any document.

We were further referred to *Chatenay* v. *Brozilian Submarine Telegraph Co.* (3) as authority of the proposition that the meaning of words is a question of fact. But here again it has first to be determined whether extrinsic evidence is necessary and, therefore, admissible to determine the meaning of the words "*khod khasta nal*" in the *dowls*. If such evidence is admissible then doubtless we are bound by the finding of fact of the Special Judge.

It was further urged that as there were no appeals against the additional rent allowed to the landlord the appeals were futile unless there was a remand but I do not think there is anything in the point as the basis of calculation was assailed and if this falls the calculations based thereon must necessarily fall.

The rest of the argument addressed to us on behalf of the landlord rested on the meaning to be applied to the words "*khod khast nal*" and was based on extrinsic evidence. It seems to us unnecessary to deal with this as, if extrinsic evidence is admissible, the landlord is entitled to rely on the finding of the Special Judge in his favour as to the meaning of the words "*khodkasht nal*". It is now necessary to return to the *dowls* themselves. I cannot find that anywhere in the earlier part of the *dowls* the words "*khod khasta*" or "*khod khast*" are used in connection with the words *nal*. All that is stated is that the land to be demised which had formerly been (as appears from the documents) let out as a *patni taluk* was then in the *zemindar's* possession and was "*mehal khas khod khasta*" that is vacant land in self-cultivation and that when this land was measured between 1249 and 1256 (presumably for the purpose of creating the former *patni taluk* which had come to an end) a pole of 16 cubits was used. I think all that can be gathered from this is that a pole of these dimensions was used presumably when the former *patni taluk* was created.

The document then proceeds that what had formerly been held as the *patni taluk* of Sitaram Sen but now was in self-cultivation had (presumably for the purpose of creating a new *patni taluk*) been again measured with a pole of 16 cubits. I do not think that from these words it can be inferred that the 16 cubits pole is the *khod khast* pole or *nal*. I only infer from the words that the 16 cubits pole was the pole used when a *patni taluk* was created and I can infer nothing else. The result is that you have, I think, nothing in the *dowls* themselves to guide you as to the meaning of the expression "*khod khasta nal*" and I think, therefore, that evidence was admissible to show what the expression "*khod khasta nal*" meant in this *zemindari*. The Special Judge had found upon the evidence that it meant a pole of 14 cubits and I think that this is a finding of fact which is binding on us in second appeal.

There is this additional argument I think in favour of his decision, namely, that the word, *khodkhast* as applied to *nal* must, having regard to the position of the words, have the same meaning as it has when used in connection with the word rate and I find it difficult to attribute to the words "*khod khasta* rate of the *Pergana*" the meaning we are asked to put upon them, namely, that this is the rate which appears in the the *dowls* as the rate charged for *khod khasta* land. In the result we dismiss these appeals and with costs, hearing fee Rs. 16 in each case to the appearing respondents.

IN No. 2604 OF 1921.

Greaves, J.—This is an appeal by the tenant. The landlord sued under s. 105 of the Bengal Tenancy Act claiming from the

(1) 51 Ind. Cas. 760; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552; 45 I. A. 183 (P. C.).

(2) 62 Ind. Cas. 474; 25 C. W. N. 328; 34 C. L. J 35.

(3) (1891) 1 Q. B. at 79 p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.

holder of a *taluk* additional rent in respect of excess area found on measurement and asking for the settlement of fair and equitable rent. The claim was allowed and the rent fixed by the Assistant Settlement Officer; the tenant appealed against the assessment to the Special Judge on the ground that lands of another *taluk* (No. 2042) had been wrongly included in his *taluk* in arriving at the excess area and in assessing rent. The Special Judge found against the tenant's contention holding that there was nothing to show that lands of another *taluk* had been included. The Record of Rights was in the landlord's favour and the presumption raised by the entry therein has not been displaced.

It is said, however, on the tenants' behalf that both Courts wrongly refused to direct production of certain *chittas* and *khatians* and to direct that the *chittas* should be relied by local investigation, and that an application requiring the plaintiff to file the *dowl* of *taluk* No. 2042 was wrongly refused. The Special Judge finds as to the first application that it was made to the Assistant Settlement Officer on the day of the trial and that it was not pressed and as to the second application that it was made after the evidence was closed and that it was rightly rejected and that the objection was frivolous and that there was no reason to disbelieve the *dowl* filed by the landlord. The appeal is concluded by the findings of fact of the Special Judge and we think that the two applications to which I have referred were rightly rejected.

The appeal is dismissed with costs one gold *mohur* to the appearing respondents.

IN No. 2266 OF 1921.

Greaves, J.—This is an appeal by a tenant and the first point raised in the appeal is the same as that raised in Appeal No. 419 of 1922 and in the other appeals heard along with that appeal. The other point raised is that the Court below has allowed the landlord additional rent without assigning any reason for so doing. The number of this case in the First Court was 15532 and the First Court has found as regards the first point that excess land is to be measured by *nal* of a 14 cubits which, it finds, is the measurement of the *khod khasta nal*. The Dowl in this case recognised a distinction between the *khod khast* rate and the *taluki* rate; so clearly in this case, having regard to the finding of fact of the First Court which was not displaced in appeal, (and indeed I am not sure that there was any appeal on this point by the tenant to the lower Appellate Court as the appeal to that Court was by the landlord against the additional rent allowed) and also having regard to the construction of the *dowl* itself, the standard of measurement was righly fixed at 14 cubits. As to the second point, the First Court allowed as the fair rent for the excess land Rs. 24-14-5 which was considerably less than might have been allowed, had the whole of excess, which calculated at the rate prevalent in the *Pergana* amounted to Rs. 49-15 0, been allowed. The lower Appellate Court allowed an additional rent of Rs. 5-14 but even this is less than what might have been allowed by some, *i.e.*, Rs. 19; so it is not apparent what grievance the tenant has except that no reason was given by the lower Appellate Court for allowing the increase of Rs. 5-14-0 but that Court has fixed what it considered the fair rent and as the total rent fixed as the fair rent does not exceed 50 per cent., of the gross assets we do not see that the tenant has any real complaint. The appeal fails on both points and is dismissed with costs one gold *mohur* to the appearing respondents.

CROSS-OBJECTIONS IN APPEALS NOS. 419 AND 420 AND 450 OF 1922, AND APPEALS NOS. 1180 OF 1922, 1209 AND 1210 OF 1922, 450 AND 451 OF 1922, AND 463 OF 1922, 1811-1814 OF 1922 AND 1874 OF 1922.

Greaves and Graham, JJ.—These three cross-objections and the appeals are by the landlord who applied under the provisions of s. 105 of the Bengal Tenancy Act for the settlement of fair and equitable rent in respect of the excess lands found on the measurement of certain *putni taluks* held by the defendants. The question which arises in the cross-objections and appeals is as to how the amount of rent in respect of these excess lands is to be calculated. The Courts below in fixing the rents have not given the full amount of rent which would result from calculating what the rent would be if the whole of the excess area found on re-measurement was assessed for rent at the rate mentioned in the *dowl kabuliat* but have fixed what they considered a fair and equitable rent in the circumstanees. The landlord contends that he is entitled to have the rent assessed in accordance with the contract contained in the *dowl kabuliyats*, although I understand him to be willing that where the rent for

excess land added to the original *jama* exceeds 50 per cent. of the gross assets, the total rent plus the amount to be allowed for excess area should not exceed 50 per cent of the gross assets.

The covenant by the tenant in the various *dowl kabuliyats* is to all intents and purposes the same, namely, that where increase of area is found upon fresh measurement, he will pay rent for the same according to the measurement and rate mentioned in the *dowl*. It is not, I think, necessary to refer to the details in all the appeals for we only have to decide the principle which is to be followed in making the calculation of the rent payable by the tenant for the excess area found on measurement, but it will be convenient to make two references to illustrate the point.

In No. 419 of 1922 the Assistant Settlement Officer, basing his measurement on a pole of 16 cubits, found the excess to be 1 *drone* 2 *kanis* 2 *krants* and calculating this at the *kabuliyat* rate allowed the full amount of Rs. 51-1-9 but the Special Judge, basing his measurement on a pole of 14 cubits, found the excess to be 1 *drone* 7 *kanis* 9 *gds.* 3 *karas* 2 *krants* which calculated at the *kabuliyat* rate would make the rent payable for the excess land Rs. 66-11-0 but instead of allowing this amount the Judge has allowed only Rs. 58 although this added to the existing rent of Rs. 133-8-3 makes the total *jama* less than 50 per cent. of the gross assests which amount to Rs. 419-7-9.

Again in No 1180 of 1922 although, according to the calculation of the Assistant Settlement Officer, the rent for excess area calculated at the *kabuliyat* rate amounts to Rs. 52-3-6, only Rs. 8-6-0 has been allowed and the Special Judge, although the rent for excess area on his calculation should be Rs. 68-1-6, has only allowed Rs. 14 although this added to the existing rent makes the total *jama* less than 50 per cent. of the gross assets which amount to Rs. 336-12-4.

In Appeal No. 451 of 1922 another point arises, it being urged on behalf of the landlord that there has been too large a deduction made for *nalayek* or waste land and the same point is made as has been referred to above that rent should have been allowed for the whole excess area found by measurement at the *kabuliyat* rate which would amount to Rs. 133-11-0 whereas the Assistant Settlement Officer has allowed Rs. 93-7-0 and the Special Judge Rs. 103. It is noticeable in this case that if a larger allowance had been made the total *jama* would have exceeded 50 per cent. of the gross assets.

A further objection is raised to the admission of Ex. A, a *chitta khatian* which it is said was put in after the case was closed with the result that the plaintiff could not adduce rebutting evidence. It appears that the amount of waste land was questioned in the written statement and that the landlord, therefore, had notice of the contention supported by Ex. A and we think, therefore, that the landlord should have called evidence on the point and that Ex. A was rightly admitted, this being so there is nothing in the point raised as to area of the waste land allowed being excessive.

The main contentions raised in these appeals on behalf of the tenants were (1) that no appeal lay as the decisions of the Courts below merely settled the rent and (2) that in any case in proceedings under s. 105 of the Bengal Tenancy Act the Assistant Settlement Officer and the Special Judge were not bound by any contract between the parties but could fix a rent which they thought fair and equitable. So far as the first point is concerned we think that an appeal lies as the question to be decided involves not merely deciding what rent is payable but deciding the question of the principle to be followed in arriving at the rent payable: It is true that the point involved does not fall expressly within any of the issues set out in s. 105A of the Bengal Tenancy Act and the cases seem to show that where these questions arise an appeal lies to the Court, but we think that if the decision of the Special Judge does not merely settle a rent but involves as here some question of principle as to the basis upon which rent is to be settled, the decision of the Special Judge is appealable to this Court.

As regards the second question it has been held that the provisions of s. 105 of the Bengal Tenancy Act are applicable not only where no rent has been fixed but also where the rent has been fixed by agreement of parties, *Aktowli* v. *Tarak Nath Ghose* (4), *Jogendra Mohan Das* v. *Janki Nath Saha* (5). Consequently it seems to us that where, as

(4) 17 Ind. Cas. 266; 16 C. L. J. 328; 17 C. W. N 774.

(5) 36 Ind. Cas. 795; 21 C. W. N. 427.

here, the landlord has invoked the provisions of s. 105 he cannot contend that the Judge is necessarily bound, in fixing the rent, to adhere to the rate mentioned in the *kabuliyat*. No doubt the Judge would take this into account but we think that if he finds that a strict adherence to the rate mentioned in the *kabuliyat* would make the rent in excess of what he considers a fair and equitable rent he is bound by the terms of s. 105 to so adjust the rent irrespective of any contract between the parties, as to make it just and equitable. The case of *Matungini Dassi* v. *Ram Das Mullick* (6) which is said to support the contrary view was not a suit under s. 105 of the Bengal Tenancy Act. We think, therefore, that it was open to the Special Judge to adopt the course which he did and that he was not bound to allow enhancement at the full rate provided in the contract. This disposes of the cross-objections which are to be dismissed with costs to be paid to the appellants and of the appeals which are dismissed with costs, hearing-fee Rs. 16 in each case to the appearing respondents.

IN S. A. Nos. 1855 OF 1921, 2236, 2372 OF 1921, 412 419, 420 OF 1922, S. A. Nos. 2266 OF 1921, S. A. Nos. 329 AND 330 OF 1922, S. A. Nos. 2427 OF 1921, 2428, 2604 AND 2605 OF 1921, 1801, 1802 OF 1922, S. A. Nos. 395 OF 1922, S. A. Nos. 956 AND 957 OF 1922, S. A. Nos. 1062 AND 1063, 1476 AND 1477, 1893 AND 1894 OF 1922.

Appeals by tenants defendants.

Graham, J.—The main point involved in these is appeals the construction to be placed upon certain *dowl kabuliyats* and the question is what the parties thereto intended when they provided that excess lands found subsequently in posseseion of the tenants should be paid for "according to the *khod khasta nal* and rate of the *Pergana*".

Exhibit 26 which has been referred to as an example of those *dowls* concludes with the following passage. "If on fresh measurement excess land be found, I shall pay separate rent for the same according to the *khod khasta nal* and rate of the *Pergana*".

The controversy centres round the meaning of these words. For the tenants-appellants it has been argued that they mean the *nal* of 16 cubits which was used for measurement at the time when the tenures were created while on behalf of the landlords respondents it was urged that the words indicate a standard of measurement different from that referred to in the earlier part of the *dowls* and that what they meant was the *raiyati nal* of 14 cubits.

It is unfortunate that these documents should have been drawn up in such a way as to leave the matter in doubt and the fact that different Courts have decided differently as regards the meaning of the words in question in similar *dowl kabuliyats* shows that the matter is not free from difficulty. There is much to be said for both points of view. In favour of the tenants' contention the following arguments may be advanced.

1. The *prima facie* probability that the same *nal* and rate, which were used at the creation of the tenures, would be used for the purpose of ascertaining and assessing excess area.

2. The improbability on the other hand that the parties could have contemplated the use of a different *nal* for measuring excess area, the effect of which would be to introduce complications, as held in the judgment of this Court in 1887 when the same question arose in connection with similar *dowl kabuliyats*. If the landlord's contention is accepted, it will involve first a measurement according to the *taluki* standard of measurement to ascertain whether the land held by the defendants is in excess of the area covered by their leases, and then in respect of excess land so ascertained, a settlement of rent after ascertaining the excess area by a re-measurement upon entirely different principles. It is arguable that the parties could not have contemplated such a complicated mode of procedure.

3. The length of the *taluki nal* has been twice mentioned in the *dowl* as 16 cubits, and if the intention had been that excess lands should be measured with a different *nal* of 14 cubits, it might have been expected that this would be clearly stated.

On the other hand, there is a great deal of force in the view taken by the learned Special Judge that if the intention had been that the same *nal* should be employed, nothing would have been easier than to say that the *nal* to be used for excess land would be as aforementioned, the word "atra" or some similar word being employed for this purpose.

(6) 7 C. W. N. 93.

For the sake of judicial consistency it might be urged that we ought to adopt the same view that was held by this Court in 1887. But, as my learned brother has pointed out, the decision on that occasion was based mainly on the finding arrived at in the Court of first appeal that the *khod khasht*, or *raiyati nal* came into existence under special circumstances at a period years later than the agreements entered into. The position is different here, as we have no such evidence before us.

On the whole, therefore, on a consideration of all the facts and circumstances, I see no reason for holding that the conclusion arrived at by the Special Judge is erroneous and I agree that these appeals should be dismissed.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 59 OF 1924.

November 22, 1924.

Present:—Mr. Ashworth, A. J. C.

LACHHMAN DASS AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Musammat PARTAPI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c)—'Agriculturists,' meaning of.

An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even if he may have some sort of interest in a field or two.

Appeal against an order of the Subordinate Judge, Partabgarh, dated the 1st September 1924.

Mr. *H. N. Das*, for the Appellants.

Mr. *Wasi Hasan*, for the Respondent.

JUDGMENT.—The appellants Debi Din and Lachhman Dass, father and son, appeal from the order in execution of the Subordinate Judge of Partabgarh, directing the sale of their house in execution of a decree, on the ground that it belongs to them as agriculturists. There is no reliable evidence that the appellants are agriculturists, and they did not come into the witness-box on their own behalf. They produced three witnesses to prove that they were agriculturists. One is the *patwari*, but he can only state that Debi Din is entered in the remarks column of the *khasra* as a partner of two persons Jagdeo and Jaikaran. There is no specification of the appellants' interest in these fields, and the fields are small being 6 *biswas* and 8 *biswansis* only. Another witness, Umaid Singh, states that he has given Debi Din two *bighas* of land, but this evidence is not supported by any entry in any *patwari's* papers. Another witness, Jagmohan, speaks of cultivating 1½ *bighas* of his land. The same objection attaches to his evidence. It was for the appellants to prove that they were agriculturists, and this onus has not been sustained by the evidence. An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even if he may have some sort of interest in a field or two. In all probability, if appellants have any interest in these fields, it is not as agriculturists. The evidence for the decree-holder is explicit that the appellants earn their livelihood otherwise than by agriculture. I consider that the lower Court was right in rejecting the contention. This appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 670 OF 1923.

July 22, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

CHANDER SEN—PLAINTIFF—APPELLANT

versus

MOHAR SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Agra Tenancy Act (II of 1901), ss. 164, 165—Suit for profits under s. 164—Plaint indicating s. 165—Amendment of plaint.

The nature of a suit is indicated by the allegations made in the plaint, and not by quoting a section in the plaint which does not apply. [p. 701, col. 1.]

Where the plaint in a suit for profits which falls properly under s. 164 of the Agra Tenancy Act, quotes s. 165 of the Act, the irregularity should be allowed to be cured by an amendment. [*ibid.*]

Second appeal from a decree of the District Judge, Badaun, dated the 23rd of February 1923.

Messrs. *P. L. Banerji* and *U. S. Bajpai*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The judgment of the learned District Judge is entirely untenable. The suit out of which the appeal arose was for profits brought by a co-sharer against a son of a deceased *lambardar*. The *lambardar* was not the *lambardar* for the whole *mahal* but he was the *lambardar* for a ten-*biswa patti*. The plaintiff accordingly described the defendant and his late father as co-sharer and he headed his plaint as a suit brought under s. 165 of the Tenancy Act. The defendant took no exception to this description of the suit in the written statement and no issue was framed in the Court of first instance which can indicate that any such objection had been taken before it. The suit was decreed partially and there was an appeal by the defendant. There was also a cross-objection by the plaintiff. The first ground taken by the defendant before the District Judge was that the suit instituted under s. 165 of the Tenancy Act was not maintainable. The learned Judge was of opinion that this was a very valid argument and the suit should fail. The plaintiff offered to amend his plaint but the learned Judge was of opinion that there was a radical difference in the natures of the suits under ss. 164 and 165 and, therefore, no amendment could be permitted. It may be true that there is a difference in the character of the two classes of suits; but if s. 164 was the proper section for a suit like the present one, no harm could be done by the amendment proposed. The nature of the suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply.

We set aside the decree of the Court below and remand the appeal to it with the direction to re-enter it on the register of appeals and dispose of it according to law. Costs here will, at all events, be awarded to the successful appellant. Costs in the Court below will be in the discretion of that Court.

Z. K. *Decree set aside. Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1460 OF 1920.

April 25, 1923.

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

SAIN DAS—DEFENDANT—APPELLANT

versus

RAM CHAND—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 43—Contract for purchase of immoveable property—Joint contract by major and minor vendee—Contract, whether can be enforced against major vendee.

A contract for the purchase of immoveable property entered into by a major and a minor may be enforced against the major alone under s. 43 of the Contract Act, provided there is a joint promise to pay, and the jointness of the transaction may be inferred in a case where although the share of each vendee is specified in the agreement of sale, the portion of the purchase-money to be paid by each vendee is not so specified.

Jamna Bai v. *Vasanta Rao*, 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916), 1 M. W. N. 452; 43 I. A. 99 (P. C.) and *Kasar Singh* v *Punjab Singh*, 66 P. R. 1896, followed.

Second appeal from a decree of the District Judge, Amritsar, dated the 10th April 1920, reversing that of the Subordinate Judge, Second Class, Amritsar, dated the 22nd July 1919.

Mr. *Sheo Narain*, for the Appellant.

Mr. *Jagan Nath*, for the Respondent.

JUDGMENT.—The plaintiff in this case sold a house to Sain Das and Sant Ram for Rs. 3,100 of which Rs. 100 were received as earnest-money, Rs. 1,000 were to be paid to the previous mortgagee and the balance of Rs. 2,000 was to be paid at the time of registration. The vendee refused to have the deed registered and the vendor had this done. Excluding the Rs. 1,000 which were to be paid to the mortgagee he brings this suit for the recovery of Rs. 2,198-3-6 including interest and a small item of Rs 25 for expenses against both vendees. It has been held by the learned District Judge that Sant Ram is a minor and is not liable, that the suit is governed by s. 43 of the Contract Act, and he has given a decree to the plaintiff for Rs. 2,025 against Sain Das who appeals urging that the whole contract is bad in law on account of his co-vendee having been a minor and that anyhow a sum of Rs. 1,584-8-0 was realised at the subsequent sale of the property which was brought about by the mortgagee by means of a separate suit, that this sum is lying in deposit to the credit of the plaintiff and should be deducted. He also claimed further deduction on the ground that the mortgagee's charge

was found to be Rs. 1, 218 and not Rs. 1,000 as recited in the deed.

The points to be decided are whether a decree has rightly been given against Sain Das alone or whether the whole transaction is vitiated by the fact of Sant Ram's minority and, in the second place, whether the appellant can claim these deductions. As to the first point *Jamna Bai* v. *Vasanta Rao* (1) is a clear authority that a contract of this nature entered into by a major and a minor may be enforced against the major alone under s. 43 of the Contract Act provided that there is a joint promise to pay. The joint nature of the transaction is clear from the fact that although the shares were specified the portions of the purchase-money to be paid by each vendee were not so specified and under these circumstances, on the reasoning adopted in *Kasar Singh* v. *Punjab Singh* (2), there is no such specification as renders the contract unenforceable against either promisor.

[NOTE.—The rest of this judgment is not material for the purposes of this report—Ed.]

Z. K. *Appeal partly accepted.*

(1) 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31 (1916); 1 M. W. N. 452; 43 I. A. 99 (P. C.).

(2) 66 P. R. 1896.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 495 OF 1924.

November 4, 1924.

Present:—Mr. Dalal, J. C.

N. JAFAR HUSAIN KHAN—APPLICANT

versus

Musammat CHOUTHI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XLVI, r. 1—Plaint returned by two Courts on ground of want of jurisdiction—Reference, application for, whether maintainable—Inherent power of Court.

Plaintiff filed a suit in the Court of the Subordinate Judge but was told to go to the Court of the Munsif. When he went to the Court of the Munsif the latter declined jurisdiction in the case. On an application to the High Court for a reference under O. XLVI, r. 1 of the C. P. C.:

Held, that the application for reference did not lie but that the High Court could take action under s. 151 of the C. P. C. and pass such orders as may be necessary for the ends of justice.

Application under O. XLVI, r. 1, C. P. C. for determination of proper Court for filing the suit.

Mr. *Badri Narayan*, for the Opposite Party.

ORDER.—I have heard the learned Counsel on behalf of the opposite party. I do not like the way in which the applicant, a feeble old man, has been treated. When he filed his suit in the Court of the Subordinate Judge he was told to go to the Court of the Munsif and when he went to the Court of the Munsif he was told that the Munsif had no jurisdiction. No doubt the orders passed are very old and an application, as made for a reference under O. XLVI, r. 1, does not lie; at the same time this Court can take action under s. 151, C. P. C. and pass such orders as may be necessary for the ends of justice.

I set aside the order of the Subordinate Judge of Lucknow, dated 5th March 1919 and direct him to take cognizance of this suit as if on a plaint filed on the 3rd of March 1919. If he has no jurisdiction I hereby transfer the suit for trial to his Court. I was told by the learned Counsel for the opposite party that the suit is time-barred. That question, however, does not arise here. It will be decided at the hearing of the suit. The papers with this order shall be sent to the Court of the Subordinate Judge of Lucknow and the applicant directed to present himself there. Action shall be taken by the Court of the Subordinate Judge to bring necessary parties on the record.

As to the other order on return by the Court of the Munsif, I set aside the order of the Munsif, dated 8th January 1923 and direct that suit to be tried by the Subordinate Judge of Lucknow. If any order is required as regards the Munsif's order dated 28th October 1918, the Subordinate Judge of Lucknow will please let me know.

I want the old man's suit to be tried out without any technical objections being raised. He must of course pay necessary Court-fee etc., or will be bound by the law, of limitation.

Z. K. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 127 OF 1924.
October 2, 1924.
Present:—Mr. Dalal, J. C.
Musammat MALUKA—PLAINTIFF—APPLICANT
versus
PATESHUR SINGH AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. VI, r. 16—Under-proprietary and occupancy land, suit for possession of—Order directing striking out of claim with regard to occupancy land, legality of—Revision, whether lies.

Plaintiff sued for possession of certain properties, part of them under-proprietary interest and part occupancy interest, in different plots of land. The suit was decreed by the First Court but on appeal the Appellate Court was of opinion that a suit for the recovery of occupancy land even as against strangers did not lie in the Civil Court and passed an order that the plaintiff should strike out from the plaint the claim for possession of the occupancy lands. On revision:

Held, (1) that the order of the lower Appellate Court amounted to an order in a "case" within the meaning of s. 115 of the C. P. C., inasmuch as it finally settled the matter whether a suit for possession of occupancy land did lie in the Civil Court or not, and that, therefore, the order was open to revision;

(2) that the lower Appellate Court had no jurisdiction to pass the order as the order was not necessary for the ends of justice or to prevent any abuse of the process of the Court within s. 151, C. P. C., nor could the pleading with regard to the occupancy land be considered as unnecessary within the meaning of O. VI, r. 16 of the C. P. C., inasmuch as the view which the lower Appellate Court had taken was disputed by the plaintiff.

Application for revision under s. 115 of the C. P. C. from an order of the District Judge, Fyzabad, dated the 3rd July 1924, in Civil Appeal No. 37 of 1924, preferred against that of the Additional Subordinate Judge, Fyzabad, dated the 7th January 1924.

Mr. *M. Wasim*, for the Applicant.
Mr. *Niamatullah*, for the Opposite Party.

JUDGMENT.—The plaintiff sued for possession of certain properties, part of them under-proprietary interest and part occupancy interest in different plots of land. The First Court granted a decree and on appeal by the defendants the learned District Judge of Fyzabad was of opinion that a suit for the recovery of occupancy land, even from strangers who are not landlords, did not lie in the Civil Court. He thereupon passed an order on 31st July last that the plaintiff should strike out from her plaint her claim for possession of the occupancy lands. Against this order the plaintiff has come here in revision.

It was first argued by the learned Counsel for the opposite party that no revision lay under s. 115. In my opinion the order of the lower Court amounted to an order in a case because it finally settled the matter whether a suit for the possession of occupancy land did lie in the Civil Court or not. The plaintiff had no other remedy. It was pointed out that she could have come here in second appeal after the appeal was fully decided. This would be a procedure fraught with much doubt. If the appeal of the defendants after the amendment of the plaint is dismissed it is difficult to understand on what ground the plaintiff could come here on second appeal from a decree in her favour. Her opportunity of objecting to the order under revision would then have lapsed.

In my opinion the learned Judge had no jurisdiction to pass the order which he did. In his opinion he acted under the provisions of s. 151 of the C. P. C. Such an order, however, was not necessary for the ends of justice or to prevent any abuse of the process of the Court. It was open to the learned Judge to decree the appeal as regards occupancy rights. That method of procedure would have been more just as allowing the plaintiff an opportunity to come here in second appeal. The powers of a Court to order the striking out or amending of any matter in any pleading are circumscribed by the provisions of O. VI, r. 16. Pleadings which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of any suit may be ordered to be struck out. The respondents' learned Counsel was of opinion that this particular pleading was unnecessary. It may become unnecessary if the opinion of the learned Judge is accepted as final. This, however, is a point of difference between the parties and the pleading cannot, therefore, be considered as unnecessary one. The inclusion of it among the other pleadings will in no way prejudice, embarrass or delay the fair trial of the appeal.

I set aside the order of the lower Court dated 31st July 1924 and direct it to proceed with the appeal according to law. The respondents shall pay costs of this application in this Court.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 725 OF 1923.
November 25, 1924.
Present :—Mr. Justice Mukerji.
MAHADEO PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SOORAJ PRASAD—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Limitation Act (IX of 1908), Sch. I, Art. 89—Suit for accounts by successor-in-title of principal—Jurisdiction of Small Cause Court—Limitation.

Plaintiffs' father purchased certain property and entrusted the management of it to defendant, to whom he advanced certain sums of money from time to time in order that the same might be lent to the tenants. After their father's death the plaintiffs called upon the defendant to render an account of the moneys received by him, and on his refusal to render an account brought a suit for accounts against him:

Held, (1) that the suit fell within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act and was excluded from the cognizance of a Small Cause Court;

(2) that the suit was governed by Art. 89 of Sch. I to the Limitation Act.

Nobin Chandra Barua v. *Chandra Madhab Barua*, 36 Ind. Cas. 1; 44 C. 1; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 886; 24 C. L. J. 509; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.), followed.

Article 89 of Sch. I to the Limitation Act is not confined in its application to suits by a principal himself, and extends also to suits by the successors-in-title of a principal.

Second appeal against a decree of the District Judge, Jhansi, dated the 13th of January 1923.

Mr. *Janaki Prasad*, for the Appellants.

Mr. *Vishun Nath*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken that no second appeal is competent. In order to answer this plea it will be necessary to see what was the nature of the suit.

Briefly, the plaintiffs' case was this. They are minors. Their father purchased certain property and entrusted the management of the same to the defendant who is the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September 1918. The defendant refused to render an account of the monies that he received and realised, sometime in 1921, hence the suit.

It appears to me that on the allegations made in the plaint the suit was one for accounts and was, therefore, exempted from the cognizance of the Small Cause Court by Art. 31 of the Provincial Small Cause Courts Act. It is clear that if the defendant can satisfactorily explain what he did with the money there will be no decree. All that was necessary for the plaintiffs to prove was what amount of money the defendant realised and what sums he otherwise got from the plaintiffs' father or from the plaintiffs themselves in order that the money might be lent out to advantage. I overrule the preliminary objection.

The Court of first intance decreed the suit, but the lower Appellate Court dismissed it. It divided the claim into two portions, *viz.*, what was due to the father during his lifetime and what was handed over to the defendant after the death of the father. As to the latter item, the learned Judge was of opinion, on evidence, that the claim had not been established. As to the rest he was of opinion that Art. 89 of the Limitation Act did not apply, as agency terminated on the death of the father. It appears that the learned Judge was of opinion that for the application of Art. 89 of the Limitation Act it was necessary that the suit should be by the principal himself and not by any successor-in-title of the principal. This would be reading Art. 89 in a very restricted sense. If the argument should hold good any suit by the *quondam* principal on the termination of the agency would not be a suit by the principal. Because, exhypothesi, the agency has ceased. In my opinion, Art. 89 does apply and as the plaintiffs were minors when the father died they were entitled to maintain the suit without regard to the period of limitation. If any authority were needed for the proposition set forth above one would be found in the *dicta* of their Lordships of the Privy Council in the case of *Nabin Chandra Barua* v. *Chandra Madhab Barua* (1).

I allow the appeal in part, set aside the decree of the Court below so far as it does not relate to the item of Rs. 27 and remand the appeal to it with the direction that it be restored to its original number in the register and be disposed of according to law. Costs here and hitherto will abide the result. Costs in this Court will include Counsel's fees on the higher scale.

Z. K.

Appeal allowed.

(1) 36 Ind. Cas. 1; 44 C. 1; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 886; 24 C. L. J. 509; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 14 OF 1924.
March 4, 1924.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

PUROSATTAM—COMPLAINANT—PETITIONER
versus
RAM DAS AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 203—Complaint, dismissal of—Examination of complainant's witnesses.

A complaint cannot be dismissed without examining the witnesses of the complainant who are present in Court to give evidence in support of the complaint. A complainant is entitled to have an opportunity of establishing the truth of his allegations by having the evidence of his witnesses tested by the Magistrate.

ARGUMENTS.—Babu *Raj Kumar Roy*, for the Petitioner.—This Rule was issued against the rejection of a petition of complaint. The facts are that the present petitioner instituted a criminal case against some persons under s. 498, Indian Penal Code, for abducting his wife. Then on the request of Ram Das the opposite party No. 1 the case was compromised for a money consideration. But subsequently Ram Das put off the payment of the money from day to day on flimsy pretexts. At last the petitioner filed his petition of complaint against Ram Das and others for criminal breach of trust and cheating.

Thereupon the Magistrate examined the petitioner and directed him to bring his witnesses. The petitioner having failed to appear on the appointed day his petition was dismissed. Then on an application for revival, 12th of November was fixed for re-hearing. On that date the petitioner was present with his witnesses; but the Magistrate did not examine any of the witnesses and dismissed the petition with the remark that the facts would not make out a case of cheating. Now, could the Magistrate dispose of the petition in that manner without giving the petitioner an opportunity to prove his allegations? This was certainly not the right procedure under the Cr. P. C. Besides, the petition related to a very serious matter and there was no knowing what would come out of it. Therefore, the procedure adopted by the learned Magistrate was not only hasty and wrong but also prejudicial to public policy.

No one appeared for the Opposite Party.

JUDGMENT.

Chotzner, J.—This Rule was granted to the petitioner upon the first and the second grounds specified in his petition. The first ground was that the learned Magistrate had erred in rejecting the petition of complaint without hearing the witnesses of the complainant present in Court; and the second ground was that the learned Magistrate had erred in holding that the facts, as disclosed in the petition, did not make out a case of cheating.

The facts, as set forth in the petition, are somewhat peculiar. The petitioner charged certain persons under s. 498 of the Indian Penal Code with having abducted his wife. While the case was still pending, Ram Das the opposite party No. 1 approached him with the proposition to compromise the matter out of Court for a money consideration. The petitioner acquiesced in the proposal and filed a petition withdrawing the complaint whereupon the accused were discharged by the Magistrate. Subsequently the petitioner approached Ram Das with a request for the money promised but he was put off from time to time on various grounds. Finally, losing patience he filed a petition in Court charging Ram Das and the other parties to the case with breach of trust and cheating.

The learned Magistrate examined the petitioner and observed that the complainant could not explain his case and directed him to bring his witnesses on 31st October. On that day the complainant did not appear and the petition was dismissed. On 1st November he applied for revival of the case and 12th November was fixed for the hearing when the learned Magistrate according to the petition, without examining the witnesses of the complainant who were present in Court, dismissed the application with the following remark: "The facts will not make out a case of cheating, even if true".

In our judgment, this Rule should be made absolute upon the ground that the petitioner should have been given an opportunity of establishing the truth of his allegations by having his witnesses' evidence tested by the learned Magistrate.

Without, therefore, expressing any opinion on the merits, we make the Rule

absolute and remit the case to the Court below for disposal according to law.

Sanderson, C. J.—I agree.

Z. K.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT. FULL BENCH.

CRIMINAL APPLICATION No. 12 OF 1924.

April 15, 1924.

Present:—Mr. Kincaid, J. C., Mr. Kennedy, A. J. C., Mr. Aston, A. J. C., Mr. Rupchand Bilaram, A. J. C., and Mr. Lobo, A. J. C.

Haji KHUDABUX AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 266, 418—Sessions trial by Judicial Commissioner—Appeal, whether lies.

An appeal lies from the decision of a Judge of the Court of the Judicial Commissioner of Sindh, holding a Sessions trial where the Judge has accepted the finding of the Jury. For the purposes of appeal such trial continues to be a trial by a Sessions Court notwithstanding the amendment of s. 266 of the Cr. P. C. [p. 707, col. 1; p. 708, col. 2; p. 710, col. 2.]

Reference to the Full Bench on a preliminary point as to whether an appeal lay from the decision of a Single Judge of the Court of the Judicial Commissioner, Sind, holding a Sessions trial where he accepts the verdict of the Jury.

Mr. *Motiram Idanmal*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.

Kincaid, J. C.—The question which has been referred to our decision is whether an appeal lies from the decision of a Judge of this Court holding a Sessions trial, where the Judge has accepted the finding of the Jury.

Under s. 418, Cr. P. C., an appeal lies, where the trial is by Jury, on a matter of law only. This section, however, only applies to Sessions Courts. No such right of appeal exists where the accused has been tried in a Chartered High Court. On the other hand, the Advocate-General has the special power of certifying cases as being fit for appeal. A modified right of appeal thus exists even in a Chartered High Court. There is no Advocate General in Sind. Thus to hold that this Court on its Original Criminal Side is a High Court for all purposes would be to deprive both accused and Crown of a right of appeal. Until the introduction of the amended new Cr. P. C., there was no question as to the status of this Court. For the trial of Sessions cases it was admittedly an ordinary Sessions Court. The accused and the Local Government had a right of appeal and the Sessions Judge had a power of reference under s. 307, Cr. P. C. The difficulty has arisen because of s. 266 of the amended Cr. P. C. which runs as follows: "In this Chapter, except in ss. 276 and 307, and in Ch. XVIII, the expression 'High Court' means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915 and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind and the Chief Court of Lower Burma and such other Courts as the Governor-General in Council may, by notification in the *Gazette of India* declare to be High Courts for the purposes of this Chapter and Ch. XVIII."

From this it follows that in all Sessions trials the procedure of the Judicial Commissioner of Sind must be similar to that of the Bombay High Court; but does it follow that the accused's right of appeal has been taken away? In the case of *Kala Kana* v. *Emperor* (Criminal Appeal No. 102 of 1923), a Division Bench of this Court held that it had been taken away. But the accused had no Counsel and the case was not fully argued. The answer to the question is, I think, to be found in s. 1 (2) which lays down: "In the absence of any special provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

Now the Judicial Commissioner's Court has only been declared by s. 266 to be a High Court for the purposes of Chs. XXIII and XVIII. But the right of appeal is conferred by ss. 410 and 417 and s. 418 which sections are to be found in Ch. XXXI. As this Court has not been declared in the new amended Code to be a High Court for the purposes of Ch.

XXXI, it must remain under s. 1 (2) that it was before under the local law which created it, namely, Act XII of 1866. S. 1 (*a*) of that Act runs as follows :—

The Judicial Commissioner and Additional Commissioners shall be appointed by the Local Government by whom alone they shall be liable to be suspended or removed. They shall, within the District and Sessions Division of Karachi, each of them exercise all the powers of a Judge of a District Court and of a Sessions Judge and all Regulations, Acts, notifications and rules now or hereafter in force and applying to the Judge of the District Court or Sessions Judge of Karachi shall, so far as they are not inconsistent with this Act or with any notifications or rules hereafter duly published or made, be deemed to apply also to each such Judicial Commissioner and Additional Judicial Commissioner.

Now, it is clear that under s. 1 (*a*) of Act XII of 1866, the Judicial Commissioner's Court is a Sessions Court. Therefore, except so far as it has been specifically altered by the amended Code, the Judicial Commissioner's Court remains a Sessions Court as before. If it is a Sessions Court the accused retain their right of appeal.

I would, therefore, answer the question referred to the Full Bench in the affirmative. Whether the Judge's right of reference under s. 307 of the amended Code has been preserved or not is a question not before us and one on which I would express no opinion.

Aston, A. J. C.—I concur.

Lobo, A. J. C.—I concur.

Kennedy, A. J. C.—The point for decision in this reference to the Full Bench is whether a Judge of this Court, does while sitting on the Original Side dispose of criminal matters as a Sessions Judge or as a Judge of the High Court; or in other words, whether an appeal lies from his decision to a Bench of this Court. I may mention that the Judge whose decision is sought to be attacked in the present application is myself, but that, under s. 9 (*d*) of the Sind Courts Act, forms no bar to my hearing the reference.

The question for decision is extremely difficult and I am by no means certain that it is possible very clearly to ascertain the intention of the Legislature and to give effect to that intention. Section 404 of the Cr. P. C. says that "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force." Section 410 says that "Any person convicted on a trial held by a Sessions Judge...may appeal to the High Court." It is only, therefore, in case that a Single Judge of this Court sits in a trial of an original criminal case as a Sessions Judge that an appeal from his decision lies. Now, s. 7 of the Cr. P. C. requires that "Every province (excluding the Presidency Towns) shall be a Sessions Division or shall consist of Sessions Divisions." Karachi and Karachi District, over which the jurisdiction of this Court in original criminal matters extends, is not a Presidency Town, and, therefore, it would appear that Karachi must be a Sessions Division. By s. 9 it is required that "The Local Government shall establish a Court of Session for every Sessions Division." Section 1 (2) of the the same Act provides that "nothing in the Cr. P. C. shall affect any special or local law now in force, or any special jurisdiction or power conferred...by any other law for the time being in force." There has been no alteration of the Bombay Act, XII of 1855 which provides for the establishment of a Court of Sessions at Karachi. So far, therefore, I should say that under that Act and the rules framed under it, a Judge of this Court tries criminal cases as a Sessions Judge and an appeal will lie to the High Court Bench of this Court. This has always been the procedure in Karachi and the question is whether the new Cr. P. C. has introduced any change into the law. Chapter XXIII of the Cr. P. C. deals with trials before a High Court of Criminal Sessions and s. 266 says that the "expression 'High Court' (*inter alia* and with immaterial exceptions) in that Chapter includes the Court of the Judicial Commissioner of Sind." It is argued, therefore, that as the trial of the original criminal cases before a Single Judge of this Court is held under that Chapter, the trial is one not before a Sessions Judge but before a High Court and that the Judge who presides at the trial by the High Court is not sitting as a Sessions Judge and, therefore, no appeal lies against his finding. I may mention, though the matter is not now directly in issue, that a further complication may occur in cases where this Court is dealing with a European British subject, because, for that purpose this Court is made a High Court, by virtue of the definition of a "High Court" in s. 4 (*j*)

of the Cr. P. C., but we are at present not concerned with the difficulties that may arise in consequence of that definition. It is argued that the intention of the Legislature was that persons tried in the Court of the Judicial Commissioner of Sind, by a Single Judge exercising original jurisdiction, should have precisely the same rights and be subject to the same disabilities which exist in the case of a person who is tried by a High Court established by Letters Patent. I myself think that the right of reference is taken away from the Judge of this Court by virtue of s. 307, and accordingly it is contended also that the right of appeal and the right to a re-consideration given by the submission of sentence to confirmation was also taken away. It seems to me that to hold so would be to hold that the Legislature had by implication taken away very rightly the rights of the subject which I cannot presume was the intention of the Legislature. It is to be observed that if the theories of the Crown are correct there is no means at all whereby an erroneous sentence once delivered can be corrected. There is no Advocate-General to certify and a High Court cannot review its own decision. It is also a fact that if this Court is actually constituted a High Court, by that definitory section, there is no provision either in the Code or in the Act of 1866 or in any other Act for the means whereby it is to exercise its original jurisdiction as a High Court. I doubt very much whether, without further legislation, it would be possible for this Court or at any rate for any individual member of this Court to hold any original criminal trial at all. This I think could be no means have been contemplated by the Legislature, and if it is possible so to interpret the law, as it stands, as to enable this Court to perform the duties laid on it by law that interpretation must be presumed to be in accordance with the intention of the Legislature. In respect of Indians the definition of a 'High Court' is confined to Ch. XXIII which refers to the form of actual trials and I should, therefore, be inclined to hold that all that was intended by the Legislature was that throughout that Chapter where the term 'High Court' occurred, such a term should be deemed to include a Judge of this Court sitting in the exercise of original jurisdiction, that is to say that as regards the procedure of actual trials, though such trials were held by a Sessions Judge, yet it was to be similar to that laid down for original trials by a Judge of the High Court. In all Chapters, therefore, where the definition of High Court does not include the Judicial Commissioner's Court that Court when exercising its original criminal jurisdiction must continue to be deemed not a High Court but a Sessions Court. Now the Chapter relating to appeals contains no such definition of 'High Court' as to include the Court of the Judicial Commissioner sitting in original cases. Therefore, I think, that under that Chapter the Judicial Commissioner's Court should continue to be considered a Court of Sessions. I, therefore, think that an appeal would still lie from a decision by such a Judge to the High Court Bench. It follows that it is also my opinion that all cases in which a sentence of death is passed by a Judge of this Court such sentence must be submitted for confirmation to the High Court. I have already expressed my personal opinion that it is impossible in cases where the Judge might disagree with the verdict of the Jury, to refer the case to High Court, and that perhaps is to be regretted, but if my views are right that is a matter for the Legislature, if so advised to deal with. In the meantime I would answer the question referred to the Full Bench by saying that an appeal does lie from the sentence of a Single Judge of this Court presiding at an original trial in criminal Sessions.

Rupchand Bilaram, A. J. C.—This reference raises the question as to the meaning and effect of s. 266, Cr. P. C., as recently amended. It is urged on behalf of the Crown that the effect of this section is to constitute this Court as a High Court of Original Criminal Jurisdiction in trials under Ch. XXIII and in the absence of any express provisions in the Code or elsewhere allowing a right of appeal, s. 404, Cr. P. C., bars a right of appeal against the decisions or order passed by this Court at such trials. Reliance has been placed on a ruling of this Court passed by a Division Bench consisting of the learned Judicial Commissioner and my learned brother Aston. In that case the accused was unrepresented and the point does not appear to have been fully argued. Section 266 is beyond all question an interpretation clause limited in its operation to certain sections in Chs. XVIII and XXIII of the Code. It is intended to be

taken into account in construing the expression 'High Court' as it occurs in those sections. It provides that the expression 'High Court' means not only Chartered High Courts but includes within its ambit this Court and certain other specified Courts. The phrase "shall include" is, as said by Lord Watson in *Dilworth* v. *The Newzeland Commissioner of Stamps* (1) used in order to enlarge the meaning of words or phrases occurring in the body of the Statute and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."

The fact that this Court is declared by s. 266 as included in the expression "High Court" as used in certain sections has not the effect of constituting this Court either a Chartered High Court or any other High Court of Original Criminal Jurisdiction for all purposes, or to attach to this Court every incident attached to a High Court by any other enactment of the Legislature. *Umachurn Bag* v. *Ajadanissa Bibee* (2). If s. 266 is limited to its legitimate functions as an interpretation clause, and the expression 'High Court' substituted by the expression "this Court of the Judicial Commissioner of Sind" in the different sections to which s. 266 applies, none of such sections purports to constitute in express terms this Court a High Court or to affect its status or to vest in this Court any new jurisdiction which it does not already possess.

The contention that Ch. XXIII deals with two different kinds of procedure, one laid down for a Court of Session and the other for a High Court, and as the procedure now applicable to this Court is not that of a Court of Session, this Court ceases to be a Court of Session when holding a trial under Ch. XXX, and is, therefore, by implication constituted a High Court is far-fetched and opposed to the well-recognized canons of construction and if allowed to prevail leads to anomalous results.

The constitution of this Court is declared by the Sind Courts Act, XII as amended by Bombay Act I of 1906. Section 1 of the Act confers two distinct jurisdictions on this Court, (*a*) as the highest Court of Appeal of the Province which prior to the amending Act I of 1906 was vested in the Sadar Court for the Province of Sind, and (*b*) as a District Court and Sessions Court for the District and Sessions Division of Karachi. Section 1(*a*) empowers each Judge of this Court to exercise all the jurisdiction and have all the powers of a Sessions Judge. Section 1, cl. (2), Cr. P. C., provides that in the absence of any specific provision to the contrary, nothing in the Code shall affect this local law. Can it then be said that the effect of providing a procedure which is different from the procedure laid down for trials, before a Sessions Court is a specific provision to the contrary declaring that a Judge of this Court shall cease to be a Sessions Judge or shall be deemed to be a High Court Judge. The expression "High Court of Original Criminal Jurisdiction" does not appear to have been defined in any Statute. Section 101 of the Government of India Act limits the definition of a High Court to the Courts established under the Letters Patent. Section 3, cl. 24 of the General Clauses defines a High Court with reference to proceedings and s. 4, cl. (*j*) of the Code does not appear to define a High Court of Criminal Original Jurisdiction at any rate with reference to trial of non-European British subjects, whatever may be its effect with regard to trial of European British subjects under the present amended Code.

The Cr. P. C. not only lays down the procedure to be adopted by the Courts in criminal trials, but it also defines the constitution and powers of different Criminal Courts except High Courts established under the Letters Patent and other Courts established under any special or local law.

Section 6 defines the different Criminal Courts; s. 7 provides that each Province except a Presidency Town shall consist of a Sessions Division or Divisions, each Division being a District; s. 9 enjoins the Local Government to establish a Court of Session for each District. This Court has been declared to be a Court of Session for the District of Karachi including the town of Karachi, which is not a Presidency Town. Section 28 provides for trial of offences under the Indian Penal Code by a High Court, or Court of Session, or any other Court by which such offences are made

(1) (1899) A. C. 99 at p. 105; 68 L. J. P. C. 1; 79 L. T. 473; 47 W. R. 337.
(2) 12 C. 430 at p. 433; 6 Ind. Dec. (N. S.) 293.

triable under the Schedule. Section 31 provides for punishments to be inflicted by the various Courts *inter alia* by the High Court and the Court of Session. Sections 193 and 194 confer jurisdiction on High Court and a Court of Session to take cognizance of certain offences. Section 266 does not extend the definition of High Court to any of those sections. It is limited to Chs. XVIII and XXIII and the maxim *expressio unius est exclusio alterius* would apply. If this Court is not a High Court within the meaning of those sections and is not a Sessions Court when trying offenders under Ch. XXIII, then it would lead to the anomalous and absurd result, that no offender can either be tried or punished by this Court as a Court of Original Criminal Jurisdiction. If it was intended to constitute this Court a High Court one would expect the constitution and powers of such Court to be defined in the Act and not merely be left to inferences being drawn from an interpretation clause.

Again the right of appeal is a valuable right especially in trials which affect the life and liberty of the accused. Prior to the amendment of s. 266 this right admittedly existed against convictions and sentences passed by this Court in trials held with the aid of the Jury.

A similar right of appeal is allowed under the Charters of several High Courts though it is subject to a certificate being granted by the Advocate General. It is difficult to conceive that the Legislature could have intended to effect such a great and sudden change of policy of depriving an accused person tried by this Court of this valuable and vested right of appeal by mere implication.

It is not too much to presume that the only change which is intended by the Legislature by the inclusion of this Court in the definition of the expression 'High Court' in s. 266 is to apply the procedure of a High Court to this Court in the proceedings held before the Trying Judge without affecting the status or the powers of this Court as a Court of Sessions, subject, however, to such powers being controlled by any express provisions to the contrary in the specified sections in Chs. XVIII and XXIII, such as the power of reference under s. 307 of the Code. If this Court continues as a Court of Session in Jury trials though it is required to adopt the procedure adopted at trials by a High Court, it would follow that an appeal against its decision is permissible under ss. 410 and 418 of the Code. This presumed intention of the Legislature renders the provisions of Chs. XVIII and XXIII consistent with the other provisions of the Code and of the Sind Courts Act and preserves this valuable right of the accused.

I, therefore, agree with the learned Judicial Commissioner in the answer given by him to the question referred to the Full Bench.

Z. K. *Reference answered accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 440 OF 1924.
August 28, 1924.
Present:—Mr. Justice Mukerji.
MOTI RAM—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476A —Penal Code (Act XLV of 1860), s. 193—Complaint dismissed by Bench of Magistrates—Order by District Magistrate directing prosecution of complainant for perjury, legality of—Perjury—Oath not administered, effect of.

A complaint was dismissed by a Bench of Honorary Magistrates. The District Magistrate, to whom an appeal would ordinarily lie from the order of the Bench took up the matter under s. 476A of the Cr. P. C. and ordered the prosecution of the complainant under s. 193 of the Penal Code:

Held, that the District Magistrate had jurisdiction to make the order which he had passed although the original complaint was not heard by him.

Even where no oath is administered to a witness in a judicial proceeding in a Court of Justice the witness is bound to state the truth and if he fails to do so he is guilty of an offence under s. 193 of the Penal Code.

Criminal revision against the order of the Sessions Judge, Budaun, dated the 29th of July, 1924.

Dr. *N. C. Vaish*, for the Applicant.

JUDGMENT.—Two points have been urged in this application for revision.

It appears that the applicant prosecuted somebody on a charge under s. 498 of the Indian Penal Code. The prosecution failed. It was before a Bench of Honorary Magistrates. The learned District Magistrate to whom an appeal would ordinarily lie from the orders of the Court of the Bench of Honarary Magistrates, took up the matter under s. 476A of the Cr. P. C. and ordered

the prosecution of the applicant under s. 193 of the Indian Penal Code. The applicant went to the learned Sessions Judge in appeal and his appeal has been dismissed.

It is urged that the learned District Magistrate had no jurisdiction to take up matter as the original complaint was not heard by him. The point, however, cannot be maintained in view of the new law, *viz.*, 476A of the Cr. P. C.

The second point is that as a matter of fact no oath was administered to the applicant. Assuming that such was the case the applicant was bound to state the truth before a Court of Justice.

I reject the application.

Z. K.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 157 OF 1924.

July 18, 1924.

Present:—Justice Sir Babington Bennett Newbould, KT., and Mr. Justice Mukerji.

CHHAKARI SHAIK—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 221, 298—Penal Code (Act XLV of 1860), ss. 141, 147—Charge, form of—Rioting—Common object, specification of—Enforcement of right—Prosecution, duty of—Trial by Jury—Charge to Jury—Omission to charge on vital points—Misdirection.

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for unless he has this knowledge he may be seriously prejudiced in his defence. In framing charges it is always a sound rule for the Court to adhere to the language of the Statute as far as possible. A departure from the words of the Statute benefits nobody and only introduces complications in many instances. [p. 712, col. 1.]

In a charge of rioting, the common object of which is to enforce a right, or a supposed right, it is necessary for the prosecution only to show that the accused was not in actual possession at the time of the occurrence. [*ibid.*]

In a trial by Jury omissions on vital points in the Judge's charge to the Jury may amount to such misdirection as to vitiate the trial. [p 713, col. 2.]

Where the Judge's direction as to the probabilities has the effect of putting the probabilities in favour of the prosecution too strongly before the Jury and upon a mere assumption of the facts which the Jury are not asked to find for themselves, it amounts to a misdirection which vitiates the trial. [p. 714, cols. 1 & 2.]

Mr. *H. D. Bose*, Babus *Narendra Kumar Bose* and *Khetra Mohan Ghosh*, for the Appellant.

Babu *Lalit Mohan Sanyal*, for the Crown.

JUDGMENT.

Mukerji, J.—The appellant, Chhakari Sheikh, has been convicted under ss. 147 and 324/149, Indian Penal Code, by the Additional Sessions Judge of Khulna in agreement with the verdict of the majority of the Jury, the Jury being divided in the proportion of 5 to 4, and sentenced under s. 324/149, Indian Penal Code, to undergo rigorous imprisonment for 3 years. There was a further charge for an offence under s. 302/149, Indian Penal Code, in respect of which the Jury unanimously found him not guilty and the learned Additional Sessions Judge has acquitted him of that charge.

The three charges aforesaid ran as follows:—

First.—That you on or about the 4th day of June at Banisanta Abad committed rioting as a member of an unlawful assembly with the common object of enforcing a supposed right over the lands of Biraj, tenant of Purna Mandal by driving away Srimanta, Biraj and others with force and thereby committed an offence under s. 147, Indian Penal Code.

Second.—That you on or about the same day at the same place were member of an unlawful assembly and in prosecution of the common object of which *viz.*, by driving Srimanta and others by force, one of the members Sonaram Pal caused the murder of Shital Mandal and you are thereby under s. 149, Indian Penal Code, guilty of committing the same offence under s. 302, Indian Penal Code, read with s. 149, Indian penal Code.

Third.—That you on or about the 4th day of June at Banisanta Abad were member of an unlawful assembly and in prosecution of the common object of which *viz.*, to drive away Srimanta and others by force, some of you voluntarily caused hurt with a deadly weapon on Jharu and Dandadhar and thereby committed an offence under s. 324/149, Indian Penal Code.

The common object set out in the aforesaid charges is not in the same words in all of them; while in the charge under s. 147, Indian Penal Code, it is to enforce a supposed right over the lands of Biraj, tenant of Purna Mandal by driving away Srimanta, Biraj and others by force, that set out in the two charges under s. 149, Indian Penal Code, is to drive Srimanta and others by force. Now driving persons by force is not one of the common objects mentioned in

s. 141, Indian Penal Code, and if these two charges stood alone the accused could very well have contended that he was tried for offences not known to law. The charge under s. 147, Indian Penal Code, however, set out the common object of enforcing a supposed right and the driving away of Srimanta and others was set out as the means by which the supposed right was enforced. The accused, therefore, was not misled by the want of precision in the framing of the charges. An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him for unless he has this knowledge he may be seriously prejudiced in his defence. In framing charges, therefore, it is always a sound rule for the Court to adhere to the language of the Statute as far as possible. A departure from the words of the Statute benefits no body and only introduces complications in many instances, of which the present case may serve as an illustration.

In a charge of rioting of which the common object is to enforce a right or supposed right it is necessary for the prosecution only to show that the accused was not in actual possession at the time of the occurrence. In the case of *Silajit Mahto* v. *Emperor* (1) a clear distinction was drawn by the Court between enforcing a right and maintaining undisturbed the actual enjoyment of a right. By introducing the words "by driving Srimanta and others by force" the prosecution took upon itself the burden of proving that Srimanta and others were in possession of the land at the time of the occurrence, and by confining the charge to the enforcement of a supposed right it further alleged that the accused had no real right to be on the land at the time.

These elements have got to be taken into consideration along with the facts alleged by the prosecution, in order to determine what facts must be found to justify a conviction of the accused on the charge of rioting or on the other charges which are based thereon.

The prosecution case on the question of possession shortly stated is this, Purna Mandal took a verbal lease of 151 *bighas* of land in 1315 *B. S.* from the predecessor-in-interest of Kiran Das and others. He kept 38 *bighas* in his *khas* possession and sub-let the remainder to nine different persons, *viz.*, Srimanta, Biraj and others. The said sub-tenants used every year to erect a hut in the land of one of them, *viz.*, Biraj, for protection against rains during the cultivation season, and demolish the same after the rains were over, that is to say, in the month of *Bhadra*. Early in *Jaistha*, 1330, such a hut was erected on the land of Biraj and on the 21st *Jaistha*, 1330 (4th June 1923) when the sub-tenants were about to start the work of cultivation, the accused persons variously armed came to the spot demolished the said hut and began to construct a new hut on its site. Purna and his sub-tenant offered opposition or rather remonstrated and upon that the occurrence took place. The motive which actuated the accused according to the prosecution was to take forcible possession of the land as one of the accused Sonaram Pal and one Ayenuddi Molangi had obtained settlement of the land under a *kabuliyat* executed in favour of the landlords.

The suggestion made to the prosecution witnesses during their cross-examination indicate that according to the defence Purna Mandal was a tenant in the land for the years 1328 and 1329, that he had no tenancy right in the land at the date of the occurrence, that he and his sub-tenants ceased to have any possession on the expiry of the year 1329, that thereafter the landlords gave the lands in *barga* settlement to Sonaram Pal and Ayenuddi Molongi and they executed a *kabuliyat* dated 2nd *Jaistha* 1330 (16th May 1923) and registered on 25th May 1923. Their case further appears to have been that there was no hut on the land as alleged by the prosecution.

Even if these suggestions be ignored as having been mere suggestions, upon the case as presented by the prosecution itself the most essential fact which would have to be proved in order to support a conviction on the charge of rioting was that there was a hut on the land which the accused came to demolish and which the prosecution alleged the accused did demolish. It is true that if the prosecution had not made a definite case as to the existence of a hut it would have been enough if it was proved that Srimanta and others or for the matter of that Purna Mandal, were in possession, either actually or even inferentially from any right which any of them may have had to the lands. It was not pretended, however, that there was any act of possession exercised on the lands of Biraj by Purna or any of his sub-tenants since the cultivation of 1329 and the only act of pos-

(1) 4 Ind. Cas. 19; 36 C. 865; 13 C. W. N. 801; 10 Cr. L. J. 471.

session in those lands was confined to the erection of the hut in question. As for inference of possession from a right to possess, no such right has been attempted to be proved in this case.

On the question of possession the learned Judge clearly misdirected the Jury. The misdirection is of a two-fold character, that is to say, of omission as well as of commission.

The question as to whether the hut was in existence or not being of prime importance, it was the duty of the learned Judge to place before the Jury facts and circumstances appearing on the evidence showing the existence or non-existence of the hut as either possible or probable. All that the learned Judge says on the point is this :—

"The prosecution witnesses Nos. 1 to 3, 7, 9, 10, 11, 14 and 18 say that Purna's subordinate tenants had a hut and this was demolished and new huts constructed. The Sub-Inspector says that he found on the 6th remnants of an old plinth over which the new hut was erected."

Though the demolishing of the hut was an integral part of the prosecution case and the existence of the hut for some days before the date of the occurrence was alleged as showing the possession of the sub-tenants, the learned Judge did not direct the Jury at all about the importance of finding whether it existed or not; on the other hand he observed thus in his charge :—"If they had it (meaning the hut) and it was demolished and new huts were constructed or *even if they had no hut*, and Sonaram Pal constructed new huts, whether these subordinate tenants and Adar, brother of Purna would not have objected, and if new tenants were backed by armed men on behalf of the *maliks*, a riot was probable, and whether there was a riot resulting in the death of Sital brother of Srimanta, one of Purna's tenants and the wounding of Purna's brother and two others was substantially correct or not, is for you to consider." He thus told the Jury that even if they found that the sub-tenants had no hut on the land they should proceed further to consider whether they could not find the accused guilty of rioting. This in my opinion is a clear misdirection. He should have, on the contrary, told the Jury definitely and distinctly that if they found that the prosecution had failed to prove that there was any hut of the sub-tenants on the land at the time of the occurrence, they should acquit the accused on the charge of rioting as framed. On the question of possession the learned Judge did not draw the attention of the Jury to some vital points which appear on the evidence. The case as laid before the Court was that the sub-tenants had been in possession of the different plots ever since Purna Mondal was settled on the land and P. W. No. 9 Sonatan Moral said that none of the sub-tenants used to take settlement every year, whereas before the Investigating Sub-Inspector P. W. No. 24 Biraj himself stated and this statement was recorded under s. 161, Cr. P.C., and proved that he obtained settlement of the land 10 or 15 days before the occurrence; this on calculation would be after the date of the *kabuliyat* executed by Sonaram Pal and Ayenuddi Molangi. There is also no precise evidence as to the date on which the hut which is said to have consisted of a few posts and a thatch and with no walls was actually erected. The *kabuliyat* which Purna Mandal executed in 1328 *B. S.* in favour of the landlords, about the contents of which he said he had no knowledge at the time, was for one year only and was a registered document. The attention of the Jury was not at all drawn to these facts. These, no doubt are mere omissions but they are omissions on vital points.

On the question of probability as to the occurrence the learned Judge also misdirected the Jury. Dealing with the respective contentions of the parties, the prosecution case being that Purna Mondal was in possession since 1315 and the defence being to the effect that he was on the land only during 1328 and 1329, the learned Judge rightly told the Jury that it was for them to consider whether they would believe that Purna was in possession from 1315. But then he proceeded to observe as follows :—"But irrespective of the length of his possession, in view of the fact that the settlement operations are going on, it is for you to consider whether Purna could not set up successfully an occupancy right in the land before the Settelement Authorities and whether it would have been easy for the landlord to deny it." He should have told them that if possession from 1315 or about that time was not proved or if the defence story of possession from 1328 only was established, that would considerably weaken the case and necessitate the evidence

about the occurrence to be examined with greater scrutiny and suspicion. He did not do so; on the other hand, he suggested to the Jury that there were facts and circumstances—irrespective of the length of Purna's possession which might help Purna to set up successfully an occupancy right in the land and which were not easy for the landlord to rebut. No such facts or circumstances are indicated in the charge; on the other hand every thing that appears on the evidence negatives the existence of such a right. The land itself is according to the prosecution 151 *bighas* by the 100 *rasi bigha*, and according to the *kabuliyat* executed by Sonaran 236 standard *bighas*. Purna sub-let almost the whole of the lands to nine persons and kept only about 38 *bighas* to himself. Purnas no doubt, has a *ryoti* holding in the village, but that also will not enable him to acquire an occupancy right in these lands. This direction, therefore, was misleading. A further direction on the question of probabilities is also open to objection. The learned Judge said to the following effect: "It is for you to consider what a landlord, who had granted no regular *dakhilas* and when there was no lease, would do to protect themselves (*sic*) against an acquisition of a tenant right by Purna, whether an unscrupulous landlord would try to set up another person as a tenant and to try to put him in possession and if there was an attempt to do so whether the original tenant would come and object and whether a riot would or would not follow." This direction proceeds upon an assumption of several facts against the landlords which should not have been assumed but, on the other hand, left to the Jury for their determination. There should have been a clear direction, on the other hand, that if Purna Mandal did not succeed in proving that he had acquired any right to the lands and if it be found that he was not actually in possession either by himself or through his sub-tanants and the accused persons went under the *kabuliyat* executed by them in favour of the landlords and began to build the huts and were opposed, they could not be convicted of rioting with the common object charged. The above direction as to probabilities had the effect of putting the probabilities in favour of the prosecution too strongly before the Jury; and upon a mere assumption of the facts which the Jury were not asked to find for themselves.

The above, in my opinion, are sufficient grounds for holding that the learned Judge's charge to the Jury was vitiated by misdirection and such misdirection must necessarily have prejudiced the accused.

I would, therefore, allow the appeal and setting aside the conviction and sentence passed on the appellant, direct that he be re-tried.

Newbould, J.—I agree.

Z. K. *Appeal allowed; Re-trial ordered.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 553 OF 1924.
August 6, 1924.
Present:—Mr. Justice Sulaiman.
DULLI AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 395, 397—Dacoity with grievous hurt—Conviction, form of—Enhanced punishment, liability to—Criminal Procedure Code (Act V of 1898), s. 35 (1)—Concurrent sentences, when can be passed.

Section 397 of the Penal Code does not contain any substantive offence but merely prescribes the minimum punishment which can be awarded if robbery or dacoity is attended with certain circumstances mentioned in the section. A conviction merely under s. 397 has no meaning. A conviction in the case of a dacoity should be under s. 395 read with s. 397 of the Penal Code, in cases where the latter section applies. [p. 715, col. 1.]

Section 397 of the Penal Code applies only to the case of persons taking part in a dacoity, who themselves used deadly weapons, or themselves caused grievous hurt, or attempted to cause death or grievous hurt, and does not apply to the case of persons taking part in a dacoity who may be liable for substantive offences committed by some of the parties only by virtue of s. 34 of the Code. [p. 715, col. 2.]

Queen-Empress v. *Mahabir Tiwari*, 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. s.) 876, *Queen-Empress* v. *Senta*, A. W. N. (1899) 186; 28 A. 404 *note* and *Emperor* v. *Nageshwar*, 28 A. 404; A. W. N. (1906) 61; 3 Cr. L. J. 322, followed.

Under s. 35 (1) of the Cr. P. C. a Criminal Court has power to direct sentences to run concurrently only when the accused is convicted at one trial of two or more distinct offences. The Court has no power to order sentences to run concurrently with sentences passed in other trials. [*ibid.*]

Makbul Husain v. *Emperor*, 19 Ind. Cas. 336; 11 A. L. J. 263; 14 Cr. L. J. 240, followed.

Criminal appeal from an order of the Additional Sessions Judge, Saharanpur, dated the 15th May 1924.

The Government Pleader, for the Crown.

JUDGMENT.—This is an appeal filed

by four appellants. The first three have been convicted under s. 397 of the Indian Penal Code and sentenced to seven years' rigorous imprisonment each, and the fourth under ss. 397/75 of the Indian Penal Code and sentenced to eight years' rigorous imprisonment. It has also been ordered that the sentences of the first two appellants should run concurrently with previous sentences passed on them in other dacoity cases.

Quite irrespective of the question of fact involved, the order on the face of it is defective in several particulars. In the first place, s. 397 of the Indian Penal Code does not contain any substantive offence, but merely prescribes the minimum punishment which can be passed if robbery or dacoity is attended with certain circumstances mentioned therein. It follows that a conviction merely under s. 397 has no meaning. The conviction in the case of a dacoity should be under s. 395 read with s. 397 of the Indian Penal Code.

The second defect in the judgment is that it nowhere shows that the appellants either used any deadly weapon or caused grievous hurt to any person, or attempted to cause death or grievous hurt to any person at the time when the alleged dacoity was committed. What the judgment merely shows is that some of the dacoits had a pistol, a sword and big knives and that a pistol was actully fired. It does not, however, show that either of the appellants himself used any such deadly weapon. In order to satisfy myself whether the evidence establishes this fact or not, I have read the entire prosecution evidence and I find that there is no satisfactory evidence that either of these appellants did any of the three acts mentioned in s. 397. Their convictions under s. 395 read with s. 397 cannot be justified.

Before s. 397 of the Indian Penal Code can be made applicable it is necessary that each of the accused is proved to have been the offender doing the acts mentioned there. When s. 397 does not refer to any substantive offence s. 34 of the Indian Penal Code would be inapplicable. For purposes of s. 397 all the persons participating in the dacoity would not be held responsible for the acts of the others. It is true that in the case of *Queen-Empress* v. *Mahabir Tiwari* (1). Sir Arthur Strachey, C. J., did hold that "Any person taking part in the dacoity who, though he may not have himself struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34 of the Code". But this case was dissented from by Knox, A. C. J. and Banerji, J., in the case of *Queen-Empress* v. *Senta* (2), where it was laid down that s. 397 applies only to those persons taking part in a dacoity who themselves use deadly weapons or themselves cause grievous hurt or attempt to cause death or grievous hurt, and that it does not apply to such persons taking part in a dacoity who may be liable for substantive offences committed by some of the parties only in virtue of s. 34 of the Code. The same view was followed by Aikman, J., in the case of *Emperor* v. *Nageshwar* (3).

On the facts of this case, therefore, it is impossible to uphold the convictions under s. 397 even if read with s. 395 of the Indian Penal Code.

Another mistake committed by the learned Additional Sessions Judge is in his ordering that the sentences of the first two accused should run concurrently with the previous sentences passed on them in other dacoities. Under s. 35 (1), Cr. P. C., a Criminal Court has power to direct that punishment should run concurrently, but this is only when the accused is convicted at one trial of two or more distinct offences. The Court has no power to order sentences to run concurrently with the sentences passed in other trials. This was the view expressed by Tudball, J., in the case of *Makbul Husain* v. *Emperor* (4), and in that view I fully concur.

Coming to the merits of the appeal I am fully satisfied that the charge of dacoity has been brought home to all the four appellants. Latif admitted his guilt and pointed out some 18 utensils buried in a heap which are proved to be part of the stolen properties. The other three appellants have been identified by a number of witnesses and there is absolutely no reason to doubt the genuineness of the identification proceedings. Dulli jumped from the roof of his house and attempted to run away as soon as he saw the Sub-Inspector but was caught in the

(1) 21 A. 263; A. W. N. (1899) 79; 9 Ind. Dec. (N. S.) 876.

(2) A. W. N. (1899) 186; 28 A. 404 *note*.

(3) 28 A. 404; A. W. N. (1906) 61; 3 Cr. L. J. 322.

(4) 19 Ind. Cas. 336; 11 A. L. J. 263; 14 Cr. L. J. 240.

market. Zafar and Latif live in a joint house and a stolen article was recovered from that house. Another stolen property was recovered from the house of Aijaz.

As I am agreeing with the learned Additional Sessions Judge on the question of the complexity of the appellants in this dacoity it is not necessary for me to discuss the evidence in greater detail. The evidence discloses that it was a daring dacoity. The dacoits were about 12 or 13 in number. They seized and beat Durga. They were also armed with deadly weapons—swords and big knives besides *lathis*—and a pistol was actually fired in order to frighten the inmates. The dacoits made light by burning straw and by lighting a small lamp and the loot lasted for about an hour and a half. They decamped with properties like utensils, clothes or cash and also ornaments taken off from the persons of females.

I am, therefore, satisfied that both the accused were guilty of the offence of dacoity within the meaning of s. 395 of the Indian Penal Code. Sentences of seven years passed by the Court below are by no means severe.

It is, of course, open to me to take into consideration the sentences passed on Dulli and Aijaz in other trials and impose a lesser sentence in this case instead of ordering that the sentence should run concurrently. I, however, see absolutely no ground why I should pass a lesser sentence in view of the fact that these two accused have been found guilty of committing other dacoities and have been previously sentenced particularly when those dacoities were quite distinct and independent. I am unable to discover any ground for leniency. When persons commit different dacoities in different villages they are liable to be punished for all those dacoities separately. Latif had a previous conviction of one year under s. 457 of the Indian Penal Code.

I accordingly find Dulli, Aijaz Ahmad and Zafar guilty of the offence of dacoity under s. 395 of the Indian Penal Code and convict them of that offence and sentence them to seven years' rigorous imprisonment each. I find Latif guilty under s. 397 read with s. 75 of the Indian Penal Code and sentence him to eight years' rigorous imprisonment. Their convictions under s. 397 are set aside. The order directing that the sentences passed on Dulli and Aijaz should run concurrently with the previous sentences passed on them is also set aside. In other respects their appeals are dismissed.

Z. K. *Appeals dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 547 OF 1923.

January 15, 1924.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

SHAMLAL SINGH AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 342—Sessions trial—Examination of accused, method of—Charge to Jury—Demeanour of witnesses, statement as to—Misdirection.

The proper method of applying s. 342 of the Cr. P. C. is to bring to the attention of the accused specific matters which appear in the evidence against him. Merely questioning him generally as to whether he has anything to say or anything to add to what he said before the Committing Magistrate is not a satisfactory method of applying the section. [p. 717, col. 2.]

The mere fact that a Sessions Judge states to the Jury his impression of the demeanour of some of the witnesses, does not amount to a misdirection, as the witnesses having appeared before the Jury, it is for the latter to judge whether the demeanour of the witnesses was such as to discredit in any way the evidence which they had given. [p. 717, col. 2; p. 718 col. 1.]

ARGUMENTS.—Babu *Debendra Narain Bhattacharjee* (with him Babu *Bibhuti Bhusan Lahiri*), for the Accused.—The accused persons are charged under s. 366, Indian Penal Code, for having abducted one Susila, in order to have forcible illicit intercourse with her. The prosecution story is that the woman who lived with one Ambica Charan Ganguly, was forcibly taken away from his house by some men including the accused persons to some distant field away from habitation and there, the accused Khuchiram and one Sasadhar had forcible sexual intercourse with her. Thereafter she was taken to the house of a certain Musalman, where she lived for an entire day. Next day she was ultimately brought back to Ambica's house by some persons. In the meantime Ambica had lodged information with the Police.

My first point is that, in this case there has been no compliance with s. 342

of the Cr. P. C. In spite of repeated rulings of this Court, the Courts do not seem to take care. Here the Court admitted the statements of the accused before the Committing Magistrate and asked them if they would add anything. This is absolutely wrong. Here there was no written statement filed as in some of the cases reported. The statement before the Committing Magistrate should not be made to serve the purpose.

Secondly s. 363, Cr. P. C. is mandatory. The word, "shall" used there is indicative of its mandatory nature. The Judge puts to the Jury in his charge, his impressions on the demeanour of several important witnesses without recording the same at the time of recording the statement: see s. 360, Cr. P. C. The Doctor who was called in the Sessions Court, has not been properly examined. His deposition in the lower Court has been read out and put in. He has undoubtedly been cross-examined, but that should not be held sufficient to cure this defect.

With regard to witnesses Komez Mandal and Laskar Sardar, who were declared hostile in the lower Court, the fact that they have not been called raises a presumption against the prosecution and the Judge's omission to mention it before the Jury is a positive misdirection: *In the matter of Empress* v. *Grish Chander Talukdar* (1). There are two other cases on the point but I need not cite them. Moreover, when the learned Pleader argued that the omission to call them would raise a presumption against the prosecution, the learned Judge directed the Jury that the contention of the Pleader was that they should infer that the witnesses were won over.

Law requires that evidence should be summed up. Summing up means analysing evidence and pointing out its bearing on the case. The learned Judge has merely filled in the gaps and has not clearly put in the discrepancies, specially about the identification. The Jury have not at all been assisted by the learned Judge. It led the Jury to come to a hasty conclusion. Merely referring the Jury to the arguments at Bar will not cure the omission in the summing up.

The learned Judge should have told the Jury that the only evidence of the intention to rape was the actual commitment of the crime and if they disbelieved this they should view the rest of the story with suspicion. The learned Judge has also failed to put the defence plea of elopement with clearness and cogency.

Lastly the way in which he has put the law relating to doubt and its reasonableness is highly improper. The Judge should not lay down a general principle in the way in which he has done. The Jury should always be taken to be reasonable men.

The submission, therefore, is that the conviction should be set aside and accused persons acquitted.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown, was not called on to reply.

JUDGMENT.—The two accused in this case have been convicted of an offence under the provisions of s. 366 of the Indian Penal Code, that is to say, abducting a woman with intent to commit rape. Each of the accused has been sentenced to undergo rigorous imprisonment for a term of five years.

Now 12 points have been urged before us on behalf of the appellants. First, it is said that there has been no sufficient compliance with s. 342 of the Cr. P. C. Apparently, what happened is this that the accused were asked if they desired to make any further statement to what they had made before the Committing Magistrate and they refused to do so or to call any evidence. Now we have had occasions to point out more than once that the proper method of applying s. 342 is to bring to the attention of the accused specific matters which appear in the evidence against them and that merely questioning them generally as to whether they have anything to say or anything to add to what was said before the Committing Magistrate is not a satisfactory method of applying s. 342 and we hope that the Courts in future will bear this in mind when the time comes to question the accused under the provisions of s. 342 but we are not prepared to say that what was done in this case necessitates a new trial.

The second point urged is that the Judge was not justified in stating to the Jury his impression of the demeanour of some of the witnesses without recording, as it

(1) 5 C. 614; 5 C. L. R. 364; 2 Ind. Dec. (o. s.) 998.

is said he should have done, his views at the end of their depositions. But after all, there is really nothing in this point. The Jury saw the witnesses and it was for them to judge whether the demeanour of the witnesses was such as to discredit in any way the evidence that they had given.

Thirdly, it is urged that there was a material defect in that the Doctor was not examined-in-chief before the Jury but his deposition before the Committing Magistrate was read without his being actually called. But after all, he was cross-examined and the Jury had an opportunity of judging of his credibility as a result of the cross-examination that was held.

Fourthly, it is said that the two witnesses Komez Mandal and Laskar Sardar who were called before the Committing Magistrate and who subsequently were allowed to be treated as hostile witnesses should, at any rate, have been tendered for cross-examination before the Jury. We think that there is considerable force in this comment. But after all, despite what has been urged by the learned Vakil, it does not seem to us that their evidence was very material. It was directed to the question why the woman was taken to the accused, Sham Lal's house against her wish instead of being taken to her own *bari* but I doubt really if their evidence affected the matter very much one way or the other.

Fifthly, it is urged that there was no proper summing up to the Jury and we were referred to various discrepancies appearing in the evidence of the prosecution witnesses, which it is said, should have been pointed out to the Jury in some detail. But the summing up has been read to us and we are not prepared to say that it is so deficient in this or in other matters that we should direct the accused to be re-tried.

Sixthly, it is said that the learned Judge should not have suggested to the Jury that Komez and Laskar were won over by the defence and that there was evidence to this effect whereas it is said that there was not. We do not think that there is much substance in this point. What the learned Judge did say in his charge is: "The defence urge you to consider that if they had been examined in this Court they would not have supported the prosecution story. The prosecution admit the argument and state that those men have been won over by the defence." This being the charge, we do not think that there is really any force in what was urged with regard to the sixth contention.

Seventhly, it is said that the learned Judge should have told the Jury that the evidence with regard to the conduct of the brother of the second accused and that of the first accused's relations were not evidence against the appellants. It is said that this evidence was prejudicial to the accused and that the Jury should have accordingly been warned with regard to it. But the same remarks that we have made with regard to the evidence of Komez and Laskar apply to this evidence and I doubt if it is really very material.

Eighthly, it is said that the Jury's attention should have been drawn to the fact that the nearest neighbours were not called and it is said that this is really no explanation and that the explanation which was given by the Police that there were only women in this house is of no value. We do not think, however, that there is very much in this point.

Ninthly, it is said that the attention of the Jury was not directed to the effect upon the prosecution case of what would have happened if they had disbelieved the story of rape. It is suggested that they did not accept this story. I am not sure whether this is so or not but I am inclined to think that probably the Jury came to a unanimous verdict because they did accept the evidence of the woman, prosecution witness No. 1 with regard to the fact that she was raped.

Then the tenth point dealt with the fact that the charge of rape was not originally made by the woman herself and criticism has been directed to the suggestion made by the Judge to the Jury that probably she did not raise this question at first out of her natural modesty. We do not think, after referring to the passage in the charge which will be found at the foot of page 5 of the copy before us, that there is really anything in this point.

The eleventh point is that the defence case was not properly put to the Jury and it is said that all that the learned Judge did was to direct the Jury's attention to the line of the cross-examination as suggesting what the case was. It is said, however, that this was not sufficient and that the learned Judge should have specifically placed before the Jury the fact that the defence case was that the woman had

eloped with some person. Here again, reading the charge on this point, we do not think that from the charge it can be shown that the defence case was not fairly put to the Jury by the Sessions Judge.

Lastly, criticism is directed to the Judge's interpretation of "reasonable doubt." But here again we do not think that this can be seriously objected to. After all, the case was really a very simple one. The woman had told her story and there was the evidence of Ambica with whom the woman lived. It was really for the Jury to decide whether they accepted the simple story of these witnesses or whether they were not prepared to accept it. This seems to us the only question that really arises in this appeal. The Jury thought fit to accept the story and it is not open to us to say after seeing the evidence that there was no evidence upon which the Jury were justified in accepting the prosecution story.

For these reasons the appeal is dismissed.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 247 OF 1924.

July 30, 1924.

Present:—Mr. Justice Boys.

PITA AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 340, 540—Right of accused person to be represented by Pleader and to cross-examine prosecution witnesses—Duty of Magistrate—Procedure—Witness called by Court—Cross-examination, right of.

Where a witness is called under s. 540 of the Cr. P. C., both sides have a right to cross-examine that witness freely. It is entirely wrong to describe as cross-examination that which consists of certain questions being suggested by the defence to the Court and those questions being put by the Court. [p. 720, col. 2.]

The spirit of the law requires that if an accused person wishes to be represented by a Pleader he should be given an opportunity of being so represented and should also have an opportunity of cross-examining the witnesses for the prosecution [*ibid.*]

Where at the commencement of a trial the accused desires to be given an opportunity to engage a Pleader and there has not already been a sufficiently long period given to him for this purpose, the Magistrate may proceed up to the end of recording his evidence of the prosecution witnesses and from that stage he should allow an adjournment in order to enable the accused to appoint a Pleader and that adjournment must be long enough to enable the Pleader to get proper instructions and to prepare himself for cross-examination. [p. 720, col. 2; p. 721, col. 1.]

Queen-Empress v. *Ram Charan Lal*, A. W. N. (1895) 40 and *Sheo Prakash Singh* v. *Rawlins*, 28 C. 594, referred to.

Criminal revision from an order of the Sessions Judge, Mainpuri, dated the 31st March 1924.

Mr. *J. M. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case certain persons have been prosecuted and convicted of assaulting the Police and rescuing certain persons whom the Police had arrested on the 28th of October 1923. On that occasion the Police were driven off after they had used their fire arms killing two men and injuring others. Later a number of villagers were arrested and were placed before a Magistrate on the 3rd of November 1923. It is a matter of complaint in this Court in revision that these accused persons were never given a reasonable opportunity of defending themselves. On the date on which they were produced in Court, the 3rd of November 1923, the Magistrate at 3-30 P. M. ordered that the case should be heard the next day in the Jail. It appears from the record that practically the first step in the proceedings in the Jail on the 4th which was a Sunday was the presentation of an application by some friend of the accused asking for an opportunity to engage a Pleader and that the evidence might be taken in that Pleader's presence. In view of s. 340 there can be no doubt that the accused were entitled to be represented by a Pleader. But this is not the most serious error complained of by the applicants here in revision. The reasonable course to adopt, if that had been the only application, would have been for the Magistrate to proceed with the evidence-in-chief for the prosecution and then, at any rate, to allow, if it had not already been allowed, a reasonable time for the accused to appoint a Pleader. This application was, however, bluntly refused on the allegation that the accused had plenty of time to appoint Pleaders since the previous day and that he would have to send the prosecution witnesses away again. Neither of these reasons appear to me a valid reason. What he should have done is to tell the accused that he would proceed with the evidence-in-chief of the prosecution witnesses and would then allow them a rea-

sonable time to appoint a Pleader. The next step was that he examined six of the prosecution witnesses and took down the accused's statements, framed a charge-sheet and said that he would take the remaining prosecution witnesses the next day. At the end, after the statements of the accused, he asked them whether they wished to cross-examine. Having had their application for time to appoint a Pleader rejected, these ignorant villagers very naturally said, "no, we do not wish to cross-examine." No one who has had 12 months' experience of the lower Courts and of this type of villager would for one moment expect that they would give any other answer. They would be utterly incapable of themselves cross-examining the witnesses. On the 5th of November further prosection witnesses were examined and the accused were further examined and they stated that they would produce defence witnesses. By this time they had succeeded in engaging the services of a Pleader who put in an application asking for another date to be fixed for cross-examination. There was nobody there who could properly instruct him on behalf of the accused. The *pairokar* and relatives of the accused lived in Agra and the Pleader had had no time to get his instruction through the relatives who had come from Agra to Mainpuri. The Deputy Magistrate refused this application on the ground that the Pleader could get his instructions from the accused themselves. In a later application which was filed on the 6th, it is stated that the Pleader also made an oral application to be allowed to cross-examine the witnesses on the 5th, presumably when the application for postponement had been rejected, and that this application was refused on the ground that he had no right left. On the 6th a further application in which all the previous proceedings were set out at length was filed asking for the prosecution witnesses to be re-summoned. On this application the Pleader was told that the case was not fixed for the 6th and if the accused wanted the prosecution witnesses he could summon them as defence witnesses paying the necessary expenses. Subsequently on the 13th of December it appears that the Deputy Magistrate summoned three of the prosecution witnesses, not four as he says, under s. 540, Cr. P. C. In an explanation which has been furnished by the learned Deputy Magistrate to this Court he says that, as the defence had left no legal right of cross-examination at that stage, he re-called the witnesses under s. 540 of the Cr. P. C. at the desire of the Counsel for the defence, and questions of the nature of cross-examination suggested by the defence Counsel were put to the witness "from the chair". There is nothing whatever to justify this procedure. If a witness was called under s. 540 both sides had a right to cross-examine that witness freely. It is wholly misleading to describe as a cross-examination that which consisted of cetain questions being suggested by the defence to the Court and those questions being put by the Court. I have detailed these proceedings at length because I have no hesitation in holding that the accused were not fairly treated. This was an important case and a serious case for the Crown. It was no less serious for the accused. It is obviously in accordance with the spirit of the law that they should be represented by a Pleader, if they wished to be so represented. It is obviously in accordance with the spirit of the law that they should have an opportunity of cross-examining the witnesses. The prosecution and the Deputy Magistrate can fall back on the fact that on the 4th of November when the accused were examined they were asked if they wished to cross-examine. Even putting aside the fact that their right of being represented by a Pleader as laid down in s. 340 had been refused, I should still hold that this was merely a literal compliance with the law and a most obvious breach of it in the spirit, and I would invite the attention of the Deputy Magistrate to the remarks of Mr. Justice Aikman in *Queen-Empress* v. *Ram Charan Lal* (1) and particularly to the remarks of Ameer Ali and Pratt, JJ., in *Sheo Prakash Singh* v. *Rawlins* (2) where they said "The work of this Court would be appreciably lightened, if the Subordinate Magistrates, in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guitly the moment he is accused and every attempt on his part to prove his innocence is regarded as vexatious". I have no hesitation whatever in holding that while the Magistrate could have been right in proceeding up to the end of the prosecution

(1) A. W. N. (1895) 40.
(2) 28 C. 594.

witnesses, from that stage he should have allowed an adjournment in order to enable the accused to appoint a Pleader if there had not already been a sufficiently long period, and that that adjournment should have been long enough to enable the Pleader to get proper instructions and to prepare himself for cross-examination. What is a proper period must be a question for reasonable decision in each case. In this case the whole proceedings of the 4th and the 5th were most unwarrantably rushed and the accused were really given no proper opportunity of defending themselves.

I set aside the whole of the proceedings subsequent to the termination of the evidence of the prosecution witness on the 5th of November and direct that the Magistrate proceed to hear the case properly and fully from that stage. To this extent the application is allowed. I am informed that the Magistrate in question has been transferred. If this is not so, the District Magistrate will see that the case is taken up again, not by the same Magistrate but by some other Magistrate.

Z. K. *Application allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 25 OF 1924.

September 18, 1924.

Present :—Mr. Dalal, J. C.

MUBARAK ALI AND OTHERS—ACCUSED—APPLICANTS

versus

ABDUL HAQ—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 177, 526 (1) (i)—Complaint filed in wrong Court—Transfer of case—High Court, power of.

Where an offence is being enquired into and tried by a Court contrary to the provisions of s. 177 of the Cr. P. C., the High Court has jurisdiction to direct the transfer of the case under s. 526 (1) (*i*) of the Code to a Court having jurisdiction to try the case.

Case reported by the Fourth Additional Sessions Judge, Lucknow, by his order dated the 19th July 1924.

Mr. *Suraj Prasad Khandailwal*, for the Applicants.

Mr. *S. M. Ahmad*, for the Opposite Party.

ORDER.—A complaint under s. 500 Indian Penal Code, was wrongly filed by the complainant in the Court of the City Magistrate who had no jurisdiction. The offence was committed in the village of Takrohi which is situated within the jurisdiction of the Magistrate trying cases of the Sub-Division of Lucknow. The City Magistrate transferred it to a Special Magistrate who issued process. The defendants applied in revision to the learned Sessions Judge to quash the proceedings and the matter has been referred to this Court. I do not think that the proceedings should be quashed. This Court has power to transfer the proceedings to the proper Court having jurisdiction. The learned Counsel for the applicants referred me to the case of *Emperor* v. *Sheo Dayal* (1) where a learned Judge of this Court quashed the proceedings and refused to transfer them to the Court having jurisdiction. With all respect I am not prepared to follow that ruling. In my opinion, the present case is covered by the authority of the High Court under s. 526 (1) (*i*) of the Cr. P. C. This offence is being inquired into and tried by a Court contrary to the provisions of s. 177 which lays down that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. This error can be rectified by this Court by transfer to the Court having jurisdiction. It is certain that the complainant desires to proceed with the matter; he is represented in this Court. Under the circumstances it will be a futile proceeding to quash his complaint as it stands and direct him to take his complaint to another Court when this Court can on its own motion order trial by a Court having jurisdiction.

In the result I remit these proceedings to the District Magistrate of Lucknow with a request that the complaint shall be sent for trial to the Magistrate who has jurisdiction within the village of Takrohi. I may give it as my opinion that the matter should be tried by a stipendiary Magistrate and not transferred to the Court of an Honorary Magistrate.

Z. K. *Proceedings remitted.*

(1) 57 Ind. Cas. 459; 23 O. C. 87; 21 Cr. L. J. 635.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 339 OF 1924.
August 28, 1924.
Present :—Mr. Justice Mukerji.
CHHOTEY LAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 411—Evidence Act (I of 1872), s. 114, Ill. (a)—Receiving stolen property—Burden of proof—Possession long after theft—Guilty knowledge—Presumption.

In a case under s. 411 of the Penal Code the burden is on the prosecution to prove the guilty knowledge of the person prosecuted. There may, however, be circumstances in which this guilty knowledge may be inferred and may be accepted as conclusive if no explanation is forthcoming on the part of the accused person. [p. 722, col. 2.]

Where certain silver ornaments of the ordinary type which had been removed during a dacoity were recovered from the person of the accused's wife, the accused being a goldsmith, 2½ years after the dacoity and the explanation of the accused was that he had himself made the ornaments for the use of his wife:

Held, that no presumption could arise in the case that the accused had received the ornaments knowing them to have been stolen. [p. 723, col. 1.]

Emperor v. *Sughar Singh*, 29 A. 138; 3 A. L. J. 808; A. W. N. (1906) 314; 4 Cr. L. J. 436, *Ram Charan Saha* v. *Haji Meah Haji Abdulla*, 21 Ind. Cas. 171; 17 C. W. N. 1129; 14 Cr. L. J. 571, *Emperor* v. *Rajendra Roy*, 47 Ind. Cas. 64; 22 C. W. N 596; 27 C. L. J. 311; 19 Cr. L. J. 868 and *Queen-Empress* v. *T. Burke*, 6 A. 224; A. W. N. (1884) 55; 3 Ind. Dec. (N. S.) 832, relied on.

The illustrations to s. 114 of the Evidence Act only exemplify the law as enacted in the section and cannot be taken to restrict the sense of the section. The section itself simply says that the existence of any fact may be presumed which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct, etc. [p. 722, col. 2.]

Criminal revision from an order of the Sessions Judge, Kumaun, dated the 29th of April 1924.

Mr. *G. N. Kunzru*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant was charged with having committed an offence under s. 411 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for one year. He appealed to the learned Sessions Judge, but his appeal was dismissed.

In this Court, it has been contended that on the facts found and in the circumstances of the case the prosecution has failed to prove a case under s. 411 of the Indian Penal Code.

The following facts appear to have been established. Two and a half years before the discovery of the articles at the applicant's house, these had been removed from the houses of the two complainants by means of a dacoity. The articles are four silver ornaments of the total value of Rs. 100. The applicant is a goldsmith by caste and profession. He was asked whence he got those articles and he replied that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the applicant. There is no evidence that any attempt had been made to conceal the property. On the other hand they were found at places where the goods belonging to the applicant or his wife would be naturally found. It was further found that, the explanation of the applicant that he had made those goods himself was false and that the goods had been really the property of the two complainants Gannu Singh and Govind Singh. The question is whether in the circumstances of the case the prosecution was entitled to raise the presumption that the applicant was in possession of the articles having reason to believe that they were stolen property.

It appears to me that it is certainly on the prosecution to prove the guilty knowledge of the person prosecuted. There may, however, be circumstances in which this guilty knowledge may be inferred and may be accepted as conclusive if no explanation is forthcoming on the part of the accused person. Such a case is mentioned by way of illustration in clause (*a*) to s. 114 of the Evidence Act. There it is stated that, if a man be found in possession of stolen goods soon after a theft, the presumption would be that the man was either himself the thief or that he knew that the goods were stolen, unless he could satisfactorily account for his possession. It is to be noted that the word 'soon' has been used in this illustration. An illustration only exemplifies the law as enacted in the Code and cannot certainly be taken to restrict the sense of the section. But the section itself simply says that the existence of any fact may be presumed which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct etc. The question, therefore, is, can it be said that the person who was found in possession of stolen property 2½ years after the actual offence, by which the owner lost it, must be presumed to be in possession with guilty knowledge, unless he can account for his possession? In judging a case, regard must be had to the nature of

the property. The property, as I have already mentioned in this case, is silver ornaments—articles which would easily change hands from time to time—and is articles which may, in the common course of events, find their way to a silversmith's shop. Speaking, therefore, of the presumption, it is difficult to say that there is any presumption of the guilty knowledge in this particular case.

Several cases have been referred to, and in my opinion, although every case has been decided on the peculiar facts of it, there seems to be a strong opinion against the raising of any presumption in favour of the prosecution where there has been a delay between the loss of the goods and the recovery of them. I do not propose to discuss any of the cases except one, *viz.*, *Emperor* v. *Sughar Singh* (1). In that case the appellant was found in possession of certain ornaments of the ordinary type and these were found six months after the dacoity by which they were lost, and it was held that no presumption under s. 114 of the Evidence Act could be raised to imply guilty knowledge. Their Lordships laid special stress on the word 'soon' to be found in illustration (*a*) to s. 114 of the Evidence Act. The other cases are *Ram Charan Saha* v. *Haji Meah Haji Abdulla* (2), *Emperor* v. *Rajendra Roy* (3) and *Queen-Empress* v. *T. Burke* (4).

I hold that the prosecution has failed to prove the guilty knowledge on the part of the applicant.

I set aside the conviction and the sentence.

The applicant is on bail and he need not surrender.

Z. K.

Conviction allowed.

(1) 29 A. 138; 3 A. L. J. 803; A. W. N. (1903) 314; 4 Cr. L. J. 436.

(2) 21 Ind. Cas. 171; 17 C. W. N. 1129; 14 Cr. L. J. 571.

(3) 47 Ind. Cas. 64; 22 C. W. N. 596; 27 C. L. J. 311; 19 Cr. L. J. 868.

(4) 6 A. 224; A. W. N. (1884) 55; 3 Ind. Dec. (N. S.) 832.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 584 OF 1923.

February 18, 1924.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

KALIA *alias* KALA GAZI *alias* ABDUL MALI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 172—Personal diary of Police Officer, entries in, whether admissible List of stolen property supplied during investigation and list of names of suspects, [admissibility of—Map prepared by Police Officer during investigation Statements made by third persons, whether should be entered.

Entries made in a personal diary kept by a Police Officer, who did not start the investigation of a case and did not take any part in the investigation, do not fall within the purview of s. 172 of the Cr. P. C., and are not, therefore, inadmissible in evidence by virtue of the provisions of that section. [p. 725, col. 1.]

A list of stolen property handed to a Police Officer in the course of investigation is not admissible in evidence and should not be placed before the Jury. The admission of such a list, however, would not of itself vitiate the trial unless it is shown that the accused have been prejudiced by such admission. [*ibid.*]

A map prepared by a Police Officer during the course of the investigation of a criminal case should not, on the face of it, contain statements which have been made to the Police Officer by some other person. [*ibid.*]

Where the names of certain persons are sent to the Police as being the names of those who are suspected of being concerned in the commission of an offence, and the evidence of the person who supplied these names to the Police is challenged in Court, the list of names supplied by him is admissible in evidence to corroborate the statement of the witness in answer to the challenge. [p. 725, col. 2.]

ARGUMENTS.—Babu *Sasadhar Roy*, for the Appellants.—The whole trial is based on a series of inadmissible evidence and the charge is full of misdirections. Exhibits 2, 3, 4 and 5 are wholly inadmissible in evidence and I shall deal with them one by one. Exhibit 2 is a piece of paper purported to have been written by Sonatan at the dictation of Waheb Ali and contains the names of seven persons including the accused in this case. The names were taken by the *chaukidar* to the Police Station, when a Police Officer had already been sent to the place of occurrence. The names given out must have exercised a great influence on the mind of the Jury. The document itself is very suspicious. The document was totally inadmissible in evidence and use made of it by the learned Judge has seriously prejudiced the accused. Exhibit 3 is part of the Police Diary and it is

totally excluded by s. 172, Cr. P. C. How the Inspector's diary could be used in evidence is beyond all comprehension. Exhibit 4 is a list of stolen property. This list was furnished by Waheb Ali during the course of the investigation and as such it is excluded by s. 162, Cr. P. C. Exhibit 5 is a map prepared by the Sub-Inspector during the investigation. The various statements made in the body of the map were collected by the Sub-Inspector in the course of his investigation and as such they are equally excluded. The learned Judge's charge is full of misdirections. The charge itself is so lengthy and elaborate that it must confuse any common person and that in itself is sufficient misdirection. The learned Chief Justice once set aside a conviction on this ground alone. One peculiarity is noticeable in the charge. The learned Judge has emphatically put forward his views of fact and nowhere has he warned the Jury that they must show their own conclusion of fact.

Mr. *Khondkar*, for the Crown, was asked to reply only as regards the admissibility of Exs. 2 and 3. So far as Ex. 2 was concerned it must be remembered that this was produced at the Police Station within 8 hours of occurrence. The only information that had been sent to the Police prior to it was the telegram which was a bare message. The *chowkidar*'s information with details was the real first information and as such the exhibit, as part of the first information is admissible. Moreover, it can be admitted as corroborative of the evidence of Sonatan. Because it was only this that was challenged that the piece of paper was produced. As regards Ex. 3, it must be remembered that it is merely the memorandum made by the Inspector, who was in charge of the *Thana* and was not investigating with the affair. His note cannot, therefore, be excluded under s. 172, Cr. P. C.

JUDGMENT.—The five appellants before us were tried before a Jury of five persons and they were convicted of offences under the provisions of ss. 395 and 397 of the Indian Penal Code. Two Jurors were in favour of their acquittal and three Jurors were in favour of their conviction and the learned Officiating Additional Sessions Judge agreed with the verdict of the majority of the Jury and sentenced the first three appellants to five years' rigorous imprisonment under s. 395 and the other two appellants to seven years under s. 397. Now the charge has been attacked in seven particulars. First of all, it is said that the learned Judge was wrong in referring the Jury to Ex. 3 and admitting it in evidence because it is urged before us that it is inadmissible in evidence under the provisions of s. 172 of the Cr. P. C., and it is said that it could only be used for the purpose of contradicting the Police Officer who wrote the diary and for no other purpose whatsoever. The second point urged is that Ex. 4 which is a list of the property stolen at the dacoity and which was given by Waheb Ali to the Police Officer was not admissible in evidence having regard to the provisions of s. 162 of the Cr. P. C., and having regard to the fact that the list was given in the course of the investigation. The third point urged is with regard to the admission of Ex. 2. Exhibit 2 was a list, a translation of which is before us, which contains the names of seven persons and also in writing "1,500." It is said that this was not admissible in evidence and that oral evidence for the purpose of explaining it should not have been allowed to be given and it is suggested that the trial has been vitiated by reason of the admission of Ex. 2. The fourth point urged is with regard to a map Ex. 5 which was prepared by the Sub-Inspector, prosecution witness No. 15. The specific objection raised to Ex. 5 is that it contains on the face of it a statement which must have been obtained by the Sub-Inspector from certain persons and it is said that Ex. 5 is not admissible in evidence for this reason. The fifth point urged is with regard to paras. 2 to 7 of the charge of the learned Judge and it is said that if these paragraphs are read they are in the nature of statements of facts representing the views of the Judge himself and these paragraphs are objected to because it is said that the learned Judge has imposed his own views of the facts upon the Jury and has not allowed them to form their own views upon the facts and it is said that he has never told the Jury in the whole course of his charge that questions of fact were for them and for them alone. The sixth point urged is that the charge is so involved as to amount to a mis-direction in itself. The seventh point is with regard to some portions of the evidence which, it is said, were not placed before the Jury at all or placed before the Jury

in such a way as to have prejudiced the accused. But the real gravamen of the attack made upon the charge is with regard to the admission of Exs. 2, 3, 4 and 5. I will take the points in order.

So far as Ex. 3 is concerned we have seen the document. It is a personal diary and it appears that the officer who made entries did not start investigating and that he never investigated and it seems to us for this reason that it does not fall within the provisions of s. 172 and that the point urged against the charge on this head fails for this reason.

Then so far as Ex. 4 is concerned this is merely, as I have already stated, a list of stolen property which was given by Waheb Ali in the course of the investigation. The learned Judge in his charge to the Jury refers to Ex. 4 in these terms "Waheb also stated to the *daroga* that articles were taken away by the dacoits and the *daroga* wrote out the same." Now we agree with the criticism that has been directed against the admission of Ex. 4. It was given, as appears, in the course of the investigation and it should not have been dealt with as it was by the learned Judge or admitted in evidence. But after all the mere admission of this document is not in itself sufficient. We must be satisfied that the appellants have been prejudiced by the fact that this document was admitted. After all it is only a list of the property stolen at the time of the dacoity. I can well imagine that if it had purported to show this or that article found in the house of one or other of the accused they might have well been prejudiced by the admission of this document in evidence in the case. But this is not so. It is not seriously disputed that on the night of the occurrence in question a dacoity in fact took place at Waheb Ali's house and that certain articles disappeared in the course of that dacoity and we are not prepared to say that the accused have been so prejudiced by the admission of this document that we should set aside the conviction on this ground and direct the appellants to be re-tried.

Then we come to Ex. 2. This, as we have already stated, is the list containing the names of seven persons and the figures already mentioned. It appears that it was written by one Sonatan who was called as a witness in the case and it appears to have been written under the following circumstances. A telegram was despatched at about one o'clock of the night of the occurrence to a Police Station at Bramanbaria containing no details but merely stating that a dacoity had taken place and that certain persons were injured. As a result of this telegram an Investigating Police Officer was sent from Brahmanbaria but he failed to arrive by the first train and a *chowkidar* was despatched by train to Brahmanbaria. It appears that the *chowkidar* asked for a list of any persons who might be suggested to have been implicated in the dacoity and that accordingly this document, Ex. 2 was given to him. The list was given, I understand, by Waheb Ali and as he was unable to write or for some other reason it was written out by Sonatan. The *chowkidar* started at 8 A. M. taking this list with him and delivered it at the Police Station at Brahmanbaria. I should say that a doubt has been thrown on the authenticity of this list having regard to the paper upon which it was written which is a piece of paper used at dispensaries. Now it seems to us that this document or rather the admission of this document can be supported on the two grounds urged by the learned Counsel who appeared for the Crown, the Deputy Legal Remembrancer. It was given some 8 hours after the occurrence. The only information that could have then been given was the telegram to which I have already referred. No investigation had been started although it is true, that the Police Officer had left Brahmanbaria at the time when this list was on its way there. It seems to us that in the circumstances it is possible to say that Ex. 2 was really the first information or some part thereof, for it is somewhat difficult to treat the telegram by itself as the first information. But even if this is not so we think that it would be admissible in evidence to corroborate the witness Sonatan whose evidence was challenged and it was upon this challenge that Ex. 2 was produced. Accordingly, we are not prepared to say that the reference of the learned Judge to Ex. 2 was wrong or has vitiated his charge.

Then comes the fourth point, Ex. 5. It is true that the map does contain upon it certain things which must have been supplied to the Police Officer by some person, for instance there appear on the map against the letter "S" these words "This is the position of the witness Daulat" and so on. Now strictly speaking the map should not have

been admitted in this form unless there had been the evidence of Daulat as to what he said to the officer and the evidence of the Police Officer as to what Daulat told him which would have made it evidence. But after all, the evidence of Daulat Ali makes it clear that he has explained the position of his house and the position he occupied on the night of the occurrence and during the progress of the dacoity. It, therefore, appears that there is no substance in the criticism that has been directed against the map and accordingly we are not prepared to say that there has been any prejudice to the accused by the admission of Ex. 5 containing the notes which it does upon it.

As to the fifth point we have read the paragraphs which are complained of, paras. 2 to 7. After all, it is only the heads of the charge that are before us and reading these paragraphs we are not prepared to say that the Judge in charging the Jury did not lay before them the facts as represented by the prosecution witnesses leaving it to the Jury to accept or reject the facts as so stated. There is nothing, therefore, in this point.

As to the sixth point this was never developed and, therefore, it calls for no notice.

A to the seventh point, criticisms were directed against certain portions of the evidence and the manner in which that evidence was placed before the Jury. There seems no substance in any of them and it is unnecessary to deal with them in detail. The real point urged against the charge was with regard to the admission of the four documents to which we have already referred and if the criticisms on those grounds fail it seems to us that the appeal cannot succeed.

For the reasons already stated, we dismiss the appeal.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 503 OF 1924.

September 29, 1924.

Present:—Mr. Justice Mukerji.

ZABAR SINGH AND OTHERS—APPLICANTS

versus

RAM SARUP—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 436—Further enquiry, when to be ordered.

Where the whole evidence has been heard by a Magistrate hearing the case and has been disbelieved, a revising authority would not lightly interfere with the order of the Magistrate. [p. 726, col. 2.]

The provisions of s. 436 of the Cr. P. C. are meant to apply to cases where there has been some misinterpretation of the law or principle of law, or there has otherwise been miscarriage of justice. The mere fact that on the evidence a revising authority comes to a different conclusion from that arrived at by the Court that heard the evidence does not justify an order for further enquiry. [p. 726, col. 2; p. 727, col. 1.]

Queen-Empress v. *Chotu*, 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 645 (F. B.), followed.

Criminal revision from an order of the District Magistrate, Meerut, dated the 11th July 1924.

Mr. *Haji Syed Muhammad Husain*, for the Applicants.

Dr. *N. C. Vaish*, for the Opposite Party.

JUDGMENT.—This is an application to revise an order of the learned District Magistrate of Meerut ordering a further enquiry into the case started by one Ram Sarup against the applicants.

It appears that Ram Sarup filed a complaint that the applicants in the course of the night cut and removed the crops which he had grown on his field. The accused persons stated in defence that they did not do the act attributed to them, and urged that the case had been falsely brought against them on account of some revenue litigation. The learned Deputy Magistrate heard the entire evidence that was adduced before him, and he says "the witnesses have differed materially from each other on several points in cross-examination, and they have left a general impression on my mind that the evidence is unworthy of credit."

The learned Deputy Magistrate having discharged the applicants, the opposite party went up to the District Magistrate who has ordered a further enquiry into the case.

The question is whether this order of further enquiry was right and justified in the circumstances of the case. The leading case on the point is that of *Queen-Empress* v. *Chotu* (1). There, it was laid down in effect that, where the whole evidence has been heard by a Magistrate hearing the case and the evidence has been disbelieved a revising authority would not lightly interfere. It was pointed out that the provisions of the (old) s. 437 were meant to apply to cases where there had been

(1) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465 (F. B.).

some misinterpretation of the law, or principle of law, and there was, otherwise, a miscarriage of justice.

It has been repeatedly held in this Court that, where on the evidence, a revising authority comes to a different conclusion from the Court that hears the evidence, a further enquiry under s. 437 (old) and s. 436 (new), should not be ordered. I have read both the judgments, and I am of opinion that it was not a fit case in which a further enquiry should have been ordered. The whole evidence was recorded by the learned Deputy Magistrate, and there was really nothing further to be done in the case.

I set aside the order of the learned District Magistrate, dated the 11th of July 1924.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 677 OF 1923.

(CASE REFERRED No. 98 OF 1923).

February 21, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Wallace.

In re Saiyed ANIF SAHIB AND OTHERS—ACCUSED Nos. 1 TO 3.

Criminal Procedure Code (Act V of 1898), ss. 435, 439—Revision, application for, disposal of—Fresh application, whether barred.

Ordinarily a Judge disposing of a revision petition filed by a convicted person or his Pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence. [p. 728, col. 1.]

A Court exercising its revisional powers upon a revision petition ordinarily deals with the points, raised in the petition and has no occasion to travel outside them and consider the whole case upon its merits as the Court that tries the accused and the Court that hears the appeal, if any, does. It might be otherwise, in a revision case taken up by the Court *suo motu.* [*ibid.*]

The only limitation to the exercise of the right to apply for revision is that an application for revision cannot be made both to the Sessions Judge and to the District Magistrate, also that a petitioner is in practice required to state all his grounds for revision in a single petition. With these exceptions there is nothing in the Cr. P. C. to make the disposal of one criminal revision case a bar to the disposal of another revision case arising out of the same original trial. It is only when there has been an actual adjudication upon a particular point, such as the jurisdiction of the lower Court to try the accused or the adequacy of the sentence, that the High Court will not review its own decision. [p. 728, col. 2.]

Where, therefore, the High Court has once dismissed a revision petition filed by a convict against the propriety of his conviction, it still has jurisdiction to consider another application made by the complainant or the Crown to enhance the sentence passed upon the convict. [p. 728, col. 1.]

Per *Wallace, J.*—No Court can reasonably accept the principle that once it has passed any sort of order in a criminal revision it is precluded from entertaining any further revision petition or reference in the same case, or even from proceeding *suo motu.* When a Court has refused to allow as adequate certain reasons put forward by a party for interference in revision it cannot be said to have endorsed the correctness, legality and propriety of the finding, sentence or order in revision beyond all further possibility of question. [p. 729, col. 2; p. 730, col. 1.]

Case referred for the orders of the High Court, under s. 438 (1) of the Cr. P. C., by the District Magistrate of Trichinopoly, in his letter R. C. No. 10399-23-D-2, dated the 17th September 1923.

Dr. *S. Swaminadhan* and Mr. *K. G. Srinivasa Iyer*, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.

Spencer, J.—This criminal revision case originated in a reference made by the District Magistrate, Trichinopoly under s. 438 (1), Cr. P. C. recommending an enhancement of the sentences which were reduced in consequence of the appeal of the accused to the Sub-Divisional Magistrate. Their appeal was decided on August 10th 1923. A revision petition (Cr. R. C. No. 561 of 1923) against their conviction was presented to this Court by Mr. V. L. Ethiraj and was dismissed by Mr. Justice Krishnan on 15th August 1923 without giving notice to the Public Prosecutor.

Dr. Swaminadhan took the preliminary objection to our proceeding to hear the present criminal revision case, that this Court having already disposed of a revision petition in respect of the same criminal case is *functus officio* and cannot re-open the matter. In other words he argued that the High Court has no power of re-revision over the criminal proceedings of inferior Courts. He referred to s. 369, Cr. P. C., and to *In re Runga Rao* (1) and an unreported case *In re Kunhammad Haji* (2) in which it was held that an order passed in the exercise of the High Court's powers of criminal revision could not be reviewed or revised. The only exception to this rule recognized by the law,

(1) 16 Ind. Cas. 518; 23 M. L. J. 371; 12 M. L. T. 350; 13 Cr. L. J. 710; (1912) M. W. N. 982.

as stated in *In re Runga Rao* (1), is that a Court of Appeal may re-admit and hear a criminal appeal dismissed for default of appearance, as such a dismissal is not a proper disposal of the appeal. In *In re Kunhammad Haji* (2) this exception was held to apply also to criminal revision petitions dismissed for default of appearance, although the earlier ruling excluded them.

I am of opinion that the preliminary objection is not sound. If there had been any adjudication by Krishnan, J., on the question of sentence, I should have no hesitation in refusing to let the same question be re-opened before us. But there is no indication from his brief order in Cr. R. C. No. 561 of 1923 that the learned Judge applied his mind to the extent of the sentence and there is no affidavit before us declaring that it was argued before him. It is most improbable that upon the accused's application which was disposed of without notice to the Public Prosecutor any question of enhancing the sentences was raised, and if the Judge had considered that any of the sentences should be enhanced, he would have been bound to give the parties notice under s. 439 (2) of his intention of dealing with the question of enhancement. No notice was issued. Ordinarily a Judge disposing of a revision petition filed by a convicted person or his Pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence. A Court exercising its revisional powers upon a revision petition ordinarily deals with the points raised in the petition and has no occasion to travel outside them and consider the whole case upon its merits, as the Court that tries the accused and the Court that hears the appeal, if any, does. It might be otherwise in a revision case taken up by the Court *suo motu*. But this is not such a case.

In the amended Cr. P. C. there is a new sub-section to s. 439 which runs thus :—

"Notwithstanding anything contained in this section any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

(2) 72 Ind. Cas. 599; 46 M. 382; (1923) M. W. N. 94; 44 M. L. J. 450; (1923) A. I. R. (M.) 426; 24 Cr. L. J. 439.

This is a very valuable and necessary provision for securing the liberty of the subject. In a trivial case an accused person, conscious of the justice of his conviction, might possibly prefer to submit to a light sentence rather than incur the expense of moving the High Court to interfere in revision in consequence of an error of jurisdiction of the Trying Court. But if there was a likelihood of the sentence being enhanced, say from a small fine to a term of imprisonment, he would naturally wish to canvass the legality of the conviction, even at the risk of an order for re-trial, and it is only just that he should be given by Statute the legal right to do so. It is pointed out that the words "unless he has already done so" do not occur in the end of this sub-section, but we must assume that they are implied from the ordinary presumption as to the finality of orders in criminal revision proceedings.

As s. 435, Cr. P. C., vests the High Court and Sessions Judges and District Magistrates, with concurrent powers of calling for and examining the records of inferior Courts, it must occasionally happen that more than one criminal revision case arises out of a single trial by a Subordinate Court. The only limitation to the exercise of the right to apply for revision is that, under sub-s. (4) to s. 435, applications for revision cannot be made both to the Sessions Judge and to the District Magistrate. Also a petitioner would in practice be required to state all his grounds for revision in a single petition. With these exceptions there is nothing in the Code to make the disposal of one criminal revision case a bar to the disposal of another arising out of the same original trial. It is only when there has been an actual adjudication upon a particular point, such as the jurisdiction of the lower Court to try the accused or the adequacy of the sentence, that the High Court will not review its own decision.

The preliminary objection is, therefore, overruled. On the merits of the reference I do not consider that the Sub-Divisional Magistrate was right in regarding the sentences as excessive in view of the provocation caused by prosecution witness No. 8. All that P. W. No. 8 did was to pull back prosecution witness No. 1 when he rose to obey 1st accused's order to beat the drum at the Nagara and to retort to 1st accused's abuse. For this the 1st accused stabbed

him in the head, and the second accused broke both his legs.

The sentence of two months' rigorous imprisonment and Rs. 100 fine imposed by the Sub-Magistrate on the 1st accused for an offence under s. 324, Indian Penal Code, and the sentence of four months' rigorous imprisonment and fine of Rs. 200 passed on the second accused for causing grievous hurt under s. 325, Indian Penal Code, were light sentences for such cruel treatment and certainly did not call for any reduction. The Sub-Magistrate stated in his judgment that even after discharge from hospital the complainant would be deformed for life. He was an in-patient for over four and a half months. That was the result of the second accused's act.

The sentence passed on the 1st accused by the Sub-Magistrate will, therefore, be restored and he will be committed to prison to undergo the portion remitted by the Appellate Court. The second accused's sentence is enhanced to 18 months' rigorous imprisonment and a fine of Rs. 200 with six weeks' additional imprisonment in default. The 3rd accused was a servant, who followed the example of his masters and gave two blows on P. W. No. 8's arm with a stick which only caused contusions. It is unnecessary to interfere with his sentence of one week's rigorous imprisonment already undergone and a fine of Rs. 50 although in his case the short sentence of rigorous imprisonment should have been avoided as unlikely to improve his character.

Wallace, J.—This is a reference by the District Magistrate of Trichinopoly asking this Court to exercise its powers of criminal revision and enhance the sentence passed on the accused in C. C. No. 152 of 1923 on the file of the Town Sub-Magistrate. Under the new Cr. P. C., s. 439 (6), the accused are entitled, when such a reference is being heard, to show cause against the conviction. Now in this case the accused themselves presented to this Court a criminal revision petition against their conviction and that petition (Cr. R. C. No. 561 of 1923) was rejected by this Court on the ground that "there is no reasonable ground for interference in revision."

Dr. Swaminadhan for the accused contends that this Court having once exercised its powers of revision in the matter of this conviction, is *functus officio* and cannot entertain any fresh petition asking for any sort of interference with the conviction and sentence now under consideration. His point is that the power of the High Court to revise a decision or order of a Subordinate Criminal Court can be exercised once and once only. It is of the nature of a general and comprehensive scrutiny by the Court to satisfy itself of the correctness, legality or propriety of the finding, sentence or order under revision. He supports this argument by pointing out that no party has any right to be heard by the Court sitting in revision, and argues that, when once the Court has taken up a case for revision and looked into the case and passed an order therein, it has once for all decided one way or the other, either that the order or decision should be revised or that it should not be revised, and, if the former, has decided once for all on what lines it calls for revision, implying thereby that it does not call for revision on other lines, and that, therefore, the matter of revision on any other lines is of the nature of *res judicata* and would be a violation of s. 369 of the Cr. P. C. He contends, therefore, that the order on Cr. R. C. No. 561 of 1923 prevents us, *e. g.*, from now setting aside the conviction of the accused and, therefore, precludes us from giving effect to the provisions of s. 439 (6) and from hearing the question of the enhancement of sentence.

The logical result of such an interpretation of the Court's power of revision would lead, however, to such absurdities that it is clear that the premises on which the conclusion is founded are not sound. It would follow, for example that if an accused person, in order to forestall a probable reference for enhancement of punishment, puts in a criminal revision petition, with grounds so, obviously and intentionally untenable that it is dismissed *in limine*, the District Magistrate would be precluded from making a reference at all. Again if one convicted person out of two put in a criminal revision petition so unsupportable that it was dismissed *in limine* that would preclude the other from putting in a criminal revision petition in his turn, however, good his grounds for revision might be. Other anomalous results will readily occur to any one.

No Court, then, can reasonably accept the principle that once it has passed any sort of order in criminal revision, it is precluded from entertaining any further revision petition or reference in the same

case, or even from proceeding *suo motu*. I cannot subscribe to the proposition that when a Court has refused to allow as adequate certain reasons put forward by a party for interference in revision, it has thereby endorsed the correctness, legality and propriety of the finding, sentence or order under revision beyond all further possibility of question. The practice has grown up in this Presidency and is now well-established, of receiving petitions as methods of setting the Court in motion to exercise its powers of criminal revision, and the Court, in dealing with these, is as a rule dealing only with the grounds put forward in the petition and the party who puts them forward. I cannot see why any order so passed on such a petition should preclude any other party to the case from putting in a fresh petition for the purpose of moving the Court to consider a fresh aspect of the case not already put before it. The Court would, no doubt, refuse to listen to a fresh revision petition put in by a party who had already put in a revision petition and obtained orders thereon, on the salutary principle that a party must put forward all his grounds of attack at once.

Reference may be made by way of analogy to the Court's power in criminal appeal. No one could contend that a decision on the appeal petition of one convicted party would preclude the Court from hearing the appeal petition of another party convicted in the same case. The true principle of differentiation is not that in appeal each party has the right of audience, while in revision he has not. It is that the Court is dealing at the time only with the particular matter brought to its notice by a party or specifically raised by itself. The reason why, once a Jail appeal by a party has been disposed of, no fresh appeal by that party can be entertained rests, not on the ground that a Court cannot entertain more than one appeal against the same conviction, but on the ground that a party must be deemed to have put forward at one time all *his* grounds of attack on the conviction, and, therefore, they have all been disposed of by the decision on his first appeal. One cannot deduce therefrom any proposition that a party must be deemed to have put forward in his petition all other possible grounds of attack by *other* parties on the conviction or sentence.

The Court cannot, of course, decide again what it has decided once, unless there is a very specific legal authority enabling it to do so. Ordinarily, therefore, this Bench would not decide over again what has been decided by this Court in Cr. R. C. No. 561 of 1923, and would not permit the accused, to raise again the grounds held in that order to be inadequate to justify revision of his conviction. As to s. 439 (6) should be read as giving an accused person, when called upon to show cause against enhancement of sentence, the right to re-agitate matters already raised by him, and as giving this Bench power, if it thinks fit to hold that these or other grounds are, notwithstanding its previous order, adequate grounds for interfering with the conviction, I prefer to say nothing at present.

I am of opinion then that the order in Cr. R. C. No. 561 of 1923 is no bar to our hearing the Public Prosecutor on the matter of the enhancement of sentence. The accused's Counsel does not on the merits here urge any grounds raised by accused in his previous criminal revision petition.

On the matter of enhancement of sentence, I agree with the order proposed by my learned brother.

V. N. V.
Z. K.

Revision allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 332 OF 1924.
August 29, 1924.
Present:—Mr. Justice Mukerji.

RAGHUNANDAN PRASAD AND OTHERS —APPLICANTS
versus
EMPEROR THROUGH *Musammat* SHEORANIA—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 426, 427—Mischief of graver kind, whether triable by Magistrate of Third Class—Jurisdiction, how determined.

The jurisdiction of a Court to hear a case depends on the allegations on which its help is sought. It may be that after a trial it is found that the case has been materially exaggerated, but unless it is found at the very outset that the allegations made by the complainant are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant must be accepted for purposes of jurisdiction. [p. 731, cols. 1 & 2.]

The law makes a distinction between mischief of a minor kind and mischief of the graver sort. Section 426 of the Penal Code makes an ordinary case of mischief punishable with imprisonment to the extent of three months and with fine; but where the amount of damage or loss caused is Rs. 50 or upwards the

maximum punishment awardable under s. 427 of the Code is two years' imprisonment and fine. A case of the graver kind of mischief is not triable by a Magistrate of the Third Class.

Criminal revision against an order of the Second Additional Sessions Judge, Cawnpore at Fatehpur, dated the 8th March 1924.

Mr. *M. A. Aziz*, for the Applicants.

The Assistant Government Advocate, for the Crown.

Mr. *Vishun Nath*, for the Opposite Party.

JUDGMENT.—In this revision a question of jurisdiction has been raised, and it is unfortunate that at this late stage I have no alternative but to allow the contention.

A woman, *Musammat* Sheorania, an agriculturist, brought a charge against the applicants on the allegation that they with a large number of cattle got her field damaged and that crops to the value of Rs. 250 were destroyed. The offence alleged was one of mischief; but the law makes a distinction between mischief of a minor kind and mischief of the graver sort. Section 426 of the Indian Penal Code makes an ordinary case of mischief punishable with imprisonment to the extent of three months and with fine; but where the amount of damage or loss caused is Rs. 50 or upwards, the maximum punishment awardable is under s. 427 of the Indian Penal Code two years' imprisonment and fine. A case of the graver kind of mischief is not triable by a Magistrate of the Third Class. In this particular case a learned Magistrate of the Third Class took cognizance of the offence, and, having estimated the damage or loss to the complainant at Rs. 140, ordered that, out of the fine to be realized, a sum of Rs. 40 should be awarded to the complainant.

An appeal was taken to the learned District Magistrate and the question of jurisdiction was raised. He, however, got over the difficulty by coming to the finding that the amount of damage was less than Rs. 50. An application in revision was made to the learned Sessions Judge but without success.

In my opinion the jurisdiction of the Court to hear a case depends on the allegations on which its help is sought. It may be that after a trial it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant in a criminal case and the statement of the plaintiff in a civil case, has to be accepted for the purpose of jurisdiction. This is, however, a much stronger case. Not only did the complainant allege that the amount of damage was much more than the sum of Rs. 50, but the learned Magistrate also found that the damage amounted to Rs. 140. The Court of first instance, therefore, had no jurisdiction to hear the case.

I set aside all the proceedings in the case and order that the case be heard by a Magistrate having jurisdiction to hear it.

Z. K. *Proceedings set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 275-B OF 1923.

January 22, 1924.

Present:—Mr. Kinkhede, A. J. C.

SITARAM AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 97, 141, 147—Private defence, right of, extent of—Unlawful assembly, what constitutes.

Where in a case of rioting the defence set up is the exercise of the right of private defence, the essence of the case is to ascertain who is the aggressor and whether the accused party acted in the exercise of his or their right of private defence or otherwise. [p. 733, col. 2.]

Queen v. *Sohun*, 2 W. R. 59 Cr., relied on.

A man who is assaulted is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat, but may pursue his adversory till he finds himself out of danger. [*ibid.*]

Alingal Kunhinayan v. *Emperor*, 28 M. 454; 3 Cr. L. J. 43, relied on.

Every attempt or threat to commit an offence would not, however, entitle a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution immediately, because there are many threats which people use as a form of abuse, but which are never intended to be taken seriously, and, still others, which the persons saying them have not the capacity to put into immediate execution; for it is only against a danger present and imminent that the right of private defence avails. [p. 734, col. 1.]

The law will always make just allowance for the sentiments of a person placed in a situation of peril,

who has no time to think. His blood is then hot and his sole object is to strike a decisive blow so as to ward off the danger. The right of private defence, however, is a very limited right. It cannot be converted into a right of reprisal and would not exonerate an accused person from punishment if he inflicts more harm than is necessary, even though such harm is caused under provocation. [p. 735, col. 2.]

The law does not declare a mere assemblage of men, however large, illegal. In order to be illegal it must be inspired by an illegal object as specified in s. 141 of the Penal Code. [p. 736, col. 2.]

Queen-Empress v. *Peelimuthu Tevan*, 24 M. 124; 1 Weir 54 and *Uma Charan Singh* v. *Emperor*, 29 C. 244; 6 C. W. N. 164, referred to.

ORDER.—This revision arises out of a prosecution started against the 12 applicants under ss. 147, 325 and 341 of the Indian Penal Code under the following circumstances.

The prosecution story is that on Friday the 18th May 1923 which was a day of Muhammadan festival called *Id*, one Mehtab had some quarrel with Bhagwan accused No. 6 regarding some money which the former alleged was borrowed by the latter from him. That at the intervention of a passer-by the quarrel was, however, stopped; but that Bhagwan being exasperated by this altercation with Mehtab called together some friends and decided to beat him. The story goes that the next day while Mehtab was passing by the way towards a mango grove with Badusha, his brother-in-law, Bhagwan came in front of him with Balia accused No. 7; that Bhagwan then with a view to provoke a quarrel said to Mehtab why did not he ask for money alleged to be due to him and take it from him? Thereupon Mehtab declared he would demand it and not leave him without taking it. Consequently Bhagwan ordered Balia "go and bring them" meaning the other accused. All came and surrounded Mehtab and beat him. Mehtab thereupon asked Badusha to go and bring over his father Sujat. That Sujat arrived in the meantime on the spot but he too was mercilessly beaten. That Mehtab escaped but was subsequently chased and dragged out of a house and tied down and bound up to a pillar. That Sujat became unconscious as the result of beating. That report was made to the Police and the latter started an enquiry, with the result that this prosecution was set on foot against the 12 accused and they were convicted and sentenced to imprisonment and fine. Against their convictions and sentences the appeals were preferred by them, but they have been unsuccessful. Hence they have come up in revision.

It is contended before me on behalf of the accused Bhagwan, Rajaram and Sakria that they were assaulted and, therefore, they were perfectly within their legal right of private defence to retaliate the assault and that they should have been held to be innocent. It is also urged that the District Magistrate's view that in spite of the fact that there was admittedly great provocation, they had no justification to assault and inflict the injuries they did on Sujat and others and that they must, therefore, be deemed to have taken the law into their own hands is not correct. As regards these contentions, it must be conceded that the injuries inflicted on the complainant Sujat were, no doubt, serious as the medical evidence clearly shows. The District Magistrate states in the course of his judgment that the three bullies, namely, Sujat, Mehtab and Badusha had become very unpopular in the village, and richly deserved all they got, but at the same time he considered that the accused had stepped beyond their proper limits. There is really much truth in what the District Magistrate has written regarding the deserving character of the three complainants but his remarks so far as the accused are concerned require careful scrutiny.

I would, therefore, clear up the ground first and settle the preliminary facts and circumstances that preceeded the rioting. So far as I have been able to find there is absolutely no independent evidence on record to show that Mehtab had, in fact, advanced any loan to Bhagwan about two and a half months before he deposed to that fact in his deposition dated 15th June 1923, as P. W. No. 2. He admits that Bhagwan entered the service of Sitaram accused No. 1 "about two and a half months ago as a yearly servant getting Rs. 150 per annum," it is a matter of common knowledge that as a rule, agricultural servants are paid in advance if not the whole at least a part of their salary. It is, therefore, highly improbable that Bhagwan who entered Sitaram's service just about the time of the alleged loan would go in for a loan from an enemy of the village including his new master Sita Ram who actually carried on money-lending business and was in a position to advance a loan to him. Mehtab says he advanced the loan in the presence of one Urkuda and the people of his house. But Sujat his father does not

in his deposition speak of any loan having been given in his presence. Sujat's wife was examined as a defence witness No. 35 to disprove some of the facts deposed to by the prosecution witnesses but was not questioned by the prosecution on this point. Nor is there any other independent witness or even Urkuda to corroborate him. The absence of evidence on this material point lends support to the version of Bhagwan that the demand of Mehtab was nothing but an attempt to extort money from him. This seems very probable also looking to the antecedents of Mehtab and his father Sujat. The District Magistrate's remark that the three complainants were very unpopular and were bullies in fact in the village clearly shows that they must have been a terror to the villagers and a strong feeling of resentment must have been prevailing against them and it is very likely that combination must have been formed against them without much difficulty or delay in the village. Under such circumstances the false demand would naturally exasperate Bhagwan or even anybody else, for the matter of that.

The next thing I consider in this connection is the scene of the occurrence. If we believe the explanation of the accused and locate the scene of the assault in the house of Bhagwan and not at some distance in the bazaar, as the complainants would have it, the situation becomes all the more grave and the provocation all the greater. It is common ground that on Friday evening there was a previous altercation between Mehtab and Bhagwan. Each of them must be seeking and waiting for an opportunity to provoke the other and pick up a quarrel just to give vent to his feelings. Even if the dispute began with an offensive challenge by Bhagwan saying to Mehtab, on the road, as the latter puts it, Mehtab's decision to press the demand then and there and the announcement of a fixed determination on his part not to leave him (Bhagwan) without taking the money would clearly show his dogged tenacity in extorting the money at any cost. The readiness with which he took up Bhagwan's challenge clearly shows the preparedness of his mind to put down all opposition to his demand and if necessary to make the man who offended him fully realize that he could not be so easily trifled with, by giving him a good lesson for the future. This persistency in pressing a false and unfounded demand would in law amount to an attempt at extorting money from a man by frightening him or by wrongful confinement, and thus raising an apprehension in the mind of Bhagwan and other people that an innocent man is being unnecessarily troubled by the village bully.

This brings us to the stage where we can consider the question whether accused had any justification for acting in the manner they did in any way of self-defence as they call it.

In deciding cases of this kind there is, as observed by Justice Campbell in *Queen* v. *Sohun* (1), generally far too much neglect of the question of private defence. It was a case of criminal trespass which gave rise to rioting and the question of the right of private defence was relevant in connection with the right to maintain possession. The remarks, however, apply with equal force to our case. As pointed out by the learned Judge, the essence of the case should be to ascertain who was the aggressor and whether the accused party acted in the exercise of his or their right of private defence or otherwise. The point would be whether the accused used more violence than was necessary. If they had no alternative but either to lose the possession of the property or beat the trespasser as they did, they would be entitled to an acquittal. The question as to the extent to which right of private defence of the body can be exercised was considered in *Alingal Kunhinayan* v. *Emperor* (2) and decided in the light of the principle laid down by Mr. Mayne in the following words to be found at pages 455-456* of the report.

"But a man who is assaulted is not bound to modulate the defence step by step, according to the attack, before there is reason to believe that the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversory till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly

(1) 2 W. R. 59 Cr.
(2) 28 M. 454; 3 Cr. L. J. 43.

*Pages of 28 M.—[*Ed.*]

cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger".

The question, therefore, which is of importance is, whether Bhagwan or Mehtab was the first aggressor and further if Mehtab was the aggressor whether Bhagwan exceeded the right of private defence of his body when he and his comrades gave Mehtab and Sujat a severe beating. Under s. 97 of the Indian Penal Code every person has a right, subject to the restriction contained in s. 99 to defend his own body and the body of any other person, against any offence affecting the human body. Bentham in his principles of Penal Law has said:

"It is a noble movement of the heart, that indignation which kindles at the sight of the feeble, injured by the strong, which makes us forget our danger at the first cry of distress. It concerns public safety that every honest man should consider himself as the natural protector of every other."

Section 97 is based upon this principle. Section 102 of the said Code further lays down that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed. It must, however, be remembered that every attempt or threat to commit the offence would not, much less an idle threat would entitle a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution immediately, because there are many threats which people use as a form of abuse, but which are never intended to be taken seriously, and, still others, which the persons saying them, have not the capacity to put into immediate execution; for it is only against a danger present and imminent that the right of private defence avails. The threat uttered here constituted an offence of an attemp to commit extortion either by intentionally putting Bhagwan in fear of injury, or by attempting to put him in fear of an injury in order to the committing of an extortion. It is clear from the facts proved that as between Bhagwan and Mehtab, the latter is stronger of the two, and as indicated above his threat was accompanied admittedly by a preparation to take or extort money from Bhagwan by declaration to him that he would not be relieved unless the money were paid. A person like Bhagwan standing face to face to the two bullies and placed as he then was in a plight may truly believe that his life was in danger. It is but natural that he should utilize the service of Balia to procure help from other people without meaning any definite individuals. He may consider his own single handed opposition or defence would be blown off at once by the superior powers of Mehtab and Badusha. It is often the case that once blood is hot persons begin to take an exaggerated view of the injuries threatened or received. Law makes some allowance for an injury caused under such circumstances as if it is caused on a grave and sudden provocation.

Under these circumstances although I do not differ from the District Magistrate's view that there was grave provocation to Bhagwan and his party and I also think this must have naturally given room for a sudden combat upon heat of blood, still I am not prepared to hold that Mehtab was not the aggressor. I prefer to accept the story told by defence witnesses Nos. 16, 17, 20 and 22 that Mehtab first attacked Bhagwan and his cry for help attracted the accused No. 3 Rajaram and No. 8 Sakria and others to the scene as a more likely and probable version. The fact was that Bhagwan sent out Balia to call up other persons for help, but it does not follow that the gloss which Mehtab put upon it to show as if it was a pre-arranged plot, is also true. The District Magistrate has given very good reasons for disbelieving the two witnesses called to prove that Bhagwan summoned a Council of his friends in the village and decided at it that Sujat and Mehtab should be beaten. Mehtab in his deposition says that he was attacked by Bhagwan and that he sent away his companion Badusha to call in Sujat. All this is very true but when and at what stage this was done is the question. I think the District Magistrate has not devoted sufficient attention to scan the evidence carefully and find as a fact who was the first aggressor; he seems to have assumed that Bhagwan must be the aggressor because he says he had received great provocation. Assuming this was so, how does the Magistrate excuse Mehtab from the consequences of his own admitted utterances in the witness-box which constitute an offence of an at-

tempt at extortion on his part? Unless Mehtab fully believed that he was more than a match for Bhagwan, he would not send away his strong and young companion only to bring in his old father to help him with mere physical force to overcome the so-called assault or comtemplated assault by Bhagwan and his party. On the contrary it is highly probable that the object of sending away Badusha was not only to fetch Sujat but also to fetch a sword and thus to overawe Bhagwan and other people who were attracted to the scene by his cries, and, if necessary to actually cause injury to them. It is very likely that Bhagwan must have been beaten and I believe that he was beaten in the combat that ensued. Several of the persons, who gathered together must have become naturally indignant, and their blood boiled as it was at the moment, and as amongst them there were also persons who had previously suffered indignities at the hands of the two tyrants Mehtab and Sujat, they all must have readily joined in the affray very soon after. Prosecution witness No. 8 tells us that Badusha had a sword in his hand although Mehtab and Badusha themselves naturally deny it. The Sub-Inspector P. W. No. 1 admits a sword and a stick were given to him in connection with the investigation he held on Sitaram's report which he calls as Bhagwan's case. The prevarication of this witness P. W. No. 1 is not without significance. That Bhagwan would have fared worse had not Rajaram accused No. 3 appeared in the meantime on the scene and saved the situation is very clear from the evidence on record. Mehtab thought himself provoked by what Rajaram accused No. 3 said at the time, and leaving Bhagwan, attacked him. In the meantime, Sakria accused No. 8 came to his rescue, finding that Sujat struck Rajaram, he struck Sujat and also struck Badusha on the hand in which he was carrying the sword., and thus deprived him of the deadly weapon. The District Magistrate has not at all taken into consideration the reasonable explanation of the principal accused Nos. 3, 6 and 8, who make no secret of the part they took in the fight that ensued. If under these circumstances, Bhagwan, Rajaram and Sakria were to exaggerate the danger they were facing, that was very natural The exaggeration could not be unreasonable, and law will always make just allowance for the sentiment of a person placed in a situation of peril, who has no time to think. His blood is then hot and his sole object is to strike a decisive blow so as to ward off the danger. But we should not at the same time forget that the right of private defence is a very limited right. It cannot be converted into a right of reprisal, and I am not prepared to say that this right of private defence could exonerate the accused from the sentence of law if they inflicted more harm than was necessary in self-defence. Such harm would not be justifiable though caused under provocation and must be punishable.

On a careful scrutiny of the evidence and of the probabilities of the case, I come to the conclusion that Bhagwan and his comrades were justified in defending themselves against the aggressions of Mehtab and his relations Sujat and Badusha in the first part of the occurrence. The evidence shows that after this they still chased their assailants and followed Mehtab who had in the meantime escaped into a house, and dragged him out of it and tied him up and finally bound him to a pillar in the *chawdi* where he was kept for some time. D. W. No. 35 Jainu Bi and other witnesses for defence bear this out. The medical evidence on record clearly shows that Sujat was very severely beaten. Mehtab was also well thrashed. It appears the beating in Mehtab's case was not very serious as we find from the Doctor's evidence that he remained an indoor-patient for one day and did not care to attend the dispensary for dressing. In fact his own deposition discloses that he feigned much as his deliberate closing of the eyes etc. disclose. There is, however, no doubt about the seriousness of the injuries inflicted on Sujat. He was, in fact, left unconscious on the road. The District Magistrate has, of course, held and I think rightly that the fracture of the collar bone was not due to any blow, but was due to a fall. He was, therefore, right also in setting aside the convictions under s. 325 of the Indian Penal Code. But so far as the convictions under s. 341, Indian Penal Code, are concerned, I think, there was ample reason for upholding the sentences passed in the case of each of the accused, and I do not see any justification to interfere with them.

As regards the convictions under s. 147, Indian Penal Code, however, I think, they cannot be sustained. Particularly as on the findings of the District Magistrate the

main ingredients of a premeditated design to assemble together, with the common unlawful object of committing an offence is wanting in the case. In this connection the omission to name all the accused in the First Information Report (Ex. P-1) is very significant. Prosecution withness No. 1 says that Badusha said he was new and did not give the names of the accused. He did not also get the information from Jainubi D. W. No. 35. He speaks with great deal of prevarication when he is asked as to who gave him the names and how he prepared his memo. Exhibit D-1. He has also destroyed the notes he took down of the information he got from Mehtab. If Mehtab kept his eyes closed he also could not have seen all the accused. The mention by Badusha that 8 or 9 persons attacked is too general. It shows that all the 12 persons who have ultimately been prosecuted were selected or singled out on further information, from the larger number who must necessarily have been at the scene. But this assembalge could not and is not proved to be an assemblage which came together with the common unlawful understanding to make a joint assault on Mehtab. This clearly points to the absence of a common unlawful object on the part of the assembly. At the same time I cannot help endorsing the District Magistrate's view that the defence of the accused is false so for as the accused other than the accused No. 3 Rajaram, No. 6 Bhagwan and No. 8 Sakria are concerned. I am not prepared to rely on the evidence given to prove that they were not at all present at the time of the quarrel, and took no part in it, or in the subsequent developments of it. Majority of them had on their own admission more or less suffered at the hands of the three bullies, Mehtab, Sujat and Badusha and it is highly probable and almost natural, that they all must have overpowered the three bullies by their swelled numbers and in a spirit of retaliation joined the principal accused Nos. 3, 6 and 8 in beating the complainants Mehtab and Badusha into a re-treat, and Sujat to a state of unconsciousness. Each in his own way has thus aided and assisted the other in the commission of the offence under s. 341 of the Indian Penal Code. But although I uphold the conviction under s. 341 of the Indian Penal Code, I am doubtful whether I have got sufficient material before me to uphold the convictions under s. 147, Indian Penal Code. As already observed the evidence on record does not go to the length of establishing the extistence of a common unlawful object on the part of all the accused. The law does not declare the mere assemblage of men, however large, illegal. What it requires is that in order to be illegal it must be inspired by an illegal object as specified in s. 141 of the Indian Penal Code. This must be proved by the prosecution. It has been held in *Queen-Empress* v. *Peelimuthu Tevan* (3) and *Uma Charan Singh* v. *Emperor* (4) that where there was large concourse of men armed with sticks and bill-hooks it could not be presumed that their object was necessarily illegal; though the fact that they were in a large crowd and were armed, may raise some suspicion, but such suspicion could not be proof upon which the accused could be convicted. I am not, therefore, prepared to uphold the convictions and sentences passed under s. 147 of the Indian Penal Code. I give them all the benefit of the right of private defence in so far as the charge of rioting is concerned. In any case I am not prepared to uphold the double convictions one under s. 147 and the other under s. 341, Indian Penal Code.

The convictions under s. 147 are, therefore, set aside, and the accused are ordered to be set at liberty at once. Fines imposed under s. 341, Indian Penal Code, will be recovered, and in case of failure to pay the same each of the accused shall undergo simple imprisonment for one week as already directed by the Trying Magistrate in his judgment dated 12th September 1923.

Z. K. *Conviction set aside.*

(3) 24 M. 124; 1 Weir 54.
(4) 29 C. 244; 6 C. W. N. 164.

LAHORE HIGH COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 1409 OF 1923.

November 20, 1923.

Present:—Mr. Justice Moti Sagar.

PARAS RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MESSRS. PURAN MAL-DITTA MAL—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Mortgage-suit—Right to receive rents and profits, whether essential.

Sub-rule (2) of r. 1 of O. XL of the C. P. C. refers to the case of removal of a person other than a party to the suit, and it does not debar the Court from removing one of the parties to the suit from the possession of the property. [p. 738, col. 2.]

There is nothing in r. 1 of O. XL of the C. P. C., which excludes mortgage-suits from its operation and a Receiver can, therefore, be appointed in a mortgage-suit. [*ibid.*]

Chand Mall Babu v. *Ban Behari Bose*, 74 Ind. Cas. 1021; 50 C. 718, distinguished.

Gobind Ram v. *Jwala Pershad*, 43 Ind. Cas. 533, dissented from.

Amar Nath v. *Tehal Kuar*, 67 Ind. Cas. 333; 4 U. P. L. R. (L.) 73, *Satya Narain Singh* v. *Srimati Keshabati Kumari*, 25 Ind. Cas. 406; 18 C. W. N. 537, *Ajepa Natesa Pandara Sannadhi* v. *Ramalingam Pillai*, 20 Ind. Cas. 767; 24 M. L. J. 658 and *Ghaneshyam Misser* v. *Gobind Moni Dasi*, 7 C. W. N. 452, relied on.

Order XL, r. 1 of the C. P. C. gives the widest power to a Court to appoint a Receiver of any property whenever it appears to the Court to be just and convenient. The existence in the plaintiff of a right to receive rents and profits is not an essential prerequisite for the exercise of this power. [p. 737, col. 2; p. 738, col. 1.]

A Receiver can be appointed in a mortgage suit where the security is insufficient for the realisation of the decree by its sale alone. [p. 738, col. 1.]

Venkata Rajagopala Surya Row v. *Basavi Reddy*, 26 Ind. Cas. 986; 1 L. W. 785; (1914) M. W. N. 771; 16 M. L. T. 407; 29 M. L. J. 457, relied on.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Simla, dated the 18th June 1923.

Lala *Jai Lall*, R. B., for the Appellants.

Messrs. *M. Rafi* and *B. P. Khosla*, for the Respondents.

JUDGMENT.—This is an appeal from an order passed by the Senior Subordinate Judge of Simla on the 18th June 1923 holding that a Receiver be appointed to take possession of the property which is under mortgage with the plaintiffs. It appears, that on the 19th of January 1916, the defendants borrowed a large sum of money from the plaintiffs on the security of certain moveable and immoveable properties specified in the deed of mortgage and promised to pay interest thereon at the rate of Rs. 9 per cent. per annum. It was stipulated that the mortgage would be redeemed within six years and that as long as it remained subsisting the defendants would not be entitled to sell or alienate any of the properties mortgaged. It was further agreed that if any of the properties were sold during the pendency of the mortgage the sale-price would be handed over to the plaintiffs in part payment of the mortgage debt in question. On the 1st of June 1923 the plaintiffs brought a suit for Rs. 3,38,270-9-9, principal and interest, due on the mortgage, and along with the petition of plaint made an application for attachment before judgment of the moveable property and also prayed that a temporary injunction be issued against the defendants not to alienate and sell the same until the suit had been disposed of. It was stated in the application that the defendants were selling the wood which was under mortgage with the plaintiffs and that they were not paying the sale price to them in accordance with the terms of their agreement. It was further stated that the value of the mortgaged property had depreciated to a considerable extent; that interest was accumulating; that the defendants were realizing rents from the tenants; that in the event of the plaintiffs' suit being decreed, it would be impossible for them to recover the whole of their decretal amount by sale of the mortgaged property and that in these circumstances it was just and equitable that a Receivar should be appointed under O. XL, r. 1 of the C. P. C. The learned Senior Subordinate Judge granted the application for the appointment of a Receiver and passed an order appointing the Official Receiver to this office. It is against this order that the present appeal has been preferred.

The first contention raised by Mr. Jai Lal, who appears on behalf of the appellants, is that the appointment of a Receiver in a mortgage-suit is illegal. It is pointed out that the mortgage was without possession and that, therefore, the mortgagors were entitled to remain in possession of the mortgaged property until such time as that property had been brought to sale in due course of law. The argument in brief is that under the terms of the mortgage the plaintiffs had no *prima facie* right to the properties themselves or their rents and profits and that, therefore, a Receiver could not be appointed under O. XL, r. 1, cl. (2) of the C. P. C. In support of this conten-

tion reliance has been placed on two cases which are reported as *Chand Mall Babu* v. *Ban Behari Bose* (1) and *Gobind Ram* v. *Jwala Prasad* (2). I have carefully read those authorities and am of opinion that one is not in point and that the other is in direct conflict with the view taken by this Court on this matter. In the Calcutta case reported as *Chand Mall Babu* v. *Ban Behari Bose* (1) the sole question for decision before their Lordships was whether in a case where a portion of the mortgaged property had been destroyed or had ceased to be available for sale after the date of the decree, the mortgagor could or could not be held personally liable. It was held that in such a case, though the remedy of the mortgagee in the first instance was against the mortgaged property, the mortgagor could be held personally liable. The question as to the appointment of a Receiver in a mortgage-suit was not even raised before their Lordships, and I do not see how this case can be considered to be an authority in support of the appellant's contention.

The next authority relied on is no doubt to a certain extent in point; but the rule laid down in that case has not been approved of in a very recent case decided by a Bench of this Court and reported as *Amar Nath* v. *Tehal Kuar* (3). In *Gobind Ram* v. *Jwala Pershad* (2), the facts were briefly these:—The plaintiffs, who were puisne incumbrancers, brought a suit and obtained a preliminary decree for sale of the mortgaged property. The decree directed that the plaintiffs should discharge the prior incumbrancer within a certain time and that thereafter they would be entitled to sell the property for the amount which they had to pay to the prior incumbrancer as well as the amount due on their own mortgage. The property mortgaged consisted of cartain shares in a ginning factory. The plaintiffs filed an appeal against this decree in the High Court alleging that they had been ordered to pay too much to the prior incumbrancer. During the pendency of the appeal they made an application to the Court below for the appointment of a Receiver which was granted. The High Court on appeal against this order relying upon O. XL, r. 1, cl. (2) of the C. P. C., held that "in the case of a simple mortgage the mortgagor is entitled to remain in possession of the mortgaged property until such time as the property is brought to sale in due course of law and that, therefore, the Court has no power to appoint a Receiver during the pendency of the appeal." Now, cl. (2) of O. XL, r. 1, C. P. C., provides that "nothing in the rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove." It was held in the above case that neither the plaintiffs nor the prior incumbrancer had any present right to remove the mortgagor from possession of the mortgaged property and that, therefore, the appointment of a Receiver was illegal. In *Amar Nath* v. *Tehal Kuar* (3), this interpretation of cl. (2) was not approved of. It was held in that case that the aforesaid sub-rule referred to the case of removal of a person other than a party to the suit and that it did not debar the Court from removing one of the parties from the possession of the property. The Calcutta and the Madras High Courts are also of the same view: see *Satya Narain Singh* v. *Srimati Keshabati Kumari* (4) and *Ajepa Natesa Pandara Sannadhi* v. *Ramalingam Pillai* (5). No other authority has been cited by the learned Vakil for the appellants in support of the contention and as there is nothing in the section to exclude mortgage-suits from its operation I must hold that the order as to the appointment of a Receiver in this case is not illegal. Indeed it has been held in a Calucutta case reported as *Ghaneshyam Misser* v. *Gobinda Mani Dasi* (6), that a mortgage suit is the class of suit in which, of all others, it is often most expedient and necessary to appoint a Receiver. I accordingly hold that there is no force in the appellants' contention and that the order as to the appointment of a Receiver in this case is quite in accordance with law.

Next it was argued by the learned Vakil for the appellants that the rents and profits were not mortgaged and that no Receiver should have been appointed to take charge of the mesne profits. I am unable to agree in this contention. The new C. P. C., O. XL, r. 1, gives the widest power to a Court to appoint a Receiver of any

(1) 74 Ind. Cas. 1021; 50 C. 718.
(2) 43 Ind. Cas. 533.
(3) 67 Ind. Cas. 383; 4 U. P. L. R. (L.) 73.
(4) 25 Ind. Cas. 406; 18 C. W. N 537.
(5) 20 Ind. Cas. 767; 24 M. L. J. 658.
(6) 7 C. W. N. 452.

property whenever it appears to the Court to be just and convenient; and it is, therefore, clear that the existence in the plaintiffs of a right to receive rents and profits is not an essential pre-requisite for the exercise of this power. There is ample authority for holding that a Receiver could be appointed where the security was insufficient for the realization of the decree by its sale alone. Indeed in a Madras case reported as *Venkata Rajagopala Surya Row* v. *Basavi Reddy* (7), the learned Judges went so far as to hold that where for the balance of the decree after the sale of the mortgaged property, a supplemental decree against a defendant for the balance of the decree amount, to be realised by the attachment and sale of his other properties, could be passed, the Court had the power to appoint a Receiver for the rents and profits of the mortgaged property in order that the accumulated rents and profits might be available to the decree-holder for the attachment if and when he obtains his supplemental decree. I am, therefore, unable to accept the contention raised by the learned Vakil for the appellants and overrule it.

Lastly, it was argued that no circumstances had been shown to exist in this case justifying the appointment of a Receiver and that the order should, therefore, be set aside. It should, however, be noted that the defendants' Vakil has admitted before me that his clients have sold a portion of the timber covered by the aforesaid mortgage-deed for about Rs. 10,000 and that the sale-proceeds have not been paid to the plaintiffs. In these circumstances I am of opinion that the plaintiffs were fully justified in asking the Court to appoint a Receiver so that the latter may take charge of the mortgaged properties and thus sufficiently safeguard the interests of the former. It should further be observed that the learned Senior Subordinate Judge, after a full consideration of the circumstances of the case, has held that this was a fit case for the appointment of a Receiver and I must decline to interfere with his discretion in a matter of this character unless it is definitely shown that the discretion has not been properly exercised or that it contravenes any express provision of law.

(7) 26 Ind. Cas. 936; 1 L. W. 785; (1914) M. W. N. 71; 16 M. L. T. 497; 29 M. L. J. 457.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2592 OF 1921.

March 28, 1924.

Present:—Mr. Justice Mukerji.

DURGA RAM DAS—PLAINTIFF—APPELLANT

versus

BHARAT RAM DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement, extinguishment of—Merger, requisites of—Suit for declaration of easement—Necessary parties.

In order that an easement may be extinguished there must be complete unity of seisin, *i. e.*, the absolute ownership of the dominant and servient tenements must vest in the same person. In other cases of unity the easement is suspended, not extinguished. [p. 740, col. 2]

In a suit for the declaration of a right of easement a dominant owner has no cause of action against servient owners who have neither caused obstruction nor raised any objection to the exercise of his right of easement. He is not bound to make parties any servient owners other than those who have so obstructed or challenged his right. [p. 741, col. 1.]

(Case-law discussed.)

Appeal against a decree of the Subordinate Judge, Second Court, Sylhet, dated the 19th of September 1921, affirming that of the Munsif, First Court at Moulvibazar, dated the 2nd of August 1920.

Babu *Hemendra Kumar Das*, for the Appellant.

Babus *Pares Lal Shome* and *Charu Chandra Chowdhury*, for the Respondents.

JUDGMENT.—This appeal is on behalf of the plaintiff and is confined to a strip of land which is described as plot No. 1 in the proceedings, with regard to which the suit has been dismissed by both the Courts below.

The plaintiff's case as laid in the plaint shortly stated and so far as is necessary for our present purposes was this: that the plaintiff was residing in his *bari* to the west of the plot from the time of his ancestors, that he and the defendants (Nos. 1, 5 and 6 being his brothers, and Nos. 2, 3 and 4 being the sons of No. 1) and their ancestors had used the said plot as a pathway for over 100 years for going to their lands with ploughs, loads, cattle, palanquain and corpses, openly, peacefully and as of right

all the time, that of late he has removed to his new *bari* and thereafter also used the plot as a pathway, till the principal defendants put up an obstruction thereon. The prayer of the plaintiff was for a declaration of plaintiff's right of way and for recovering possession of it as a way after removing the obstruction.

As to the defence of the principal defendants as set forth in their written statement, paragraphs 4 and 5 are important. The averments therein are to the effect that Upendra Ghose and his brother are the *maliks* of the middle part of plot No. 1, and the plot is a part of the defendant's *bari* and yard. These defences were somewhat varied in the course of the proceedings before the Trial Court. The learned Munsif, however, found; (*a*) that Upendra Ghose and his brother had no connection with plot No. 1; (*b*) that though the plaintiff and his son said that plot No. 1 belonged to Government, that plot belonged to the four brothers meaning the plaintiff and the defendants Nos. 1, 5 and 6 and they had acquired title to it by adverse possession. He held ultimately that the plaintiff was not entitled to any relief on the grounds, (1) that the plaintiff being the joint owner of the plot along with his brothers was not entitled so far as he claimed a right of way on the ground of prescription, as no man can acquire easement in a tenement of which he himself is the owner, (2) even if the plaintiff and his brothers are not the owners of the plot the servient owner not having been made a party, the plaintiff was not entitled to any relief.

These grounds, together with two others were relied upon by the learned Subordinate Judge for dismissing the plaintiff's suit. They are these, (3) the plaintiff cannot claim the easement over the plot treating it as servient one of his new house, since when he gave up the old *bari* for the new one the dominant tenement so far as he was concerned ceased to exist, (4) it was not known who are the owners of the servient tenement; and if Upendra Ghose and his brothers or Government be the owners they were not parties to the suit.

It is true that the plaint is rather inartistically worded, and from some of the statements made in the plaint it might appear as if the plaintiff was asking for a declaration of a right of way which he has acquired against the defendants. In substance, however, the suit was of a wholly different nature. It is a simple suit to the effect that the plaintiff and the contesting defendants and their predecessors had acquired by prescription a right of way over the plot, they had been in adverse possession of this plot against all others for a sufficiently long period and the defendants had wrongfully obstructed the plaintiff in the exercise of his right of way over the plot, and the relief claimed was a declaration to the effect that the plaintiff had acquired such a right of way and for recovery of possession of the plot as a way after removing the obstruction which the contesting defendants had put up thereon.

Such a suit, in my judgment, is not liable to be dismissed on any of the grounds relied upon by the Court below.

As for the ground No. 1, it is not tenable as there must be complete unity of seisin or the absolute ownership of the dominant and servient tenements must vest in the same person in order that easements may be extinguished. (Peacock on the Law relating to Easement in British India, 3rd Edition, page 532). The principle of extinguishment of easement by merger is simply this that the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, is now merged in the general rights of property, and this doctrine has been so strictly construed that it requires the estates in the two tenements to be of an equally high and perdurable character (Gale, on Easements, 8th Edition, page 517). Mr. Mitra in his well-known book on Limitation, Prescription and Easements, 4th Edition, page 492 says as follows:—"The expression unity of ownership or unity of possession or occupation which is often employed to denote that species of union which will extinguish an easement is inaccurate. Unity of ownership in fee of both the tenements extinguishes easements." Goddard, 2nd Edition, pages 365-367. The same person must be absolute owner of the whole of the dominant and servient heritages in order that the easement may be extinguished. The dominant owner's title to the one must be co-extensive with his title to the other (See *Ivemey* v. *Stocker* (1). In other cases of unity the easement is suspended, not extinguished." If the facts be that the plaintiff and the contesting defendants and their predecessors acquired a prescriptive right

(1) (1866) 1 Ch. 396 at p. 408; 35 L. J. Ch. 467; 12 Jur. (N. S.) 419; 14 L. T. 427; 14 W. R. 743.

of way, and being in adverse possession against the rest of the world also acquired an indefeasible right jointly to be owners of the property, how can the plaintiff lose the right which he had acquired to use it as a pathway ?. Where in such a case is there any room for the application of this principle ?

As for grounds Nos. 2 and 4 which may be taken up together, it was found by the learned Munsif and that finding has not been displaced by the learned Subordinate Judge, that Upendra Ghose and his brother or the Government were not owners of any part of this plot. We are not entitled to proceed upon a mere supposition that they are. The servient owners, as far as one can see, are the defendants in this suit who are holding possession adversely to the plaintiff's rights. Even if there are others, there being no cause of action against them and their presence not being necessary for adjudicating on the rights of the parties in the present litigation they need not have been made parties.

In the case of *Madan Mohan Chakravarty* v. *Sashi Bhusan* (2), it was held that a dominant owner has no cause of action against servient owners who have neither caused obstruction nor raised any objection to the exercise of his right of easement. In a suit for declaration of his right of way he is not bound to make parties any servient owners other than those who have so obstructed or challenged his right. The cases of *Madan Mohan* v. *Akshoy Kumar* (3) and *Haran Sheikh* v. *Romesh Chandra* (4) only lay down the general rule, and the facts of those cases are clearly distinguishable from those of the present case. The same view has been taken in the case of *Amritanath Biswas* v. *Jogendra Chandra Bhattacharjee* (5).

As for ground No. 3 it has no substance as the deed of exchange clearly excludes this plot and the plaintiff's right therein were expressly reserved in that deed and whatever right the plaintiff might have acquired he never could lose by shifting on to his new *bari*.

A feeble attempt was made by the respondent to justify the dismissal of the suit upon grounds other than those that were covered by the issues in the case. I am of opinion that the same should not be permitted at this stage.

In my judgment, therefore, the decrees of the Courts below so far as plot No. 1 is concerned should be set aside and I accordingly do set them aside and order that the plaintiff do get a declaration that he has the right of way therein as claimed in the plaint and that all obstructions, if any, put on it by the defendants be removed and that the plaintiff do recover possession thereof to use it as a way. The plaintiff is entitled to the costs of this appeal.

Z. K. *Decrees set aside.*

(2) 31 Ind. Cas. 549; 19 C. W. N. 1211.
(3) 5 Ind. Cas. 23; 14 C. W. N. 15.
(4) 62 Ind. Cas. 425; 25 C. W. N. 249.
(5) 69 Ind. Cas. 183.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1474 OF 1923.
November 21, 1923.
Present :—Mr. Justice Martineau.
DEDAR SINGH—DEFENDANT—APPELLANT
versus
BANSI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Marriage debts—Minor co-parcener, whether bound—Alienation by de facto *guardian for benefit of estate.*

Under the general principles of Hindu Law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage of his sister. [p. 742, col. 2]

Jai Indra Bahadur Singh v. *Dilraj Kuar*, 61 Ind. Cas. 278; 8 O. L. J. 94, relied on.

A debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parceners. [p. 742, col. 1.]

Sundrabai Javali Dagdu Pardeshi v. *Shivanarayana Ridkarna*, 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44, *Bhagirathi* v. *Jokhu Ram Upadhaya*, 6 Ind. Cas. 465; 32 A. 575; 7 A. L. J. 667 and *Debi Lal Sah* v. *Nand Kishore Gir*, 65 Ind. Cas. 315; 1 Pat. 266; (1922) A. I. R. (Pat.) 22; 3 P. L. T. 759, relied on.

A Hindu is not entitled to impeach an alienation made during his minority for the benefit of the estate and with due regard to his interests by his *de facto* guardian. [p. 742, col. 2.]

Mastu v. *Nand Lal*, 73 P. R. 1890, followed.

Appeal against a decree of the District Judge, Hoshiarpur, dated the 12th March 1923, confirming that of the First Class Munsif, Una, dated the 30th November 1922.

Lala *Madan Gopal* for Lala *Faqir Chand*, for the Appellant.

Lala *Gopal Chand*, for the Respondents.

JUDGMENT.—In 1913, during the plaintiff's minority two shops and a site

belonging to him and his brother Ramji Das were sold for Rs. 400 to the defendant Didar Singh by Ramji Das and his mother Prabhi, the latter acting as the plaintiff's guardian. The plaintiff sues for possession of his half share of the property on the ground that the sale is not binding on him, not having been effected for his benefit. He has been given a decree, which has been confirmed by the lower Appellate Court, and the vendee has preferred a second appeal.

Rs. 360 out of the sum of Rs. 400 were to be paid by the vendee to Kirpa Ram, to whom the money was due on the mortgage-deeds executed on behalf of the plaintiff and Ramji Das by their mother and uncle acting as their guardians. The first mortgage deed was executed in 1908 for Rs. 200 which were borrowed for the expenses of the marriages of Ramji Das and his sister, and the second, by which a further charge of Rs. 68 was created, was executed in 1909. The learned Additional Judge points out that Ramji Das was not mentioned in the deeds as being the Manager of a joint Hindu family, and that in an undivided family the management of the property does not vest in the mother, and he finds that the appellant never recognized Ramji Das as the Manager of the family and never dealt with him as such, and goes on to hold that the property of the minor could not be validly sold for the payment of a debt incurred for the expenses of the marriages of Ramji Das and his sister.

I cannot see that it matters whether or not the appellant regarded Ramji Das as the Manager of a joint family if in fact the brothers constituted a joint family as presumably they did. On the question of their being members of a joint family there is indeed practically no room for doubt as the plaintiff was a minor and it has never been suggested that there had been any partition.

A debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parceners: see *Sundrabai Javali Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (1), *Bhagirathi* v. *Jokhu Ram Upadhya* (2) and *Debi Lal Sah* v. *Nand Kishore Gir* (3). It has also been held in *Jai Indra Bahadur Singh* v. *Dilraj Kuer* (4), that by the general principles of Hindu Law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage of his sister. The mortgage effected in 1908 for raising money for the marriages of Ramji Das and his sister was, therefore, justifiable and binding on the plaintiff even if, as found by the Courts below, no necessity has been shown for the further mortgage of 1909; this fact would not be a sufficient reason for declaring the sale to be invalid as the amount due for principal and interest on the first mortgage exceeded the price of the plaintiffs' share in the property.

The fact that it was the plaintiff's mother who acted as his guardian in selling the property and not Ramji Das, seems to me of no importance. In the first place, the plaintiff does not take the objection that his mother could not act on his behalf; in the second place, Ramji Das joined with his mother in effecting the sale; and in the third place, the plaintiff is not entitled to impeach an alienation made during his minority for the benefit of the estate and with due regard to his interests by his *de facto* guardian, as was held in *Mastu* v. *Nand Lal* (5).

I hold, therefore, that the sale is binding on the plaintiff, and accepting the appeal I reverse the decrees of the Courts below and dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44.
(2) 6 Ind. Cas. 465; 32 A. 575; 7 A. L. J. 667.
(3) 65 Ind. Cas. 315; 1 Pat. 266; (1922) A. I. R. (Pat.) 22; 3 P. L. T. 759.
(4) 61 Ind. Cas. 278; 8 O. L. J. 94.
(5) 73 P. R. 1890.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 272 OF 1924.

August 20, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

Moulvi ABUL HASMAT AHAMAD—APPELLANT

versus

HRISHIKESH DAS AND OTHERS—RESPONDENTS.

Execution of decree—Mortgage-decree—Decree-holder notifying Executing Court that sale would not affect rights of certain defendants, effect of—Amendment of decree—Decree-holder, right of, to proceed against any portion of mortgaged property—Duty of Court.

No amendment of an execution petition should be allowed after it has been registered. Where, however, a mortgagee decree-holder simply notifies to the Court that the sale of the mortgaged properties should not affect the *mirasi* rights or interests of certain defendants and makes no further prayer with respect to them in the execution application, his action does not amount to an amendment of the petition. [p. 745, col. 1.]

It is the right of a mortgagee-decree-holder, in order to realise his dues, to proceed against any of the mortgaged properties or any portion of them inasmuch as his mortgage-debt extends to every bit of the property mortgaged. [p. 745, col. 2.]

A question with regard to the apportionment of the mortgage-debt between different mortgagors defendants must be raised in the mortgage-suit itself, and cannot be raised in execution proceedings. [*ibid.*]

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.), *Hari Kissen Bhagat* v. *Valiat Hossein*, 30 C. 755; 3 C. W. N. 723 and *Inam Ali* v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576, referred to.

A decree-holder is entitled to execute the decree as it stands and the Executing Court is in law bound to execute the decree as it finds it and is not entitled to go behind it. [*ibid.*]

Appeal against an order of the Subordinate Judge, First Court, Dacca, dated the 30th of July 1924.

Babus *Sarat Chandra Roy Choudhury*, *Sures Chandra Talukdar* and *Mohendra Kumar Ghose*, for the Appellant.

Mr. *H. D. Bose*, Dr. *Sarat Chandra Bask*, Babus *Rajendra Chandra Guha*, *Sures Chandra Das* and *Debendra Nath Bhatta*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings in connexion with a mortgage-decree obtained by the respondent against the appellant and some others. It is necessary to narrate briefly the history of this litigation in order to appreciate the points which have been urged before us.

The defendant No. 1 mortgaged several items of property on the 14th June 1915 for a loan of Rs. 2,15,000. After the mortgage he made a gift of the residential house (one of the items of properties mortgaged) to his son defendant No. 2 who is the appellant in this appeal. He also created several *mirases* in favour of defendants Nos. 3 to 8. The plaintiff brought a suit on his mortgage against the original mortgagor defendant No. 1 and the other defendants, as transferees from him since the mortgage. An application was made by the plaintiff in the suit for the appointment of a Receiver which was dismissed by the Trial Court. An appeal was preferred to this Court against that order and at one stage of the appeal notices were not properly served upon the defendants Nos. 3 to 8; and the plaintiff by an application abandoned the appeal at his own risk against those respondents. The appeal was subsequently compromised between the plaintiff and defendants Nos. 1 and 2, the appeal having been withdrawn as against the other defendants. The order passed on the compromise was to the following effect: "It is ordered that the suit be decreed by the Court below after deducting the sum of Rs. 8,033 from the principal which, some of the defendants pleaded, had not been received by them; and the usual mortgage-decree will be drawn up by lower Court and the defendants will be allowed four months time to pay the amount so found due to the plaintiff from the date on which the amount is so ascertained. If after the expiry of the said period the defendants fail to pay the amount, the preliminary decree will be made final." The amount was subsequently ascertained at Rs. 3,59,925-10-0. In pursuance of this consent order by this Court a preliminary decree was drawn up by the Court below on the 16th June 1923 in which defendant No. 1 was described as the principal defendant and defendants Nos. 2 to 8 were described as *pro forma* defendants. It may be useful to quote a portion of the decree to show its nature. "The suit being brought up to-day by consent for preliminary decision by order of the Hon'ble High Court dated the 13th March 1923, in the presence of the Vakils for the defendants Nos. 1 and 2 and in the absence of defendants Nos. 3 to 8, it is ordered and decreed that by consent of both the parties this suit be preliminarily decreed in part with proportionate costs, etc. The defendants Nos. 1 and 2 do pay to the plaintiff, within four months from this day the balance amounting to Rs. 3,55,925-10-0 and proportionate costs and in default the decree be duly made absolute; and the decretal amount be realised thereafter by the sale of the mortgaged properties or a sufficient portion thereof." The money not having been paid within the time allowed, the final decree was drawn up on the 17th November 1923. In that decree also all the eight defendants were made parties as in the preliminary decree. It states that it appearing that the amount, declared due by the preliminary decree, has not been paid, it is ordered that the immoveable properties men-

tioned in the said decree and specified at the foot thereof, or so much thereof as may be necessary "be sold by public auction." On the 5th December 1923, the decree-holder applied for execution of this decree. in that execution petition all the defendants were mentioned as judgment-debtors Including defendants Nos. 3 to 8, execution was sought against all the defendants and it was prayed that the mortgaged properties in the schedule attached thereto be sold and the claim of the decree-holder paid out of the sale-proceeds. To this execution proceeding the appellant took several objections which will be referred to later. On the 29th April 1924, the learned Subordinate Judge overruled those objections and ordered the sale of the properties. Against that order an appeal was taken to this Court (being Appeal from Original Order No. 149 of 1924); and before the hearing of the appeal the properties were sold; but as they did not fetch the upset price fixed by the Court it refused to accept the bids and ordered a re-sale of the properties. When that appeal came on for hearing before this Court this circumstance was brought to the notice of the learned Judge whereupon the appeal was dismissed on the 20th May 1924; but all the matters raised in it were left open. The ground on which the appeal was dismissed was that the learned Subordinate Judge had ordered issue of fresh sale proclamation and, therefore, the order under appeal had become vacated. The fresh sale-proclamation was issued and the 1st August was fixed for the sale. The defendant No. 2 again renewed his objections before the Execution Court and they were again overruled by the learned Subordinate Judge by his order dated the 30th July 1924 which virtually upheld the order passed by the Judge on the 29th April 1924. Against this order the present appeal is preferred by defendant No. 2 and it is argued on his behalf, first, that the original decree being against all the eight defendants the decree-holder is not entitled to execute it against defendants Nos. 1 and 2 alone without having it amended according to law; secondly, that the Court below was wrong in regarding the application for execution as having been amended by the petition filed by the decree-holder on the 5th May 1924. It is argued in this connexion that under the law an application for execution cannot be amended after it is admitted and registered. Thirdly, it is argued that if the decree-holder gives up his claim against some of the judgment-debtors in execution of the mortgage-decree, the amount payable to the decree-holder must be apportioned and before such apportionment the decree cannot be executed. The first and the second points are so intermixed with each other that it will be desirable to treat them together. The objection is that the decree having been passed against eight defendants the decree-holder is not entitled to take out execution only as regards two of them and give up his claim or express his intention not to proceed against the other defendants. As the decree is a joint mortgage-decree, it is indivisible and cannot be executed against some of the defendants. If the application made by the plaintiff giving up his claim against defendants Nos. 3 to 8 is taken as an application for amendment of the execution petition, such amendment cannot be allowed and is against the law. Now the preliminary decree was, no doubt, passed against all the defendants. The question, therefore, arises as to whether the plaintiff is entitled to proceed in execution against two of these defendants. The history of this case which we have related above will show that so far back as the 13th March 1923 defendants Nos. 1 and 2 both took upon themselves the liability for the entire amount and the defendant No 2 also undertook to pay the amount within a certain time and if he failed to do so he agreed that the mortgaged properties would be sold. The other defendants did not appear in the suit or at the time when it was compromised, nor was the mortgage-bond proved in their presence. The money not having been paid in time, the decree-holder wants to sell the mortgaged properties in terms of the compromise. He has not given up his claim against any of the defendants. What the decree-holder wants in this proceeding is to sell the properties as they stood at the date of the mortgage. The defendant No. 1 is really the person against whom the mortgage-decree was passed and upon whose failure to pay the decretal amount within the time allowed the execution was directed to proceed against those properties as they stood at the time of the mortgage. The question of amendment under these circumstances hardly arises. In the first place, the decree-holder has nowhere asked for the amend-

ment of the application for execution. In his petition dated the 5th May 1924 he simply notifies to the Court that the sale of the properties would not affect the *mirasi* right or interest of defendants Nos. 3 to 8. He makes no further prayer in that application. On the authority of the Full Bench of *Asgar Ali* v. *Troilokya Nath Ghose* (1), it can be maintained that no amendment of execution petition should be allowed after it has been registered. But the present case is not a case of amendment after registration of the petition for execution. Then again, there is no order by the Court upon this petition the effect of which is to amend the petition of objection by removing the names of defendants Nos. 3 to 8 from it.

The most important question that has been raised in this case is the question of apportionment. It is argued that the decree-holder having given up his claim as against defendants Nos. 3 to 8 cannot proceed to take out execution of the entire decretal amount against the other defendants ; but there should be an apportionment of the charge on all the properties and the amount which the decree-holder is entitled to recover from the defendant No. 2 ascertained, before execution can proceed. Several authorities have been cited before us in support of this contention. But they do not support exactly what the learned Vakil for the appellant contends for. Reference is made to the cases of *Hari Kissen Bhagat* v. *Veliat Hossein* (2) and *Imam Ali* v. *Baij Nath Ram Sahu* (3) as authorities for the proposition that where a mortgagee gives up or releases any person interested in the equity of redemption in respect of a portion of the mortgaged properties or where the effect of his conduct is to cause such release, there ought to be an apportionment of the mortgage-debt and the mortgagee cannot recover more than what falls to the share of the properties not released. This proposition is unquestionably correct and supported by the authorities. But questions like these can be raised and decided in suits. The learned Counsel for the respondent contends that questions like the present cannot be agitated in execution proceedings; and in support of this proposition he has drawn our attention to the cases of *Amir Chand* v. *Bukshi Sheo Pershad* (4) and *Nafar Chunder Mundul* v. *Baikanto Nath Roy* (5). We think that there is a great deal of force in the view urged by the respondent. The decree-holder is entitled to execute the decree as it stands. The Executing Court is in law bound to execute the decree as it finds it and is not entitled to go behind it. The decree-holder, therefore, has the right to execute the decree against all the defendants. In the execution of the decree he may express his intention not to proceed against certain persons or certain property. It is the indisputable right of the mortgagee that he can, in order to realise his dues, proceed against any property or any portion thereof inasmuch as his mortgage-debt extends to every bit of the property mortgaged. What the decree-holder has in this case sought is to execute the decree against all the defendants but to sell the interest of defendants Nos. 1 and 2. No authority has been cited before us that he is not entitled to do so ; nor has any authority been placed before us in support of the contention of the appellant that the question of apportionment can be gone into in execution proceedings. Then, it is not clearly a case where the decree-holder has given up any claim in respect of the properties as against any defendant in the suit. The mortgagee seeks to sell the mortgaged properties in the state in which they were at the time of the mortgage. The effect of his applying not to proceed against the other defendant is to leave the question between himself and the subsequent transferees of the mortgaged properties open for future consideration. This may or may not be the result of his conduct, but that is what he wants to do. We may mention in this connexion that under the mortgage-bond the defendant No. 1 bound himself not to grant any lease or under-tenure or to make any gifts of the mortgaged properties. He has not kept to his promise.

There is another matter which may be taken into consideration, *viz.*, the defendant No. 1's conduct in this case. The learned Counsel for the respondent has rightly submitted that there is hardly any equity in his favour. He became a party to the consent order passed by this Court for the preliminary and the final decrees being passed in the form in which they

(1) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.).
(2) 30 C. 755; 7 C. W. N. 723.
(3) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(4) 34 C. 13; 4 C. L. J. 573.
(5) 4 C. L. R. 156.

were passed. One of the conditions was that if he failed to pay the money within a certain time the mortgaged properties would be sold. It would hardly lie in his mouth now to say that though he has not paid the money the properties should not be sold. The learned Counsel for the respondent rightly argues that by his conduct the judgment-debtor is debarred from raising the question. We do not think that the present defendant ought to be allowed to question the order of the Court below on the grounds raised before us. We, therefore, hold that this appeal fails and is dismissed with costs. We assess the hearing-fee at 5 gold *mohurs*.

We understand that a fresh sale-proclamation, in view of the events which have happened since the appeal was filed, has to be issued. We are also informed that the Receiver has sent a communication to the learned Judge that if a certain reasonable time is allowed he may pay off the dues of the decree-holder by privately selling a portion of the mortgaged properties and thereby save a portion of the properties of the judgment-debtors. If it is so, the learned Judge will take this matter into his consideration.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 134 OF 1924.

July 30, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Dalal.

Sheikh MUHAMMAD HABIBULLAH—JUDGMENT-DEBTOR—APPELLANT

versus

R. B. Seth TIKAM CHAND—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24—"Suit," whether includes execution proceeding—Transfer of execution proceedings—Jurisdiction of Court to which proceedings transferred

The word "suit" in s. 24 of the C. P. C. includes an execution proceeding and a Court to which an execution proceeding is transferred under the section has jurisdiction to continue the proceeding. [p. 746, col. 2.]

Gaya Prashad v. *Bhup Singh*, 1 A. 180; 1 Ind. Dec. (N. S.) 140, followed.

Execution first appeal from a decree of the Judge of the Court of Small Causes at Agra, dated the 15th of March 1924.

Messrs. *A. P. Dube* and *P. L. Banerji*, for the Appellant.

Dr. *S. N. Das* and Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—It is objected in this appeal that the Court of Small Causes at Agra had no jurisdiction to carry on execution proceedings on the application of the decree-holder in Execution Case No. 76 of 1923. The decree was passed by the Additional Subordinate Judge, and the application for execution was filed by the decree-holder in that Court. Subsequently on 30th November 1923, the District Judge of Agra transferred, for overwhelming reasons, this particular application for execution to the Court of the Small Cause Court Judge. It was argued here that the District Judge had no jurisdiction under s. 24 to do so. We are, of opinion, that the word "suit" in s. 24 will include execution proceedings. This was held by this Court so far back as 1876 under Act VIII of 1859, s. 6 [*Gaya Prashad* v. *Bhup Singh* (1).] It was pointed out that under s. 38 a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution, and that, therefore, no other Court can execute a decree. The reason for the passing of s. 38 is different. It was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court *A* is transferred to Court *B* and Court *B* decides it, s. 38 enjoins that application for execution shall be presented to Court *B* and not to Court *A*, that is the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under s. 24. The analogy of the provisions of s. 141 does not hold except in favour of the view that suits include execution proceedings. Under that section the procedure provided by the Code in regard to suits is made applicable to all proceedings in any Court of civil jurisdiction. This means that the procedure for suits as well as the procedure for executing decrees shall apply to other proceedings both as to the trial of those proceedings and the carrying out of the orders passed in those proceedings.

(1) 1 A. 180; 1 Ind. Dec. (N. S.) 140.

Reference by the appellant's learned Counsel to s. 39 of the C. P. C. indicated a confusion between two totally different matters. Section 39 covers cases of transfer of a decree and not of an application for execution. Once a decree is transferred under s. 39 the Court which passed the decree ceases to have jurisdiction till it receives a certificate under s. 41. Under O. XXI, r. 10 an application for execution is to be presented to the Court to which the decree is transferred, when the decree is sent to another Court for execution, and not to the Court which passed it. This is totally different from the transfer of one particular application for execution under s. 24 of C. P. C. For instance, in the present case, the Small Cause Court has jurisdiction to dispose of this particular execution matter but not to receive any fresh application for execution, which will lie in the Court of the Additional Subordinate Judge.

We hold that the lower Court had jurisdiction and dismiss this appeal with costs which shall include Counsel's fees here on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1195 OF 1922.

July 31, 1924.

Present:—Mr. Justice B. B. Ghose.

SURENDRA NATH BANDOPADHYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JABED ALI TALUKDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 158-B—Rent-suit by one of several co-sharers—Procedure—Parties—Execution of decree—Sale—Auction-purchaser, position of.

Section 158-B of the Bengal Tenancy Act requires that in order to enable one or more co-sharer landlords to sell a tenure all the remaining co-sharer landlords should be made parties to the suit and also that when one or more co-sharer landlords, having obtained a decree in such a suit, applies for execution of a decree by sale of the tenure, notices of the application for execution should be given to all the co-sharers. The provisions of this section must be strictly followed in order to give complete title to the auction-purchaser in such a sale. Where all the co-sharer landlords are not made parties to the suit an auction-purchaser in execution of a decree obtained in the suit does not purchase the holding free from all incumbrances. [p. 748, col. 2; p. 749, col. 1.]

Appeal against a decree of the Additional Subordinate Judge, Backergunj, dated the 17th of February 1922, reversing that of the Munsif, First Court, Patuakhali, dated the 22nd of July 1920.

Babus *Gunada Charan Sen* and *Prasanta Bhusan Gupta*, for the Appellants.

Babu *Jatindra Nath Sanyal*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs and it arises out of a suit for rent with regard to a *howla* which is situated within a *taluk* under a *zemindari*. The defendants Nos. 1 and 2 are tenants of the *howla*. But the real question in dispute is between the plaintiffs and the defendant No. 9 as to the title to the superior *taluki* interest which the plaintiffs claim. The Court of first instance passed a decree in favour of the plaintiffs. On appeal by the defendants Nos. 1, 2 and 9 the decision of the Munsif, was reversed by the Subordinate Judge and the suit has been dismissed. The plaintiffs appeal to this Court, and their contention is that, on the facts found, the plaintiffs are entitled to the rent claimed from the defendants Nos. 1 and 2 and the defendant No. 9 has not acquired the superior title in the *taluks* of the plaintiffs by virtue of his purchase of the *taluki* interest.

The facts stand thus:—There was a *taluk* called Abdul Kasim the owner of which was one Akimannessa Bibi. This *taluk* was under the *zemindari* of which there are several co-sharers. The plaintiffs were the proprietors of the *zemindari* to the extent of one-anna odd share. They brought a suit for rent against the lady Akimannessa for their share of the rent of the *taluk* Abdul Kasim and put the *taluk* to sale and purchased it themselves on the 21st September 1909. One of the co-sharers of the *zemindari* was the Nawab of Dacca. In the year 1910 he brought a suit for the rent of the *taluk* Abdul Kasim and it appears that he purported to have framed his suit under s. 148-A of the Bengal Tenancy Act for the entire rent due on account of the *taluk*. The Nawab executed the decree and had the *taluk* sold. It was purchased by the defendant No. 8 in the name of defendant No. 7 and the defendant No. 9 subsequently purchased it at a sale *inter vivos* from defendant No. 8.

The question in controversy turns upon the effect of the sale in execution of the Nawab's decree which was held on the 9th March 1911. It is contended on behalf of the plaintiffs that this sale did not affect the interest which he had purchased in 1909. On the other hand it is contended by defendant No. 9 that the sale by the Nawab was under s. 158-B of the Bengal Tenancy Act and it is the entire interest in the *taluk* Abdul Kasim free from all incumbrances which was purchased by the auction-purchaser and, therefore, the plaintiffs had no title which would be effective as against the title of defendant No. 9 under the auction-sale of the 9th March 1911.

Two points were raised by the defendants in their appeal before the Subordinate Judge. The first point was; was the sale held at the instance of the Nawab of Dacca and his co-sharers a rent sale or not? and secondly, did the conduct of the plaintiffs-respondents in attaching the sale-proceeds in execution of the decree held at the instance of the Nawab and his co-sharer and in appearing in that case in which the decree was being executed as a rent-decree estop them from questioning the sale as a rent-sale and the decree as a rent-decree? The learned Subordinate Judge has decided both the points against the plaintiffs. The controversy is with regard to the fact that one co-sharer, Golam Ajam by name, of the *zemindari* was left out in the execution proceeding of the rent-decree of the Nawab. Section 158-B requires that in order to sell a tenure by one or more co-sharer landlords all the remaining co-sharer landlords should be made parties to the suit, and also that when one or more co-sharer landlords having obtained a decree in a suit properly framed applies for execution of a decree by the sale of the tenure notices of the application for execution should be given to all the co-sharers. If Golam Ajam was really a co-sharer in the *zemindari* then the execution sale by the Nawab could not have given the auction-purchaser a title free from all incumbrances, because admittedly Golam Ajam was not a party either in the suit nor was any notice of the execution proceeding given to him. The Trial Court found that Golam Ajam was a co-sharer in the *zemindari*. It is contended by the learned Vakil for the respondents that the effect of the finding of the Subordinate Judge is that Golam Ajam was not a co-sharer. The *kobala* by which Golam Ajam purported to have purchased 1 *kara* share in the *zemindari* is dated the 27th November 1909. The Subordinate Judge deals with the question in this way and it is necessary I think to quote some passages from his judgment:—"The important question, therefore, arises whether Golam Ajam was a necessary party in the rent-suit. Golam Ajam does not come forward:" again "Golam Ajam gave *ijara* of his 1 *kara* share to plaintiff No. 1's son (Hari Prosad's son). Hari Prosad must have been the *ijaradar* though the deed might have been in the name of one of his sons. It is clearly proved that Hari Prosad was in possession of the share as *ijaradar* of Golam Ajam." Then lower down: "The said sale and decree cannot but be a rent sale and decree as Hari Prosad as co-sharer as well as *ijaradar* of Golam Ajam was a party in the case." Upon these findings he comes to the conclusion, "I, therefore, hold that the sale in question was a rent sale." The finding is clear that Golam Ajam had a share which was given in *ijara*. There is, however, another passage where the Subordinate Judge has said this: "It can be safely inferred, therefore, that Golam Ajam was no proprietor before and he was no necessary party in the Nawab's rent-suit." This observation of the Subordinate Judge is probably with reference to the fact that Golam Ajam's name was not registered under the Land Registration Act till 19th August 1910 and the rent-suit of the Nawab was brought on the 15th April 1910. It seems to me that the Subordinate Judge was in error in thinking that although Golam Ajam had purchased a share in the *zemindari* because his name was not registered under the Land Registration Act he should be considered as no proprietor till his name was registered. The special provision of the Bengal Tenancy Act which allows one or more co-sharer landlords to sell a tenure or holding in execution of their decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the *ijaradars* under a particular co-sharer was a party in another capacity being himself a co-sharer in the *zemindari* and, therefore, the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in section 158-B of the Bengal Tenancy Act. In my opinion, therefore, the special

provision of the Bengal Tenancy Act not having been followed in the rent execution case by the Nawab, the auction-purchaser did not purchase the holding free from a l incumbrances and the interest which the plaintiffs acquired by their purchase in 1909 was not affected by the subsequent sale.

Then comes the question as regards estoppel. I feel great difficulty in understanding how the Subordinate Judge comes to the conclusion that the plaintiffs are precluded from asserting their title in the property. It is contended by the learned Vakil for the respondents that it was the duty of the plaintiffs to give notice of the fact that all the co-sharers in the *zemindari* had not been made parties in the rent-suit or had not been served with notice of the execution under s. 158-B as the plaintiffs had appeared in the suit and in the execution proceedings before the Court. I cannot see that there was any duty cast upon the plaintiffs who were made *pro forma* defendants in the suit to give notice to intending purchasers that the rent-suit of the Nawab or the execution sale or the proceedings in execution were not such as to confer title on the purchaser as contemplated under the special provision of the Bengal Tenancy Act. If there was no such duty cast upon him his silence could not have influenced the conduct of the auction-purchaser in any way and it cannot be said that the plaintiffs are estopped by this conduct of theirs in asserting their title.

It is next urged that the plaintiffs are precluded from asserting their interest by reason of the fact that they had attached the surplus sale-proceeds of the execution sale under the Nawab's decree. But they did not draw out the money, and the mere fact that they had attached the surplus sale-proceeds in order to satisfy any decree obtained by them but did not proceed further cannot preclude them from claiming title to the property. It is then urged by the learned Vakil for the respondents that the plaintiffs had abandoned the title acquired by their purchase in 1909 because they had subsequently brought a suit for rent against Akimannessa Bibi in 1911 for the period subsequent to the date of sale. It appears that the sale of the plaintiffs was confirmed in 1913. Under the new Code under s. 65 there is no doubt that the title of the purchaser vests from the time of the sale. But apparently the parties were under the impression that till confirmation the plaintiffs' title had not been completed and that seems to have been the impression in the mind of the Subordinate Judge also. In any case, however, this question of abandoning the right of the plaintiffs was not raised in the Court of Appeal below, and I do not think that it would be proper to allow the defendants to raise this question in second appeal for the first time. An endeavour was made by the learned Vakil for the respondents to argue that the plaintiffs' conduct amounted to fraud. But no question of fraud was raised either in the Court of first instance or in the Court of Appeal.

On these grounds I am of opinion that the judgment and decree of the Subordinate Judge dated the 17th February 1922 should be set aside and those of the Munsif restored with costs in this Court and in the Court below.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1120 OF 1924.
July 31, 1924.
Present:—Mr. Justice Sulaiman.
Raja SURAJPAL SINGH—PLAINTIFF—APPELLANT
versus
SAHIB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 11—Redemption suit—Decree for possession and recovery of surplus profits—Execution of decree barred—Fresh suit, whether lies.

Where in a suit for redemption of a usufructuary mortgage the plaintiff alleges that the mortgage has been satisfied out of the usufruct and he claims possession of the property and of the surplus amount received by the mortgagee out of the profits, and a decree is passed for possession and the surplus amount, the decree is purely one for recovery of possession and recovery of money. After the passing of such a decree the rights of the mortgagor and mortgagee become merged in the decree and the mortgage is no longer subsisting. The mortgagor's remedy in such a case is to take possession of the mortgaged property by execution of the decree and to realise the surplus by execution. If he allows this remedy to become barred by time it is no longer open to him to evade the Law of Limitation and bring a new suit for redemption with a view to seek the same relief. [p. 750, col. 2.]

Ramanand v. *Jairam*, 59 Ind. Cas. 632; 18 A. L. J. 1001; 43 A. 170; 2 U. P. L. R. (A.) 379, referred to.

Sita Ram v. *Madho Lal*, 24 A. 44; A. W. N. (1901) 194 (F. B.), distinguished.

Second appeal against a decree of the District Judge, Aligarh, dated the 8th of April 1924.

Mr. *N. P. Asthana*, for the Appellant.

JUDGMENT.—The only point in this case was a pure point of law, but, in my opinion, the view taken by the Courts below on that point is correct.

There was an usufructuary mortgage executed on the 7th April 1891 in favour of the defendant's predecessor. In 1907 the plaintiff's predecessor brought a suit for redemption of the mortgage and for recovery of a certain amount as surplus on the allegation that the mortgage-debt had been satisfied out of the usufruct and that there was a balance in his favour. The Court found that the mortgage-debt had been fully satisfied and had, in fact, been overpaid. The suit was accordingly decreed not only for possession but also for a sum of Rs. 39 as surplus profits. The plaintiff's predecessor unfortunately died soon after and no steps were taken to execute that decree. The result was that the execution of that decree became barred by time and in fact more than 12 years have expired. The plaintiff then instituted a fresh suit for redemption alleging that the mortgage was still subsisting and that his equity of redemption was still intact. The Courts below, however, have dismissed the suit holding that his claim is not maintainable.

It is true that the previous suit originally was a suit for redemption but when the Court found that the mortgage had been satisfied and that, in fact, a surplus amount was due to the plaintiff's predecessor, the decree that was passed was really a decree for possession together with a decree for the surplus amount. The form in which the decree was prepared was the printed form under s. 92 of the Transfer of Property Act, but if had the second portion of it cut out, which would have become necessary only if any amount had to be paid by the plaintiff.

In my opinion, therefore, the decree was purely a decree for recovery of possession and recovery of money. After the passing of that decree the rights of the mortgagor and the mortgagee became merged in the decree, and the mortgage was no longer subsisting. The plaintiff's remedy, therefore, was to take possession by execution of that decree and to realise that surplus by execution. If owing to the laches of his predecessor or himself he has allowed his remedy by way of execution to become barred by time it is no longer open to him to evade the Law of Limitation and bring a new suit with a view to seek the same relief. The decree that was passed in the previous case was really a decree which would be passed under the new Code under O. XLI, r. 11, though no such provision was expressly embodied in the Transfer of Property Act.

It has been laid down in *Ramanand* v. *Jairam* (1) that when a person obtains a decree for recovery of possession of property and allows it to be barred by time, a separate suit on that decree cannot be maintained. The case of *Sita Ram* v. *Madho Lal* (2) is clearly distinguishable because in that case the plaintiff had to pay a certain amount of money and the decree provided that if payment was not made within the time fixed "the judgment should be deemed to be non-existent." The rule of law laid down in that case cannot be extended so as to apply to the facts of this case.

I, therefore, dismiss the appeal summarily.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 632; 18 A. L. J. 1001; 43 A. 170; 2 U. P. L. R. (A.) 379.

(2) 24 A. 444; A. W. N. (1901) 194 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 299 OF 1923.

August 14, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

AZAM KHAN—OPPOSITE PARTY No. 2—APPELLANT

versus

UMEDALI MORAL—PETITIONER AND CHAND KHAN—OPPOSITE PARTY No. 1 AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 173—Civil Procedure Code (Act V of 1908), s. 47—Order under s. 173, Bengal Tenancy Act—Appeal, whether lies—Auction-purchaser, position of.

Where a question decided under s. 173 of the Bengal Tenancy Act is one which is covered by s. 47 of the C. P. C. an appeal lies against the order mad

by the Court though no provision for such an appeal is made in the Bengal Tenancy Act itself. No appeal, however, lies at the instance of the auction-purchaser against an order passed under s. 173 of the Bengal Tenancy Act, the reason being that the auction-purchaser is not one of the parties to the suit within the meaning of s. 47 of the C. P. C. [p. 751, cols. 1 & 2.]

(Case-law discussed.)

Appeal against an order of the Subordinate Judge, Dacca, dated the 11th of May 1923, reversing that of the Munsif, First Court of that place, dated the 21st of August 1922.

Babu *Trailakhyanath Ghose*, for the Appellant.

Babu *Charu Chandra Chowdhury*, for the Respondents.

JUDGMENT.—This is an appeal by the auction-purchaser in a sale pursuant to a rent decree. One of the judgment-debtors applied under s. 173 (3), Bengal Tenancy Act to have the sale set aside mainly on the ground that the auction-purchaser was a *benamdar* for one of the judgment-debtors, *viz.*, Chand Khan. The First Court dismissed the application on several grounds. The learned Subordinate Judge in appeal held that the auction-purchaser was the *benamdar* of one of the judgment-debtors Chand Khan and in that view set aside the sale. The auction-purchaser appeals from this decision; and a preliminary objection has been taken to the competency of the appeal on the ground that no second appeal lies in the present case.

Section 173, Bengal Tenancy Act, does not confer any right of appeal nor does any other provision of the Bengal Tenancy Act or any other Act provide for an appeal against an order passed under s. 173, Bengal Tenancy Act. But it has been held that where the question is one which is covered by s. 47, C. P. C., an appeal is allowable from an order passed under s. 173, Bengal Tenancy Act, though no provision for appeal is made in the Act itself. The right to appeal, therefore, from an order passed under s. 173, Bengal Tenancy Act, depends upon the questions raised and upon the party appealing. Hence the appellant can maintain the present appeal if he can bring his case within s. 47, C. P. C. The first point, therefore, which must be established is that he is a party to the suit under s. 47. It is argued on his behalf that the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1) is an authority for the proposition that the auction-purchaser is a party within the meaning of s. 47, C. P. C. We do not think so. Their Lordships of the Judicial Committee laid down in that case that when a question is raised between parties to the suit within the meaning of s. 244 of the Code of 1882, the fact that the auction-purchaser is interested in the decision of that question does not take the case out of the operation of that section. See *Joytara* v. *Ram Krishna Seal* (2). The question as to whether the auction-purchaser has a right of appeal from an order under s. 173, Bengal Tenancy Act has been considered by this Court in several cases. It is sufficient for our present purpose to refer to the case of *Jadab Chandra Mukherjee* v. *Joy Gopal Bhattacharya* (3) in which all the previous cases have been summarised and commented upon. The result of all these decisions is that no appeal lies at the instance of the auction-purchaser against an order passed under s. 173, Bengal Tenancy Act, the reason being that he is not one of the parties to the suit within the meaning of s. 47, C. P. C. There is one case which requires special notice as on the face of it, it lends support to the contrary view. In *Chand Monee Dasya* v. *Santo Monee Dasya* (4), there is a general observation that having regard to the decision of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), an application to set aside a sale under s. 173, Bengal Tenancy Act, is an application cognizable under s. 244 of the Code of 1882 and, therefore, a second appeal lies. The learned Vakil for the appellant relies upon the *dictum* and argues that it empowers the auction-purchaser to maintain a second appeal. But that case has been distinguished in the case of *Jadab Chandra Mukherjee* v. *Joy Gopal Bhattacharya* (3) and has been explained in the case of *Joytara* v. *Ram Krishna Seal* (2), referred to above. In that case the judgment-debtors were the applicants. It does not appear from the report of the case as to who was the appellant in the lower Appellate Court. The appeal, therefore, was competent by virtue of s. 244, C. P. C. The point whether the auction-purchaser is also entitled to appeal under that section was not raised

(1) 19 C. 683; 19 I. A. 166; 6 Sar P. C. J. 209; 9 Ind. Dec. (N. S.) 898.

(2) 7 Ind. Cas. 769; 13 C. L. J. 257; 15 C. W. N. 512.

(3) 20 Ind. Cas. 191; 19 C L. J. 81.

(4) 24 C. 707; 1 C. W. N. 534; 12 Ind. Dec. (N. S. 1140.

and decided in that case. On the whole we are of opinion that this appeal is incompetent and does not lie.

We are next asked by the learned Vakil for the appellant to treat the memorandum of appeal as a petition for revision and to interfere with the decision of the Court below in the exercise of our revisional jurisdiction. We do not think that this is a case in which we should exercise our extraordinary jurisdiction. The objection to the legality of the order of the Court below is that the sale could not be partially set aside. The learned Subordinate Judge has given effect to the compromise between some of the parties and allowed the sale of a portion of the property to stand and set aside the sale to the extent of the interest of the respondent. This may or may not have been the correct procedure to follow but he has done substantial justice to the parties. Besides we do not see how the appellant has been aggrieved. It has been held that he is a *benamdar* for judgment-debtor No. 2. Whether the sale is partially or entirely set aside, it is of no concern to him. We think that there are no merits in appellant's case.

The result is that this appeal is dismissed with costs. We assess the hearing-fee at two gold *mohurs*.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 293 OF 1924.

October 13, 1924.

Present:—Mr. Neave, A. J. C.

MADHO PRASAD—APPLICANT

versus

SUKH DIN AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review, grounds for—Point considered and decided—Error, whether ground for review.

When a point of fact or law has been brought to the notice of the Court trying the case and has been referred to in its judgment and decided by it, no ground for review is furnished by the fact that such decision is considered erroneous by the party against whom it was given.

Application under s. 114 and O. XLVII, r. 1, C. P. C., against the judgment and decree of the First Additional Judicial Commissioner, Oudh, dated the 24th March 1924.

Messrs. *Niamatullah* and *H. D. Chandra*, for the Applicant.

Messrs. *Ram Bharose Lal*, *Raj Narayan Shukla* and *Bisheshwar Nath*, for the Opposite Party.

ORDER.—This is an application for a review of an order passed by this Court in appeal. A number of grounds have been taken in the application. In every one of these the contention of the applicant is that the Court took a wrong view either of the facts or law in the case. One only of these grounds has been pressed in argument. This is that the Court was wrong in refusing to admit certain evidence. It is mentioned in the judgment that all this evidence except that of one witness was abandoned by the Counsel who argued the appeal, and the contention now put forward is that Counsel was wrong in so abandoning this evidence, and that this is both a mistake or error apparent on the face of the record and a sufficient reason for admitting a review. It appears, however, from the judgment that the Court did consider this question of the admissibility of this evidence, and rightly or wrongly came to the conclusion that it should not be admitted.

When a point of fact or law has been brought to the notice of a Court trying a case and has been referred to in its judgment and decided by it, no ground for review is furnished by the fact that such decision is considered erroneous by the party against whom it was given. If such grounds were to be recognised there would be no end to applications for review. It would be impossible to draw any definite line and any party considering himself aggrieved by a decision against him could always contend either that his Counsel had not competently argued the point or that his Counsel was not justified in yielding when he did.

None of the grounds in this application appear to come within the provisions of r. 1 of O. XLVII of the C. P. C. and it is accordingly rejected with costs.

Z. K. *Application rejected.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2511 OF 1921.

March 18, 1924.

Present:—Mr. Justice Mukerji.

JOAD ALI—DEFENDANT—APPELLANT

versus

Srimati RAIKISHORE SAHA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pleadings—New case—Court, power of—Prejudice to defendant.

A Court is not entitled to make a case inconsistent with or different from that which is presented to it on behalf of the parties, and it is not permissible for a Court to pass a decree in favour of a plaintiff upon the basis of a case which is inconsistent with the case which he himself has put forward. This rule is based upon the question of prejudice to the defendant. [p. 753, col. 2; p. 754, col. 1.]

In a suit by a landlord for recovery of possession of a plot of land which the defendant alleged to have purchased from a former tenant of the plaintiff, the defence of the defendant was that the holding to which the plot in dispute appertained was not the holding of his transferor alone but belonged to him and several others, having devolved on them on the death of their father, and that inasmuch as the other heirs of the latter were still living, the sale of the holding by one of them did not operate to transfer the entire holding so as to give the landlord the right of re-entry. The finding was that although there were other heirs of the deceased tenant living they had no interest in the holding and that the transferor of the defendant was the only tenant of the holding:

Held, (1) that the consequence of the finding was that the transfer in favour of the defendant operated to extinguish the rights of his transferor in the holding and constituted abandonment such as entitled the landlord to re-enter; [p. 755, col. 2.]

(2) that it could not be said that the finding was contrary to the claim of the plaintiff. [p. 755, col 2.]

Eshenchunder Singh v. *Shamchurn Bhutto*, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J 209; 1 Suth. P. C. J. 649; 20 E. R. 3 (P. C.), *Mukhoda Soondary Dasi* v. *Ram Churn Karmokar*, 8 C. 871; 11 C. L. R. 194; 7 Ind. Jur. 32; 5 Ind. Dec. (N. S.) 562 and *Shibkristo Sircar* v. *Abdool Hakeem*, 5 C. 602; 5 C. L. R. 455; 2 Ind. Dec. (N. S) 991, distinguished.

Appeal against a decree of the Subordinate Judge Third Court, Tipperah, dated the 18th of May 1921, reversing that of the Munsif, Second Court, Nabinagar, dated the 7th of July, 1920.

Babu *Birendra Chunder Das*, for the Appellant.

Babu *Upendra Coomar Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff as a co-sharer landlord for recovery of possession from the defendant of a plot of land which the defendant alleges to have purchased from a former tenant of the plaintiff named Wazuddi. The defence of the defendant is that the holding to which this plot of land appertains was not the holding of Wazuddi alone but belonged to Wazuddi and several others, the same having devolved on them on the death of Wazuddi's father Asanullah, and that, inasmuch as the other heirs of Asanullah are still living, the sale of the holding by Wazuddi did not operate to transfer the entire holding such as would give the landlord the right of re-entry. It is unnecessary to refer to the other allegations in the pleadings of the parties. The learned Munsif dismissed the plaintiff's suit being of opinion that it had been proved that the holding originally belonged to Asanullah, that there were heirs of Asanullah other than Wazuddi, that they had not abandoned the holding, that the possession which Wazuddi exercised in respect of the holding was one exercised not merely on his own behalf but on behalf of the other co-sharers as well and that, by the transfer by Wazuddi in favour of the defendant, the entire holding did not pass. On appeal by the plaintiff, the learned Subordinate Judge came to certain findings which it will be necessary for one to examine more closely presently. In the result, he decreed the plaintiff's suit. Against that decision the present appeal has been preferred by the defendant.

The contentions put forward on behalf of the defendant-appellant are principally two. The first contention is that the learned Subordinate Judge has given the plaintiff a decree upon certain findings of fact which are inconsistent with the case set up by her and the learned Vakil appearing on behalf of the appellant contends that it is not permissible for a Court to make a new case to that which has been put forward in the pleadings of the parties and to pass a decree in favour of the plaintiff thereupon. The second contention is that the findings, which the learned Subordinate Judge has arrived at in the present case, are not sufficient for the purpose of holding that the tenancy of Asanullah has terminated or that the interest of the other heirs of Asanullah in the holding in question has come to an end so as to enable the plaintiff to take possession of the holding.

Now, with regard to the first contention, it is a settled proposition of law that a Court is not entitled to make a case inconsistent with or different from that which

is presented to it on behalf of the parties, and that it is not permissible for a Court to pass a decree in favour of a plaintiff upon the basis of a case which is inconsistent with the case which he himself has put forward. This rule is based upon the question of prejudice and, if in the present case there was anything to show that the defendant had in fact been prejudiced by reason of the learned Subordinate Judge basing his decree upon the findings at which he arrived, I would certainly have held that that decree could not be sustained in law. Furthermore, if it appeared to me on a consideration of the pleadings as set out in the plaint that the case which the lower Appellate Court found was inconsistent with that which was put forward on behalf of the plaintiff, I certainly would have held that the plaintiff was not entitled to a decree on the basis of those findings. In support of this contention, reliance has been placed by the learned Vakil appearing on behalf of the appellant upon certain decisions which it will be necessary for me to refer to. The first case relied upon by him is the case of *Eshenchunder Singh* v. *Shamachuran Bhutto* (1). The Judicial Committee in that case observed that it was incorrect to conclude parties by inferences of fact, not only inconsistent with the allegations in the plaint, constituting the case the defendants had to meet but which were in reality contradictory to the case made by the plaintiff in the Court below. Now applying the principle laid down in that case to the facts of the present case, if upon the facts found by the learned Subordinate Judge it could be said that those facts were inconsistent with the case which the plaintiff put forward, the appellant certainly would have succeeded so far as this contention is concerned. Now, what is the case that was presented in the plaint? It was a plain and simple case to the effect that Wazuddi, was the tenant in respect of the holding, that he had transferred the holding to the defendant and that the defendant had not acquired any interest by such transfer and upon that ground relief was sought for in the shape of ejectment. The defendant in the present case set up the plea that, although Wazuddi was the person whose name was recorded in the plaintiff's *sheristha* as the tenant of the holding, not only he but other persons also who were his co-sharers were tenants in respect of the holding all of them having derived their interest from Asanullah, the father of Wazuddi. This allegation, in my opinion, is not inconsistent with the allegation which the plaintiff has made in the plaint and, if the Court found, as it has done in the present case, that, although Wazuddi was the recorded tenant, the original tenant in respect of the holding was his father and that he had other heirs who might or might not have acquired an interest in the holding and who were at the date of the suit not co-sharers in respect of this tenancy with Wazuddi and if, upon those findings, the Court passed a decree in favour of the plaintiff, I am unable to say that those are findings which are inconsistent with the plaintiff's case. In that view of the matter, I think the first case relied upon by the learned Vakil on behalf of the appellant has no application to the facts of the present case.

The next case relied upon by the appellant is the case of *Mukhoda Sundary Dasi* v. *Ram Churan Karmokar* (2). In that case, the learned Judges laid down this proposition of law: "When a plaintiff sues to recover possession of property on the allegation that he had purchased it with his own money, and the suit is dismissed in the Court of first instance, the Court of Appeal is not justified in giving the plaintiff a decree for a portion of the property, on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer." This proposition of law necessarily follows from the facts which appear to have been the facts of that case. There the plaintiff came to Court with the allegation that certain property had been purchased by himself with his own money. On that ground, he claimed to recover possession of the property. He failed to establish that claim in the Court of first instance. In the Court of Appeal, he relied upon the fact that he was a member of a joint Hindu family and that, as the property belonged to that family, he was entitled to a share of it upon the ground that he was a mem-

(1) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 1 Suth. P. C. J. 649; 20 E. R. 3 (P. C.).

(2) 8 C. 871; 11 C. L. R. 194; 7 Ind. Jur. 32; 5 Ind. Dec. (N. S.) 562.

ber of that family. This new allegation which he put forward before the Court of Appeal, if found, would be the basis of a decree which must in its very essence be a decree of an entirely different character from the one that was sought for originally in the plaint. I, therefore, think that the facts of that case are entirely different from the facts of the present case.

The next case relied upon in support of the first contention of the appellant is the case of *Shibkristo Sircar* v. *Abdul Hukeem* (3). That was a suit on the Original Side of this Court before Wilson J. The suit had been instituted to recover a specified sum of money for the hire of cargo boats and no other relief was claimed by the plaintiff. The defendant alleged and proved that he was merely the agent of the plaintiff to find hirers for the boats and that he was not liable for the hire of the boats. Upon that, the plaintiff sought to amend his plaint by abandoning his own story and adopting that of the defendant and asking relief on that footing. It was held by Mr. Justice Wilson that to allow the plaintiff to adopt the allegations made by the defendant in his written statement would be to make the plaintiff to seek quite a different relief upon a state of fact which would be inconsistent with the facts set forth in the plaint, and that such amendment was not permissible under the law upon the ground that it would be to the prejudice of the defendant. This case, therefore, also is not applicable to the facts of the present case.

As I have stated above, the difference between the case put forward on behalf of the plaintiff and that put forward on behalf of the defendant is this: Whereas the plaintiff alleged that Wazuddi was the sole tenant in respect of the holding, the case which was found by the Court was that though at the date of the institution of the suit he was the sole tenant, the holding originally belonged to his father from whom he and possibly some other persons had inherited, but that by subsequent conduct on the part of those heirs Wazuddi alone became entitled to the holding as tenant. What was ultimately found by the Court was what was alleged by the plaintiff in her plaint as being the state of affairs at the time when the cause of action arose and, although the defendant's story as to the origin of the tenancy and as to other persons being co-sharers with Wazuddi therein was accepted to the some extent by the Court, it cannot be said that the findings on those questions are so inconsistent with the plaintiff's case as would disentitle him to the relief that he has asked for. In my opinion, therefore, there is no substance in the first contention which has been put forward on behalf of the appellant.

With regard to the second contention, I quite agree with what the learned Vakil appearing on behalf of the appellant has said that the findings of the learned Subordinate Judge are not very satisfactory. They are scattered and diffused and it does not seem to me that he has recorded those findings keeping in view the points which it was necessary for him to decide. I have, however, carefully examined those findings in order to see whether they do really dispose of or not the facts found by the Court of first instance and whether they do in law amount to findings sufficient to enable the Court to award a decree to the plaintiff. Now, the way in which the learned Judge dealt with the matter was this: He held that the tenancy originally belonged to Asanullah, that Asanullah left certain heirs along with Wazuddi and that it might be that the other heirs of Asanullah also inherited an interest in the tenancy. He was doubtful whether occupancy holdings were heritable before the Bengal Tenancy Act came into operation but he thought that it was immaterial whether the other heirs of Asanullah acquired a title to the holding by inheritance because he thought that the evidence was that those other heirs had long ceased to cultivate the lands and pay rent to the holding. He observed further that the holding stood abandoned by them and Wazuddi was recorded as the sole owner of the holding. This last finding of his which has been so ably criticised by the learned Vakil for the appellant is undoubtedly not sufficient for the purpose of coming to the conclusion that there was abandonment by the other heirs of Asanullah. If Asanullah had left other heirs and if they had inherited an interest in the holding, the mere fact that they ceased to cultivate the lands and also ceased to pay rent for the holding while Wazuddi was in occupation of the holding and was paying rent all the time would not be

(3) 5 C. 602; 5 C. L. R. 455; 2 Ind. Dec (N. S.) 991.

sufficient in law to prove that there was abandonment on the part of those other heirs. The learned Judge, however, proceeded to record certain further findings in respect of this matter. He found that it was proved that Wazuddi was in sole occupation of the holding for more than twelve years, that it was not proved on behalf of the defendant as it was his duty to prove that the other heirs of Wazuddi's father also inherited the property, that the defendant had also failed to prove that the inheritance opened after the passing of the Bengal Tenancy Act and further that the other heirs of Wazuddi's father had not been proved to have been the tenants of the holding. The learned Vakil appearing on behalf of the appellant urged that it was the duty of the plaintiff to prove that the other heirs of Ashanullah did not inherit any interest in the holding or that the other heirs had abandoned the holding. In that, I am unable to agree with him. The case put forward on behalf of the defendant was not that Wazuddi was in possession of the holding on behalf of himself and the other heirs—for, if that was the case, the sale by Wazuddi alone of the entire holding would operate to the prejudice of the interests of the other heirs as well, but it was to the effect that the other heirs were living and, therefore, they also had an interest in the holding. If the defendant wanted to show that the other heirs had an interest in the holding notwithstanding that Wazuddi was the ostensible holder thereof—his name being recorded in the *zemindari's sheristha* and he himself paying the rent all the time, it was for him to prove that fact and the learned Judge was, in my opinion, perfectly right in holding that, in the absence of any evidence on the side of the defendant to show that the other heirs were co-tenants of the holding, it must be taken that it was Wazuddi alone who was the tenant in respect of this holding. Then the learned Judge also took into consideration the presumption which arose from the Record of Rights there being an entry in the Record of Rights to the effect that Wazuddi was the tenant in respect of this holding. Furthermore, the learned Judge relied upon the fact that the defendant purchased the holding from Wazuddi by a document in which Wazuddi admitted that the entire holding belonged to him. All these findings taken together leave no room for doubt that the learned Subordinate Judge on a consideration of the facts and circumstances and the entire evidence in the case came to the conclusion that, although there were other heirs of Asanullah living, they had no interest whatsoever in the holding and that it was Wazuddi alone who was the tenant in respect of it. If that was his finding, the consequence logically followed that the transfer made by him to the defendant No. 1 operated to extinguish his rights in the holding and constituted abandonement such as would enable the landlord to re-enter. In this view of the matter I think the second contention put forward on behalf of the appellant by his learned Vakil also fails.

The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 115 OF 1924.

August 6, 1924.

Present:—Mr. Justice Daniels.

MOTI LAL—PETITIONER—APPLICANT

versus

YAR MUHAMMAD—PLAINTIFF—OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), s. 108—Lessor and lessee—Lease granted by person having no title—Possession not secured—Rent, whether can be recovered.

Where a person knowing that he has no title to certain property grants a lease of it to another, but in consequence of his want of title either fails to secure possession of the property to the lessee in the first instance or fails to secure him undisturbed possession, he fails to carry out the obligation imposed upon him by s. 108 of the Transfer of Property Act, and is not entitled to recover rent from the lessee.

Taryawa v. *Girshidappa*, 25 B. 269; 2 Bom. L. R. 1070 and *Nowrang Singh* v. *Janardan Kisholal Singh Deo*, 70 Ind. Cas. 161; 50 C. 68; 36 C. L. J. 28; 27 C. W. N. 71; (1923) A. I. R. (C.) 41, relied on.

Revision against an order of the Judge of the Small Cause Court, Cawnpore, dated the 8th March 1924.

Mr. *I. B. Banerji*, for the Applicant.

JUDGMENT.—This is an application in revision against a decree of the Small Cause Court, Cawnpore, dismissing a suit for rent of a shop. It appears that the ownership of the shop is in dispute between the plaintiff Moti Lal and one Kanhaiya Lal. The plaintiff gave a lease to

the defendant, who entered into occupation of the shop. Shortly afterwards the defendant was ejected by Kanhaiya Lal. The learned Judge of the Small Cause Court has dismissed the suit holding (1) that the *prima facie* title to the shop is in Kanhaiya Lal, and (2) that the plaintiff failed to secure to the defendant possession over the property. By the second finding the learned Judge evidently means to find that there has been a breach of the covenant implied by s. 108 (*a*) (*c*) of the Transfer of Property Act, for he finds earlier in the judgment that the defendant was ejected after entering into occupation of the property.

As to the first of these findings, the applicant rightly objects that under s. 116 of the Evidence Act it was not open to the defendant to deny the plaintiff's title. It is not clear, however, that the second finding is wrong. If the plaintiff, knowing that he had no title, gave the defendant a lease, but in consequence of his want of title either failed to secure possession to the defendant in the first instance, or, as in this case, failed to secure him undisturbed possession, he has, according to the view of at least two High Courts, failed to carry out the obligation imposed by s. 108, Transfer of Property Act, *vide Taryava* v. *Girshidappa* (1) and *Nowrang Singh* v. *Janardan Kisholal Singh Deo* (2). The order complained of does complete justice between the parties and on full consideration I am not disposed to interfere with it. I, therefore, dismiss the application but without costs as the respondent is not represented.

Z. K. *Application dismissed.*

(1) 25 B. 269; 2 Bom. L. R. 1070.

(2) 70 Ind. Cas. 161; 50 C. 68; 36 C. L. J. 28; 27 C. W. N. 71; (1923) A. I. R. (C.) 41.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO 1394 OF 1921.

March 13, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr Justice Mukerji.

JOGESH CHANDRA ROY—PLAINTIFF —APPELLANT

versus

TAZAR ALI AND OTHERS—DEFENDANTS —RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 5 (5)—Landlord and tenant—Tenancy, nature of, determination of—Question of law—Appeal, second—Presumption —Occupancy holding, transfer of portion of—Surrender of holding after transfer, whether affects transferee.

A question as to the nature of a tenancy is a question of law and may be dealt with in second appeal. The High Court is entitled to draw its own conclusions and inferences as to the legal incidents of the tenancy in order to judge the character of the tenancy and the status of the tenant. [p. 758, col. 2.]

Sulatu Dass v. *Jadu Nath Das*, 8 C. W. N. 774 (F. B.) and *Ramanuj Mahanta* v. *The Midnapore Zemindary Co. Ltd.*, 14 Ind. Cas. 729; 16 C. W. N. 727, referred to.

The question is primarily one of intention as between the contracting parties. [*ibid.*]

The presumption arising under s. 5 (5) of the Bengal Tenancy Act, though of considerable importance in a case where the origin of the tenancy is not known, is of little consequence where the terms of grant are known and are not ambiguous. In cases where the terms of the grant are equivocal, the Court must rely upon the attendant circumstances and evidence of subsequent conduct is also admissible. What has got to be determined, if possible, is whether the right acquired was the right to hold the land for purpose of collecting rent or bringing it under cultivation by establishing tenants on it or the right to hold the land for purposes of cultivating it by oneself or by members of one's family or by hired servants or with the aid of partners. [p. 758, col. 2; p. 759, col. 1.]

Where the outstanding features of a *kabuliyat* were that there was nothing stated as to the granting of sub-leases or collecting of rent from sub-tenants, nor was there anything as to establishment of tenants on the land, and the grantee was described as a *raiyat* enjoying right of occupancy and was required to make the land fit for cultivation by cutting jungle and erecting embankments:

Held, that the conditions and circumstances were more consistent with an intention to confer on the grantee the right to hold the land for cultivation by himself or by members of his family or by hired servants or with the aid of partners than that he should be permitted to establish tenants on the land for purposes of cultivation. [p. 759, col. 2.]

A surrender of an occupancy holding by the tenant after the transfer of a share of the holding is invalid in so far as it professes to affect the interest of the transferee [*ibid.*]

(Case-law discussed.)

Appeal against a decree of the District, Judge, Chittagong, dated the 14th of March 1921, affirming that of the Subordinate Judge, Second Court of that District, dated the 31st of July 1919.

Babus *Sarat Chandra Roy Chaudhury* and *Nripendra Chandra Das*, for the Appellant.

Babu *Narendra Coomar Das*, for the Respondents.

JUDGMENT.

Mukerji, J.—Upon the arguments addressed to us on behalf of the appellants in this appeal the three questions which arise for our consideration are: 1st what was the status of Homar Ali, that is to say whether he was a tenure-holder or an

occupancy *ryot*; 2nd whether the compromise entered into by the defendants Nos. 1 and 2 with the plaintiff after the institution of the suit amounted to a surrender of the holding, which taken with the previous sale in favour of the defendants Nos. 7 to 13 (or rather in favour of some of them and the predecessors of the rest) by Homar Ali, the predecessor of the defendants Nos. 1 and 2, operated to constitute abandonment conferring on the plaintiff the right of re-entry, and if so whether that relief should be given to him in this suit, and 3rd whether the decree of the Court of first instance declaring that the defendants Nos. 8 to 10 are not liable to ejectment from $\frac{1}{8}$th share of the disputed lands, should stand in view of the fact that the plaintiff had already obtainted an *ex parte* decree for ejectment against defendants Nos. 9 to 13 and their application to have the same set aside had already been refused.

With regard to the first of these questions appellant's contention is that Homar Ali was a tenure-holder for a fixed term. In support of this contention it is urged that the *kabuliyat*, Ex. 3, having been on a printed form ordinarily used for drawing up *kabuliyat* for Government or *khas mahal* lands in respect of occupancy *ryots* not much weight should be attached to the terms and expressions used therein, that the intention of the document was to make Homar Ali a tenure-holder, only the agency by which he was to get the work of cultivation done was not specified and was left undetermined; that the lessee was to cut jungle, erect embankments at his own expense and make the land fit for cultivation, the obvious intention being that all this was to be done through the agency of others, that the said conditions together with the stipulation that no rent was to be paid for the first three years suggested that it was an ordinary re-clamation lease such as is usually given to tenure-holders and that the presumption arising from the area of the lands demised also supports this contention. The respondent on the other hand relies upon the terms and expression used in the *kabuliyat* and the clauses forbidding the digging of tanks and entitling the lessee to enjoy and take the fruits and he also relies upon the finally published Record of Rights in which the lessee's rights were entered as those of a settled *ryot*. It is also urged on behalf of the respondent that the stipulation in favour of devolution of rights by inheritance and the restriction in regard to alienation made the tenancy a heritable but non-tranferable occupancy holding; and that in any event the question was concluded by the concurrent findings of the two Courts below to the effect that it was an occupancy holding and not a tenure.

Now, as to whether we should treat the finding of the Courts below on the question of status of the tenant as a finding of fact, I may say at the very out set that I do not assent to the view put forward on behalf of the respondent. In my opinion it is a matter of inference as to whether certain legal conditions had been made out or not. In the case of *Sulatu Dass* v. *Jadu Nath Das* (1) it was held that a question as to the nature of the tenancy is a question of law. The case of *Ramanuj Mahanta* v. *The Midnapore Zemindary Co., Ltd.* (2) on which reliance has been placed on behalf of the respondent in support of this contention, only lays down that because that is so it does not follow therefrom that all questions of fact arising for the determination of the status are necessarily to be dealt with in second appeal. In my opinion we are perfectly entitled to draw our conclusions and inferences as to the legal incidents of the tenancy in order to judge of the character of the tenancy and the status of the tenant.

The determination of the question, however, is to my mind, a matter of some difficulty. It depends almost entirely upon the conclusions that should be drawn from the various terms and expressions contained in the *kabuliyat*. The question being primarily one of intention as between the contracting parties and the determination of the rights of parties which are dependent on the facts of the particular case before us a consideration of the various cases, in which one view or another was taken will serve no useful purpose. So far as principles are concerned, they are well settled. First of all, there is the statutory presumption arising under s. 5 (5), Bengal Tenancy Act. That presumption though of considerable importance in a case where the origin of the tenancy is not known is of little consequence, where the terms of the grant are known and unambiguous. In cases where the terms of the grant are equivocal, we have to rely upon attendant circumstances

(1) 8 C. W. N. 774 (F. B.).
(2) 14 Ind. Cas. 729; 16 C. W. N. 725.

[*Debendra Nath Das* v. *Bibudhendra Mansingh* (3)]—and evidence of subsequent conduct is also admissible: *Pramotha Nath Kumar* v. *Nilmoni Kumar* (4), *Promoda Nath Ray* v. *Asirud-din* (5) and *Bomapada Roy* v. *The Midnapur Zemindary Co. Ltd.* (6). What has got to be determined if possible is whether the right acquired was the right to hold the land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it or the right to hold the land *for the purpose of cultivating it by oneself or by members of his family or by hired servants or with the aid of partners.* In my opinion no particular weight should be given to the use of the word "*ryot*" or "right of occupancy" or "*raiyati kabuliyt*" to be found in the document which was in a printed form which is ordinarily used in the case of occupancy *ryots* and with regard to which the learned District Judge observes that "it cannot be ascertained which portions were printed and which were manuscript." I am also of opinion that the clauses forbidding the digging of tanks and entitling the lessees to take and enjoy the fruits, and the stipulation in favour of heritability and against transferability taken by themselves cannot lead to any definite conclusion. The appellant's contention that the lease, one for purposes of reclamation and with no provision for rent for the first three years, should be taken as creating a tenure, in support of which contention reliance was placed upon the cases of the *Secretary of State for India* v. *Gobinda Prasad Barik* (7) and *Bibhudendra Mansingh* v. *Debendra Nath Das* (8), does not also afford a sure test. It will be seen that the latter case went up on appeal to the Privy Council and the Judicial Committee in *Debendra Nath Das* v. *Bibudhendra Mansingh* (3) did not place any reliance upon the remission clause in the lease in determining the question of the status conferred by it. At best, therefore, the lease in the present case was an equivocal one. Of subsequent conduct the evidence is very little; at least nothing definite has been found by the Courts below. Of the attendant circumstances, there is nothing in this case such as is referred to in the judgment of the Judicial Committee referred to above, in the shape of the lessee being a man of means, or a man of another place brought for the purpose of re-clamation and he being competent to make such other arrangement or adopt such other convenient steps as he might consider necessary for cultivating the land. The outstanding features of the document in the present case are the following:—(*a*) There is nothing stated as to granting of sub-leases or collecting of rents from sub-tenants, (*b*) there is nothing stated as to etablishment of tenants on the land, (*c*) Homar Ali is described as a *raiyat* enjoying a right of occupancy, and (*d*) Homar Ali is to make the land fit for cultivation by cutting the jungles and erecting embankments. These conditions and circumstances seem to me more consistent with an intention to confer on Homar Ali the right to hold the lands for cultivation by himself or by members of his family or by hired servants or with the aid of partners, than that he should be permitted to establish tenants on the land for the purpose of cultivation. To this must be added the presumption that arises upon the finally published Record of Rights under which Homar Ali is recorded as a settled *raiyat* and the conclusion to my mind is irresistible that Homar Ali was an occupancy *ryot* and not a tenure-holder and the interest of defendant No. 8 was that of a purchaser of a share of an occupancy holding. A lease with similar terms and incidents was held to have conferred an occupancy right in the case of *Secretary of State for India* v. *Digambar Nanda* (9).

With regard to the second question the surrender by heirs of Homar Ali after the transfer made by the latter is invalid in so far as it professed to affect the inerest of the transferees in view of the decision of the Full Bench of this Court in the case of *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (10). It is unnecessary to go into the question which has been raised by the appellant as to whether there is any real conflict between that decision on the one hand and the Full Bench decision of *Dayamoyi*

(3) 45 Ind. Cas. 411; 45 C. 805; 5 P. L. W. 1; 27 C. L. J. 513; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67 (P. C.).
(4) 10 Ind. Cas 431; 14 C. L. J. 38.
(5) 11 Ind. Cas. 262; 15 C. W. N. 896.
(6) 16 Ind. Cas. 376; 16 C. L. J. 322.
(7) 39 Ind. Cas. 934; 21 C. W. N. 505.
(8) 27 Ind. Cas. 432; 20 C. L. J. 140.

(9) 45 Ind. Cas. 43; 27 C. L. J. 334.
(10) 61 Ind. Cas. 443; 25 C. W. N. 29; 32 C. L. J. 286; 48 C. 605 (F. B.).

v. *Ananda Mohan Roy* (11) and the decision of the Special Bench in the case of *Chandra Binode Kundu* v. *Sheikh Ala Bux* (12) on the other, for I am of opinion that in the present suit no relief should be given to the plaintiff on the footing of events which occurred after its institution.

The third question arises only upon the misconception of the fact. It appears that by a *kobala* dated 26th May 1899 Homar Ali sold altogether 7 annas share in the lands to five different persons of whom one Tofeali and one Buzur Mia were joint purchasers of a 4 annas share. Buzur Mia was the brother of the defendant No. 8. The defendant No. 8 alleges that the purchase by Buzur Mia was in respect of half of that 4 annas share, that he was the heir of Buzur and he and the other defendants *viz.*, Nos. 7 and 9 to 13 cultivated this share of Buzur jointly. The Subordinate Judge found that the defendant No. 8 was heir of Buzur and was a co-sharer with him and made a decree refusing to give the plaintiff *khas* possession of the said 2 annas or $\frac{1}{8}$th share. By that decree he never meant to re-open the suit so far as the remaining shares out of the 7 annas share transferred by Homar Ali were concerned, shares in respect of which the learned Subordinate Judge had already refused to set aside the *ex parte* decree at the instance of the defendants Nos. 9 to 13. It is interesting to note that the appellant did not make these defendants parties to his appeal in the lower Appellate Court and does not appear to have raised this question before that Court.

The appeal accordingly must be dismissed with costs.

Let the record be sent down to the Court below with as little delay as possible.

Walmsley, J.—I agree.

Z. K. *Appeal dismissed.*

(11) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52 (F. B.).

(12) 58 Ind. Cas. 353; 48 C. 184; 31 C. L. J. 510; 24 C. W. N. 818 (F. B.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 180 OF 1924.

April 8, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

SURENDRA KRISHNA ROY CHOWDHURY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

ABBAS ALI AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115—Bengal Tenancy Act (VIII of 1885), s. 153 (b)—Rent suit tried by Munsif specially empowered—Appeal, whether lies—Revision.

Where a second appeal is dismissed on the ground that no appeal lies to the High Court, the decree of the lower Appellate Court stands good as between the parties and is the only decree which is capable of execution. It is also capable of revision by the High Court. [p. 761, col. 1.]

No appeal lies against the decision, in a rent-suit of a Munsif specially empowered under s. 153 (*b*) of the Bengal Tenancy Act, where the value of the suit does not exceed Rs. 50. [*ibid.*]

Rule against an order of the Sub-Judge, First Court, Tipperah, dated the 24th August, 1922, in Rent Appeals Nos. 81 and 96 of 1922.

Dr. *Sarat Chandra Basak* and Babu *Bankim Ch. Banerji*, for the Petitioners.

Babu *Satyendra Krishna Ghose*, for the Opposite Parties.

JUDGMENT.

Suhrawardy, J.—The facts which have given rise to this application are as follows:—The petitioners brought a suit against the opposite parties for rent in the Court of the Munsif and obtained a decree. On appeal that decree was set aside by the Subordinate Judge. There was a second appeal preferred to this Court by the petitioners against the decree of the lower Appellate Court on the ground that no appeal lay to that Court from the decree of the learned Munsif who was specially empowered under s. 153 (*b*) of the Bengal Tenancy Act.

The appeal came on for hearing before Mr. Justice Walmsley who held that no appeal lay to this Court from the decree of the lower Appellate Court inasmuch as no appeal lay to that Court from the decree of the First Court. The learned Judge expressed his inability to treat the memorandum of appeal as an application in revision as he was sitting alone and suggested that the remedy open to the landlords was to go to a Division Bench and ask for a Rule. Thereafter the petitioners came to a Division Bench of this Court

and obtained the present Rule. The Rule was made returnable within the period during which a Letters Patent Appeal could be preferred against the judgment of Mr. Justice Walmsley. But as it could not be heard within that period the petitioners as a matter of precaution filed a Letters Patent Appeal also against the judgment, which has not yet been heard for admission.

This Rule was issued on the ground that the Court of Appeal below had no jurisdiction to interfere with the decree of the First Court inasmuch as the learned Munsif who had decided the case originally was empowered under s. 153 (*b*) of the Bengal Tenancy Act to try rent-suits of the value of Rs. 50 or less with final jurisdiction. This allegation of fact is not disputed by the opposite parties. But it is contended on their behalf that the decree of the lower Appellate Court has now become merged in the decree passed by this Court dismissing the appeal and that, therefore, we have no jurisdiction to revise a decree of this Court. In my opinion there is no substance in this contention. The appeal to this Court was dismissed on the ground that no appeal lay to this Court; and the result of that decision is that the decree of the lower Appellate Court stands good as between the parties and it is the only decree which is now capable of execution.

It is next argued on behalf of the opposite parties that the Letters Patent Appeal from the judgment of Mr. Justice Walmsley is now pending in this Court and that, therefore, we have no jurisdiction to interfere with the order of the lower Appellate Court under s. 115, C. P. C. I do not think that this contention ought to prevail. The judgment of Mr. Justice Walmsley so long as it is not set aside is a judgment of this Court and is binding on us unless we wish to differ from it and refer the case to a Full Bench. That judgment so far as the present Bench is concerned is final it being held therein that no appeal lay to this Court. It is, therefore, open to us to revise the decree of the lower Appellate Court under s. 115, C. P. C.

It being proved to our satisfaction that the Munsif who tried the suit in the First Court was specially empowered under s. 153 (*b*) of the Bengal Tenancy Act no appeal lay to the lower Appellate Court. That being so, the order passed by the lower Appellate Court is without jurisdiction and must be set aside.

This Rule is accordingly made absolute. The judgment and decree of the lower Appellate Court are set aside and those of the Court of first instance restored and affirmed. I make no order as to costs.

Graham, J.—It has been conceded on behalf of the opposite parties that the Munsif was specially empowered under s. 153 (*b*) of the Bengal Tenancy Act. As the suit in question was valued at less than Rs. 50 no appeal lay and the Subordinate Judge must be held to have exercised a jurisdiction not vested in him by law. A case is, therefore, made out for our interference under s. 115, C. P. C. I concur, therefore, in the order which my learned brother purposes to make.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 545 OF 1924.

November 4, 1924.

Present:—Mr. Justice Mukerji.

Lala BANARSI DAS—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD OF AMROHA AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Municipalities Act (II of 1916), ss. 2 (23), 211—"Street," what is—Blind lane with houses on either side, whether "street"—Notice under s. 211, when may be given.

The jurisdiction of a Municipal Board to issue a notice under s. 211 of the U. P. Municipalities Act depends on whether or not the projection complained of overhangs a street. Where a projection does not overhang a street but overhangs a private piece of property, the Municipal Board has no jurisdiction to pass an order under s. 211, and if an order under that section is passed in such a case, it may be called into question in a Civil Court as being without jurisdiction. [p. 762, col. 1.]

A blind lane with houses on either side over which the residents of those houses have a right of passage is a street within the meaning of cl. (23) of s. 2 of the U. P. Municipalities Act. [p. 762, col. 2.]

Second appeal from a decree of the Additional Subordinate Judge, Moradabad, dated the 8th March, 1924, reversing that of the Munsif, Amroha, dated the 26th September 1922.

Dr. *K. N. Katju* and Mr. *Gopinath Kunzru*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal. His house abuts on a blind lane. He constructed a cornice projecting from the front wall of his house and over this lane. The Municipal Board gave a notice to the plaintiff to remove the cornice. The plaintiff disputed their right to issue such notice and instituted the suit, out of which this appeal has arisen.

The Court of first instance decreed the suit, but a learned Subordinate Judge on appeal dismissed it. He held that maintenance of the suit was barred having regard to the provision of s. 321 of the Municipalities Act, 1916. He also held that the Municipal Board were within their right in issuing the notice and that the land in question was a public street within the meaning of s. 2, cl. 19 of the Municipalities Act.

In this Court it has been contended that the suit is not barred and that the finding of the Court below that the lane was a public street was not justified.

There can be no doubt that the jurisdiction of the Municipal Board to issue a notice under s. 211 of the Municipalities Act would depend on whether or not the projection complained of overhangs a street. Where a projection does not overhang a street, but overhangs a private piece of property it may very well be urged that Municipal Board has no jurisdiction to pass an order and that if an order is passed without any jurisdiction that order may be called into question in a Civil Court. The reason for this opinion is absolutely clear. The Municipalities Act was never meant to destroy private rights that may exist in property. All that it seeks is to regulate the comfort and health of the public or a portion of the public by restricting their rights to do as they please with respect to their own property. As an abstract question of law, therefore, I hold that the suit would be maintainable provided the lane over which the projection hangs be not a street or a public street within the meaning of s. 2 of the Municipalities Act.

Coming to the question as to the character of the lane the facts appear to be these. The lane is a blind one with houses on either side and at one end amounting in number to 14. Fourteen different people residing on either side of the lane have been impleaded in the suit by the appellant. It was stated in para. 2 of the plaint that the land covered by the lane belonged to the houses of the parties in the suit other than the Municipal Board. It seems from this admission of the plaintiff to follow that the lane is a street within the meaning of cl. (23) of s. 2 of the Municipalities Act. The word 'street' in cl. (23) defined as "any road, bridge, footway, lane.....which the public, or any portion of the public, has a right to pass along, and includes, on either side. ....." The 14 inhabitants on either side of the lane are "a portion of the public" and if they have a right of access to this place, *viz.*, the lane, the lane becomes the street within the meaning of cl. (23). If the lane be a street it will attract the provisions of s. 211 of the Municipalities Act although it may not be a public street. The learned Subordinate Judge has examined the evidence and has come to the conclusion that the lane is, besides being a street, a public street within the meaning of sub-cl. (6) of cl. (19) of s. 2 of the Municipalities Act. He has found that as far back as 1904 the Municipal Board at its own expense constructed a drain on one side of the lane. He has further found that the lane was repaired about two years before the litigation arose by the Municipality with public funds. The finding is a finding of fact and is, therefore, binding on this Court. Whatever view may be taken there is no escape from the conclusion that the lane is a street and a public street and that, therefore, the Municipal Board had a right to regulate the construction of any building on either side of it.

If the Municipal Board were within their rights to pass an order under s. 211, the provisions of s. 321 will be attracted and the suit would not be maintainable.

The result is that the appeal fails and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 124 OF 1921.

August 1, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chuckerbutty.

Haji ASIRUDDIN MONDOL—DEFENDANT No. 1—APPELLANT

versus

Musammat LATIFUNNESSA BIBI AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Co-heirs, position of—Tenants-in-common—Adverse possession—Custom in derogation of personal law, proof of.

Where a custom has been set up in derogation of the personal law of the parties, which overrides the provisions of the personal law, it must be strictly proved by very clear and definite evidence and such evidence must establish all the elements of a valid custom. [p. 765, col. 1.]

The entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants-in-common and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. [p. 767, col. 1.]

Jogendra Nath Rai v. *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, *Mc Clung* v. *Ross*, (1920) 5 Wheaton 116; 5 Law. Ed. 46 and *Clymer* v. *Dawkins*, (1845) 3 Howard 674; 11 Law. Ed. 778, relied on.

Co-heirs under the Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs.

Ujalbi Bibee v. *Umakanta Karmokar*, 31 C. 970; 9 C. W. N. 32, *Maulvi Saiyid Muhammad Munawar* v. *Razia Bibi*, 9 C. W. N. 625; 2 A. L. J. 513; 2 C. L. J. 179; 27 A. 320; 15 M. L. J. 261; 32 I. A. 86; 8 Sar. P. C. J. 788 (P. C.), *Corea* v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836 and *Faizuddin Khan* v. *Reju Akab*, 28 Ind. Cas. 22; 21 C. L. J. 192, referred to.

Appeal against a decree of the Subordinate Judge, First Court, Pabna and Bogra, dated the 18th of May 1921.

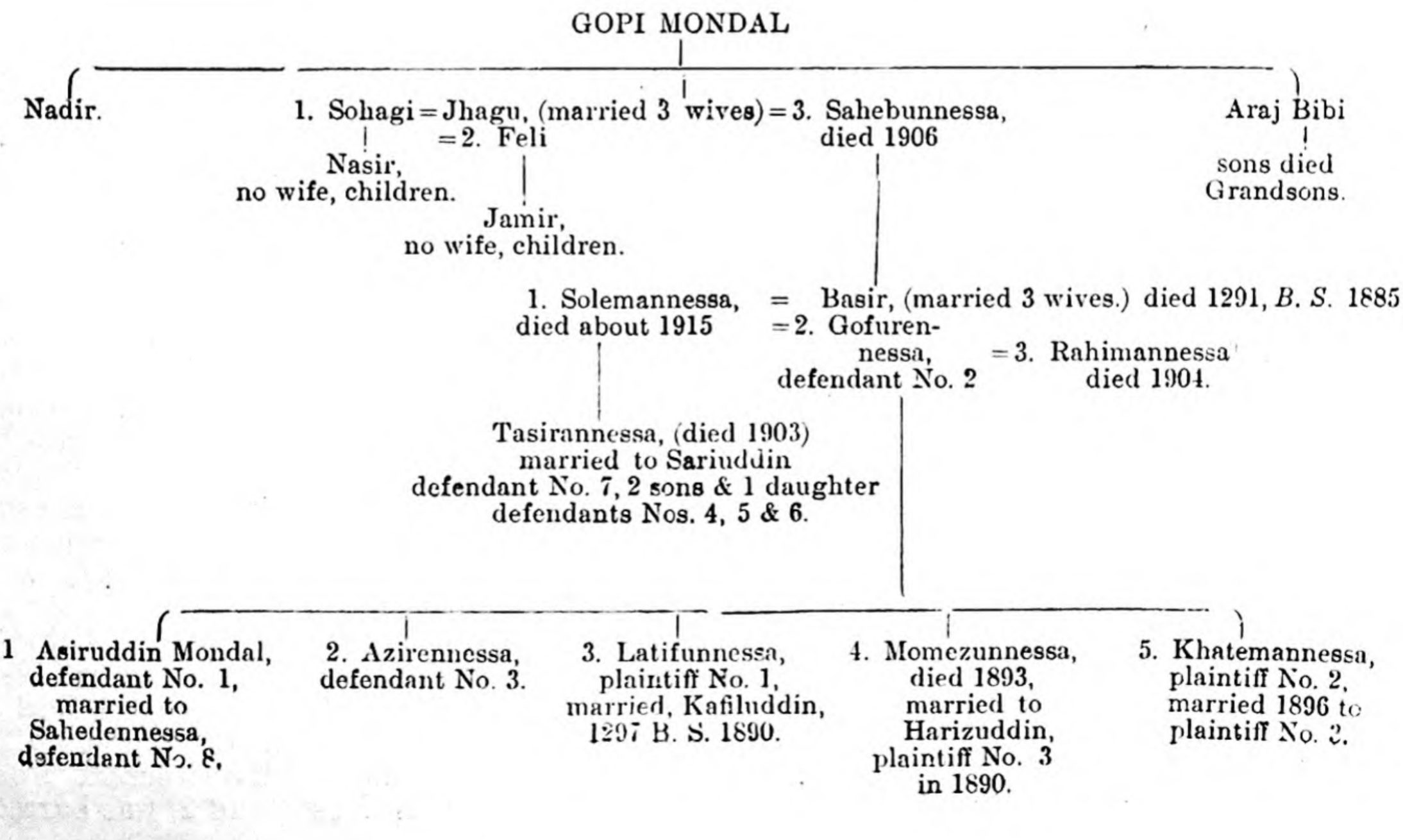
Babus *D. L. Kastgir* and *Nagendranath Bose*, for the Appellants.

Dr. *Basak* (with him Babus *Banwarilal Sircar* and *Bansari Lal Sarkar*), for the Respondents.

Babu *Shib Chandra Palit*, for the Deputy Registrar, the guardian *ad litem* for minor respondent.

JUDGMENT.

Chuckerbutty, J.—This is an appeal by the defendant No. 1 against a preliminary decree in a suit for partition of immoveable properties and the plaintiffs have filed cross-objections against the decree in so far as it has dismissed the plaintiffs' claim with respect to certain items of the claim. The following geneological table will be of help in understanding the relations between the parties and the basis of their respective shares claimed in the disputed properties.



Basir, it appears died in the year 1885 and left his mother, three widows and a large family by two of them as his heirs. The third widow Rahimannessa was childless. The present suit relates to the property left by Basir who it appears was a substantial cultivator and left considerable properties both moveable and immoveable. His two daughters by his wife Gofurennessa are plaintiffs Nos. 1 and 2 and the husband of a deceased daughter by the same wife, is the plaintiff No. 3.

The defendant No. 1 is the only son of Basir by Gofurennessa and the suit is really directed against him, the other defendants are the other claimants to the property with the exception of defendant No. 8 who is the wife of defendant No. 1. Plaintiff No. 3 married Momezunnessa one of Basir's daughters in the year 1890 and became a widower in 1893 and married the plaintiff No. 2 in 1896. It is as husband of his deceased wife that he claims a share in Basir's property.

The case of the plaintiffs Nos. 1 and 2 who shall be called the plaintiffs in this judgment, shortly stated, is that they were infants at the time of their father's death and they lived jointly with defendant No. 1, also a minor, in a joint family with their grand-mother Sahebunnessa and mother Gofuerennessa in their father's house and were maintained out of the income of their father's property and that they were married, at the instance of defendant No. 1. That since their marriage they occasionally came to their father's house and lived with defendant No. 1 and were then maintained out of the income of the family properties and that many of their children were born in their father's. house and that all incidental expenses were borne out of the income of the family properties and that they got ornaments and other presents and also got occasionally cash money when necessary from their brother. In substance their case was that their grand-mother managed the family property until defendant No. 1 took charge from her and that they participated in the income of the family properties until their right was denied by the defendant No. 1 in or about the year 1911. Hence they have brought this suit for declaration of their title to their legitmate share in their father's properties and for possession after partition of the various properties with the other sharers therein. The immoveable properties left by Basir are described in schedule (*ka*) of the plaint and the properties, subsequently acquired with the income of the ancestral properties are described in schedule (*kha*) of the plaint. The other schedule deals with moveable properties ; the claim to which has been dismissed except a small item and it is not necessary to deal with them in details as the appeal does not relate to them.

The case of plaintiff No. 3 who stands on a totally different footing to plaintiffs Nos. 1 and 2 is not specifically stated nor is it shown how he enjoyed possession of his share which he inherited in 1893 although he lived in a different village and manage and enjoyed his own properties there.

The defendant No. 1 who alone really contested the suit, mainly relied on the defence of limitation and as to properties of schedule (*kha*) he claimed them as his self acquired properties and in *ka*, he claimed Baghail as the property obtained by him by gift from Shahebunnessa to whom that property according to him really belonged. Baghail in schedule (*ka*) and Douki a property in Schedule (*kha*) were not originally included in the claim but were subsequently added by a petition for amending the plaint filed on the 9th September 1920 long after the defendant No. 1 filed his written statement on the 19th of March 1920. The property called Douki added after amendment was claimed by defendant No. 8 as her own property.

The learned Subordinate Judge found that the claim is not barred by limitation and that all the plaintiffs were entitled to their share which, however, he found to be less than the shares claimed. He further found that the plaintiffs had no right to the properties described in schedule (*kha*) with the exception of items Nos. 22, 23, 24, 25 and 27 and also to the two properties stated above and also that their claims to the moveables were not established with a small exception and on those findings made a preliminary decree for partition.

The defendant No. 1, as I have already stated, filed this appeal and his main contentions raised by the learned Vakil who appeared for him are these :—

First : That the claim of the plaintiffs was barred by limitation and that even assuming that the plaintiffs Nos. 1 and 2 are not barred, the claim of the plaintiff No. 3 which is materially different from those of plaintiffs Nos. 1 and 2, was barred.

Secondly: That there was a custom prevalent in Pabna by which daughters of a Muhamadan are precluded from inheritting *jotes* left by their fathers.

The plaintiffs pressed their cross-objections as regards property called Baghail and it was contended on their behalf that the findings of the Subordinate Judge that it belonged to Shahebunnessa and that she made a gift of those properties to defendant No. 1 were erroneous.

These are the only questions which arise for determination in this appeal and the cross-objections.

I shall first deal with the questions which are really questions of fact and in which we agree with the decision of the Sub-Judge.

The question of custom raised by the appellant was faintly urged and we think there is no substance in that contention.

The custom set up is, in derogation of the clear law of succession as laid down by the Muhammedan Law which overrides the law as laid down in that law must be strictly proved by very clear and definite evidence and such evidence must establish all the elements of valid custom. The learned Subordinate Judge has fully dealt with that evidence, we have no hesitation in agreeing with his conclusions. The evidence is meagre and is of a very unsatisfactory character. No evidence of any concrete cases have been given in which a claim by a daughter to a *jote* right was disallowed by Courts of Law but on the contrary evidence has been adduced that in a number of cases such claims have been enforced even without any question by the opposite party. It is needless to discuss the evidence in detail. We agree with the Subordinate Judge and generally for the reasons given by him.

Then I shall deal with the cross-objections raised by the plaintiffs as to Baghail.

The claim of the plaintiffs to this property was disallowed by the Subordinate Judge on the ground that this property belonged to Sahebunessa Bibi and not to Basir. The learned Subordinate Judge has discussed the question in full details and we agree with his conclusions.

Sahebunnessa was a lady of considerable business capacity. She claimed some of the *jotes* constituting this property on the basis of transfers to her in lieu of her dower. When the *zemindar* after measurements made a fresh settlement, Sahebunnessa as the owner of the *jotes* executed the *kabuliyat* in 1878, at a time when Basir was alive and evidence has been adduced to show that this was done with the knowledge and concurrence of Basir who was then managing his own ancestral properties and died shortly after leaving five children and three widows. Sahebunnessa exercised all acts of ownership, she paid the rent due to the *zemindar*, and the collections were made in her name and there is ample and satisfactory evidence that she enjoyed the profits of the property. When she separated from the defendant No. 1 and his mother she retained this property and then she made a gift of this property to Solemannessa the step-mother of defendant No. 1. Upon this the dispute between her and her grandson broke out. The result was that she was obliged to give up this property to defendant No. 1 in lieu of a monthly annuity promised to be paid to her for her maintenance. That there was pressure brought to bear upon her with a view to induce her to give up this property there can be no doubt. The whole thing was managed according to the direction of defendant No. 1. Here the property was described as Basir's property. This statement is no doubt of considerable weight against the defendant No. 1 but we are satisfied on the evidence that this was not a correct statement. The evidence is overwhelming to prove that the property was really Sahebunnessa's own property and not Basir's as alleged by the plaintiffs.

On the whole, therefore, we agree with the Subordinate Judge that the plaintiffs have failed to establish that Baghail was Basir's property. The plaintiffs claim in this suit is based, as is stated in paragraph 5 of the plaint, on the ground that the properties belonged to Basir. They claimed their shares of the properties left by Basiruddin Mundle and of those acquired with the profits of those properties; they cannot, therefore, get any share of this property as it did not form part of Basir's estate.

It was argued by Dr. Bysak for the plaintiffs that by the Nadavi executed by Sahebunnessa she gave up only her share in Baghail inherited by her from Basir, therefore, there was no transfer of the rest. We think that by this deed she intended to give up all her rights in Baghail, although the deed is clumsily drawn. Even assuming that Dr. Bysak is right; as I have already shown, that does not help the plaintiffs as their present claim is confined to the share which they claim in Basir's property.

The question of limitation is the main question urged in this appeal. I shall deal with this question so far as it affects plaintiffs Nos. 1 and 2, separately from the question as against plaintiff No. 3.

Now, so far as the plaintiffs Nos. 1 and 2 are concerned, the judgment of the Subordinate Judge has been assailed on the grounds that the evidence establishes a case of adverse possession of the defendant No. 1 for over 12 years. The learned Vakil for the appellants put his case on the footing that Art. 144 of the limitation was applicable to the case and he argued that although the plaintiffs were co-sharers their title was denied by the defendant to their knowledge and that the evidence shows that there was ouster for more than 12 years before suit.

The learned Subordinate Judge has carefully considered the evidence and has found, to quote only a few passages from his judgment, that "The same affectionate relations continued till 1911 when they demanded a share of the compensation money obtained on account of lands acquired for the Sara Bridge (Hardinge Bridge) which probably was the first time when they demanded their full share of any property or profits of the state. Up to that time their relations were friendly, that Latifunnessa often came to her brother's place, several of her children were born there, and a son of defendant No. 1 used to remain with Latifan's husband for prosecuting his studies. Now if the plaintiffs had insisted upon the entry of their names in the records and Asiruddin had expressly denied their title, or had they understood that the opposition to the claim of Tasiran amounted also to a denial of their right, the terms between them and the defendant No. 1 could not have continued to be so cordial and affectionate as it did."

Then again "of course it is admitted by the plaintiffs, that before 1318 they never demanded the division of the income and payment of their share, and it is also the fact that the income of their share far exceeded what small amounts they participated in by residing in the family or by the occasional presents. It is also true that where the sisters have no legal rights, *e.g.*, among Hindus, such residence in the brother's family, or occasional visits, or receipt of occasional presents would not amount to possession of the property. But where they have a legal right by inheritance, I think they may fall back upon such acts of slight participation as evidence of their joint possession.

"From the above facts and circumstances, and relying upon the rulings cited above, I am of opinion that there was no express denial of the plaintiffs' title or such open hostile and exclusive possession of defendant No. 1 which would amount to an ouster of the plaintiffs more than 12 years before the institution of the suit. I, therefore, hold that the plaintiffs' claim regarding the immoveable properties is not barred by limitation and the possession of defendant No. 1 was on behalf of himself and other co-heirs of Basir excepting of course Tasiran."

These findings are amply supported by the evidence in the case which was placed before us and discussed by the learned Vakils of both the parties.

The principles of law of limitation and adverse possession as between tenant-in-common, have been discussed and laid down in numerous cases. In the case of *Jogendra Nath Rai* v. *Baldeo Das* (1), Mr. Justice Mookerji, after discussing numerous cases both Indian and English, laid down the rule in the following words at page 969*: "Much stronger evidence, however, is required to show an adverse possession held by a tenant-in-common than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be establised that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant-in-common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended tc be asserted; in other words, in the language of Chief Justice Marshall in *Mc Clung* v. *Ross* (2), 'a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession' mere possession, however, exclusive or long-

(1) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.
(2) (1820) 5 Wheaton 116; 5 Law. Ed. 46.

*Page of 35 C.—[*Ed.*]

continued, if silent, cannot give one co-tenant in possession, title as against the other co-tenant; see *Clymer* v. *Dawkins* (3), in which it was ruled that the entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants, and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possessian by the party so entering is brought home to the knowledge or notice of the others; when this occurs, the possession is from that period treated as adverse to the other tenants."

In a case between Muhammadan co-owners, Mr. Justice Brett sitting with Mr. Justice Mookerjee, held that although there was no actual participation of the profits as a co-sharer by the plaintiff, as an heiress to her mother, the claim was not barred although the property was actually held and managed by her brothers because the plaintiff "while she was living in the house of the *jote* she was being supported out of the profits of the property;" See the case of *Ujalbi Bibee* v. *Umakanta Karmokar* (4). Similarly in a case, *Maulvi Saiyid Muhammad Munawar* v. *Razia Bibi* (5), in which a daughter of a deceased Muhammadan lady brought a suit for possession of her share of the inheritance long after 12 years from the death of her mother, the Judicial Committee held at a page 626* "That the High Court was right in holding that exclusive enjoyment by the husband of the wife's estate in terms of the deed, did not constitute his possession adverse to a daughter who survived the wife but predeceased the husband and the right of the heirs of the daughter to recover her share of her mother's estate was not lost". In a case where one of co-heirs had taken possession of the entire property, under the claim of a sole heir, the Judicial Committee in the case of *Corea* v. *Appuhamy* (6) considered the question of adverse possession and ouster of the other co-heirs and Lord Macnaghten by whom their Lordships judgment was delivered said as follows:—"The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the Trial Judge. They both held that Iseris entered as 'sole heir' and that his title has been adverse ever since he entered. They held that he entered as 'sole heir' apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any such secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about the result". In applying the principle of this decision in a case of adverse possession between a Muhammadan brother and sister, Sir Lawrence Jenkins Chief Justice held in the case of *Faizuddin Khan* v. *Reju Akab* (7) that, "Therefore, in this case, "*prima facie*, the possession of Rajabdi was the possession of his sisters, and it could not become an adverse possession, until there was an ouster."

In this case, the case of the plaintiffs is much stronger because at the time of the death of Basir both the plaintiffs were minors and so was the defendant No. 1; the property was in the possession of the grand-mother and mother and the plaintiffs were maintained from the income of the property and they were married and the expenses came out of the income of the family property. In the year 1895 a suit was brought by defendant No. 1 with respect to a family property in which the plaintiffs Nos. 1 and 2, but not No. 3, were joined as co-sharers and the decree obtained was put into execution in 1898 on behalf of all. It was, therefore, incumbent upon the defendant No. 1 to establish definitely as to when after 1898, his possession became adverse to those plaintiffs. The defendant has relied upon the proceedings at the time of the Record of Rights when he expressly denied the title of Tasiran, the half-sister of defendant No. 1 but there is nothing to show that he denied the title of the plaintiffs also who are his uterine sisters. I have already shewn that the plaintiffs remained on as friendly terms with their brother the defendant No. 1, as before and participated in the profits of the property when they lived in the family house in the same mess with defendant No, 1 and for months on some occasions. Defendant No. 1 never denied the title of his sisters, the plaintiffs Nos. 1 and 2. The dispute

(3) (1845) 3 Howard 674; 11 Law. Ed. 778.
(4) 31 C. 970; 9 C. W. N. 32.
(5) 9 C. W. N. 625; 2 A. L. J. 513; 2 C. L. J. 179; 27 A. 320; 15 M. L. J. 261; 32 I. A. 86; 8 Sar. P. C. J. 788 (P. C.).
(6) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

*Page of 9 C. W. N.—[*Ed.*]

(7) 28 Ind. Cas. 22; 21 C. L. J. 192.

really broke out between the parties when the plaintiffs' share in the compensation money obtained from the Land Acquisition Collector was refused to be given to the plaintiffs by the defendant in year 1911. It is in evidence that the defendant No. 1 admitted the title of the plaintiffs before the Rajah of Dighapatia, their landlord, to whom the parties applied for a settlement of their dispute. It is an admitted fact that Rs. 1,001 was paid by the defendant No. 1 to the plaintiffs at that time although there is considerable difference between the parties as to the conditions under which the payment was made.

On the whole we, therefore, find that that case comes within the principles of the cases cited above and the claim of plaintiff Nos. 1 and 2 is not barred by limitation.

The case of the plaintiff No. 3 stands upon a different footing. He inherited a share out of the share which his deceased wife Montazannessa who died in 1893 inherited from her father Basir. He is a stranger although he married the plaintiff No. 2 in 1896. His house is at a considerable distance from Basir's house and he has his own house and *jote* lands. He never claimed his share over 30 years and never participated in the profits of the properties as the other plaintiffs did. He was excluded in the suit of 1895 and we can find nothing in the evidence to hold that the possession of defendant No. 1 was anything but adverse against him.

Plaintiff No. 3 did not examine himself in this case and practically there is nothing on the record to prove his case. It was incumbent upon him to show how he was in possession of his share which he inherited more than 30 years ago and it was also clearly his duty to explain, if possible, why the possession of defendant No. 1 after he was excluded from the suit of 1895 should not be held to be adverse to him. In short in the absence of his deposition in this case it cannot be held that the plaintiff No. 3 has succeeded in saving his claim from the bar of limitation. His conduct shows that he abandoned his claim to this property.

The result of the aforesaid findings are that the appeal is dismissed against plaintiffs Nos. 1 and 2 with costs and their cross-objections directed against defendant No. 1 are also dismissed with costs. The costs of the appeal and the cross-objections are to be assessed in proportion to the success or otherwise of the parties. The appeal as against plaintiff No. 3 is decreed and his suit is dismissed and under the circumstances without cost as the case against the plaintiff No. 3 was not separately pressed by the defendant No. 1 in the Court below Hearing fee 10 gold *mohurs*.

Greaves, J.—I agree.

Z K. *Appeal and cross-objections dismissed in part.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291-B OF 1922.

January 23, 1924.

Present:—Mr. Kinkhede, A. J. C.

LAXMAN—DEFENDANT No. 1—APPELLANT

versus

BABUSA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Pleadings—Failure to deny allegation, effect of—Procedure—Suit against person in possession of assets—Assets, existence of, enquiry as to—Execution.

The provision contained in r. 5 of O. VIII of the C. P. C., which is applicable expressly to allegations in the plaint and to a defendant's failure to deny them, cannot be extended to an oral pleading of the defendant, so as to justify an inference from the absence of a reply thereto by the plaintiff that the latter accepts it as true. [p. 769, col. 2.]

Where a suit is brought against a person as being in possession of the assets of a deceased debtor, the question of possession of assets may either be investigated in the course of the suit or left for adjudication in the course of execution proceedings. [p. 770, col. 1.]

Girdharlal Krishnavalabh v. *Baishao*, 8 B. 309; 4 Ind. Dec. (N. S.) 580 and *Govind Abaji Jakhadi* v. *Mohaniraj Vinayak Jakhadi*, 25 B. 494; 3 Bom. L. R. 407, referred to.

Appeal against a decision of the Second Additional District Judge, Amraoti, in Civil Appeal No. 181 of 1921, dated the 22nd February 1922.

Messrs. *Atmaram Bhagwant*, *A. C. Roy* and *D. P. Tiwari*, for the Appellant.

Mr. *G. R. Deo*, for the Respondents.

JUDGMENT.—This case involves the question whether a legal heir is bound by a decree obtained by a creditor of the deceased debtor against a stranger who is neither an heir nor is in possession of the estate of the deceased. The plaintiff is the transferee from one Udaram who purchased the property in suit at an auction-sale held in execution of a decree which one Mahadappa had obtained in respect of a debt due

by one Bhagwant *alias* Bapurao, against one Rangubai the aunt of the deceased and one Sitaram to whom she had sold the property by a sale-deed dated 18th June 1913, alleging that they were in possession. The decree was obtained on 25th August 1916 in Small Cause Court Suit No. 104 of 1916 and in execution of the same, the property in suit was attached sometime in April 1918. The sale was held on 16th January 1919 and one Udaram purchased the fields at it. The sale was confirmed in due course. But when he applied for possession he was obstructed by Laxman who is the present appellant on the strength of a sale-deed dated 11th January 1919 which he took from Bhagwant's sisters who according to him were the legal heirs. The Executing Court refused to distrub Laxman's possession. This order of refusal was passed on 27th February 1920 and the auction-purchaser was referred to a regular suit. He sold his interest to Babusa plaintiff by a registered sale-deed dated 27th January 1921, Ex. P-5. The present suit was instituted by Babusa on 14th February 1921.

On the basis of the title conveyed to Sitaram by Rangubai the former sued Harni the mistress of Bhagwant for possession of the property and for mesne profits (Suit No. 247 of 1917) and obtained a decree on 14th September 1918 for possession and profits against her and actually got possession thereof on 23rd September 1919 (Ex. P-14). It was held in that case that Rangubai was the legal heir of Bhagwant Rao and as such Sitaram was entitled to recover possession of property from Harni who was a trespasser.

The defence of Laxman was that the decree in execution of which the property was sold was not binding on his vendors, the sisters of Bhagwant Rao who were his legal heirs, and that as Rangubai and Sitaram were neither heirs nor in possession of the estate of the deceased they were not legal representatives of the deceased Bhagwant and, therefore, the decree obtained against them was a nullity and the auction-sale held in pursuance of such a decree did not convey any title to Udaram and, therefore, plaintiff could get no title from Udaram.

The First Court held that the decree did not bind the defendants' vendors who were the legal heirs, but the lower Appellate Court has reversed the decree on the ground that the defendants to Suit No. 104 of 1916 were the legal representatives of the deceased, within the meaning of that word as defined in s 2 (11), C. P. C. The defendant No. 1 has, therefore, come up in second appeal. Amongst other contentions his submission is that the Court of Appeal has erroneously assumed that the estate of the deceased was in the possession of Rangubai and Sitaram at the date of the litigation in Suit No. 104 of 1916 or at the time of the passing of the decree and that consequently defendant No. 1 was not bound by a decree obtained against persons who could not legally be styled as legal representatives.

A perusal of the pleadings clearly shows that the defendant No. 1 had specifically denied that Rangubai and Sitaram were in possession of the estate of Bhagwant. The plaintiff did not give any reply to this. It is contended that this must mean that the plaintiff admitted the defendants' assertion on this point. Reliance is placed on O. VIII, r. 5, C. P. C. I am not prepared to extend the provisions expressly made applicable to allegations in plaint, and to defendant's failure to deny them, to an oral pleading of the defendant and infer from the absence of a reply thereto by plaintiff that the latter acceptd it as true. The Court of first intance did not frame a specific issue on this point. It is contended that had the point been put in issue by the Court of first instance the plaintiff would have given the necessary evidence to prove possession of Rangubai and Sitaram or such intermeddling with the estate of the deceased as to make them his legal representatives for the purposes of Suit No. 104 of 1916. I think the plaintiff's contention is correct and the defendant-appellant also concedes that in the circumstances of the case plaintiff must have opportunity to prove all the facts which are relevant for the success of his case.

I find that the pleadings of the parties are not very satisfactory. The parties agree that the only way in which the case could be properly decided would be to remand it for fresh pleadings, issues and for such additional evidence as the parties may think fit to adduce in support of their respective cases. The case is, therefore, sent back to the Court of Appeal with direction to send it down to the Court of first instance for fresh decision after full and proper enquiry into all the relevant facts and circumstances.

It will be open to the Court of first instance to consider the position arising out of the facts admitted or proved hitherto also. I may point out that the decree was passed against the assets of the deceased. As the question of possession of assets may either be investigated in the course of the suit to enforce the liability against the assets, or may be left for adjudication in the course of the execution proceedings as has been held in *Girdharlal Krishnavalabh* v. *Baishao* (1) and in *Govind Abaji Jakhadi* v. *Mohoniraj Vinagak Jakhadi* (2) it is open to plaintiff to rely on the judgment obtained and possession recovered by Sitaram as against Harni under the decree in Suit No. 247 of 1917 before the date of the actual auction, and show that even if the persons sued were not actually possessed of the assets at the date of the suit, or decree passed against them, still at the same time, before the actual auction-sale took place they became possessed of assets of the deceased and thus the auction-purchaser got a good title. But this and several other positions open to a *bona fide* innocent auction-purchaser for value involves questions of fact which must be sufficiently tried out in the First Court, compare *Pares Nath Mallik* v. *Hari Charan Dey* (3). This question has not been put into issue. It will be for the First Court to examine the parties thoroughly and then decide the case after full and complete trial. The parties are at liberty to supplment the evidence already on record.

The appeal is allowed and the case is remanded for fresh decision with advertance to the above remarks. The costs of appeal to this Court as also those in the Courts below will abide the event.

Z. K.

Appeal allowed.

(1) 8 B. 309; 4 Ind. Dec. (N. S.) 580.
(2) 25 B. 494; 3 Bom. L. R. 407.
(3) 10 Ind. Cas. 361; 38 C. 622 at pp. 627, 628; 15 C. W. N. 875; 14 C. L. J. 300

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1056 OF 1922.

July 24, 1924.

Present:—Justice Sir Babington Newbould, KT.

Munshi ABDUL KARIM CHOWDHURY—PLAINTIFF—APPELLANT

versus

PROSANNA KUMAR NATH—DEFENDANT—RESPONDENT.

Landlord and tenant—Abwabs—*Additional sums payable in excess of rent—Payment for several years without objection, effect of—Rent decree, whether operates as* res judicata—*Calcutta High Court Appellate Side Rules, rr. 50, 51, 52, operation of.*

Where a *pattah* stated the total rent to be at a certain sum and certain additional items for vet cocoanut and for Beggar were shown in a tabulated form and in that form was also shown a sum as the total amount payable for the land and the body of the *pattah* provided that the cocoanuts were to be supplied and the labour was to be performed specifically on a single occasion only:

Held, that the additional items in respect of cocoanu- and Beggar were irrecoverable *abwabs*. [p. 771, col. 2.]

Bejoy Singh Dudhuria v. *Krishna Behari Biswas* 41 Ind. Cas. 561; 21 C. W. N. 959; 45 C. 259 and *Nagendra Lal* v. *Hamdoo Mia*, 37 Ind. Cas. 965, referred to.

The payment of a disputed amount as rent for a large number of years without objection does not prevent the question as to the legality of the payment being raised in a subsequent suit between the parties. [p. 772, col. 1.]

Radha Charan Ray Chowdhry v. *Golap Chandra Ghose*, 31 C. 834; 8 C. W. N. 529, followed.

A previous rent decree in the absence of the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realised from year to year. [*ibid.*]

Note 1 to r. 50 of Ch. IX of the Appellate Side Rules of the Calcutta High Court and r. 50 itself apply to all appeals from appellate decrees. Rule 52 does not make any alteration as to the contents of the paper-book to which r. 50 relates. It only modifies the previous rule No. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in r. 52 no printed paper-book is prepared, but instead of that typed copies of the paper book are prepared without any charge being levied from the parties but the contents of the paper-book remain the same in both classes of appeals. [p. 771, col. 1.]

Appeal against the decree of the Subordinate Judge, First Court, Chittagong, dated the 17th February, 1922, modifying that of the Munsif, Fatickchhari, dated the 20th of January, 1921.

Babu *Sarat Chandra Mukherjee*, for the Appellant.

Babus *Nripendra Chandra Das* and *Nikhunja Behary Roy*, for the Respondent.

JUDGMENT.—The only point pressed in this appeal as before the lower Appellate Court relates to the amount of yearly

rent which the plaintiff-appellant is entitled to realise. The plaintiff claimed rent at the rate of Rs. 2-10-6 in addition to cesses and obtained a decree based on this rate in the First Court. On appeal the annual amount of rent payable was held to be Rs. 2-4-6, the learned Subordinate Judge having disallowed two items for vet cocoanut, 1 anna 6 pies, and for Beggar 4 annas 6 pies, as irrecoverable *abwabs*.

Before dealing with this question it is necessary to refer to a preliminary point which arose in connection with the hearing of the appeal. The decision of this appeal depends on the construction of the lease, Ex. 1, by which the tenancy was created. Under the rules of this Court contained in note 1 of r. 50 of Ch. IX of the Appellate Side Rules of this Court it was the duty of the Vakil for the appellant before the hearing of the appeal to serve on the Vakil for the respondent a typed copy of the translation of this Ex. and also to provide two such typed copies for the use of the Division Court, and this was not done; and as provided in that rule I refused to allow the learned Vakil for the appellant to refer to this document at the hearing. He contended that this rule did not apply in the case of the present appeal which is an appeal from an appellate decree not exceeding Rs. 50 in value. In my opinion this note and also r. 50 apply to all appeals from appellate decrees. Rule 52 does not make any alteration as to the contents of the paper book to which r. 50 relates. It only modifies the previous r. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in r. 52 no printed paper book is prepared, but instead of that typed copies of the paper-book are prepared without any charge being levied from the parties, but the contents of the paper-book remain the same in both classes of appeals.

As the decision of this appeal depends entirely on the construction of the lease the appellant has been put to some difficulty. It is for him to show that the decision of the Appellate Court is wrong and it is difficult for him to do so without referring to the document which the Courts have to interpret. However, from the judgment of the lower Appellate Court there is sufficient description of the contents of the document to enable the argument to be adduced that the construction by that Court is wrong and the argument has been considerably strengthened by the admission that was very fairly made by the learned Vakil for the respondent that in this document there is a provision for payment of the rent by instalments and these instalments amount to the total sum claimed by the plaintiff-appellant as payable.

There is a large amount of case-law on the question as to whether the extra amount of which payment is provided in the lease should be treated as part of the rent and, therefore, recoverable or treated as irrecoverable *abwabs*. A large number of these cases were discussed in the case of *Bejoy Singh Dadhuria* v. *Krishna Behari Biswas* (1). It was a Letters Patent Appeal from my own decision and in that particular case it was held that the sum which was in dispute was to be regarded as an irrecoverable *abwab*. But there is a passage in the head-note to that case which to some extent supports the contention raised on behalf of the appellant. It is there held that in determining whether an item did or did not form part of the rent the fact that it has been stipulated to be paid separately from the rent and also the fact that it is not included in the instalments of the rent have been considered as having material bearing on the question. Here as already stated it is in the appellants' favour that the items in dispute in the present case have been included in the instalments of the rent. I do not propose to refer to all the cases which have been cited in argument. A very large number of them has been discussed in the case to which I have just referred. I will refer to one unreported case* *Nagendra Lal* v. *Hamdoo Mia* [S. A. 3653 of 1914] decided on the 22nd November 1916 which was specially relied on by the learned Vakil for the appellant. That was a case from the same District Chittagong and it was there held that the items in dispute were really part of the consolidated rent and, therefore, recoverable. There too one of the grounds for deciding in the landlords' favour was that this consolidated amount including the disputed item was shown as recoverable in three instalments. It appears to me that this case is distinguishable on the ground that it is there stated that the

(1) 41 Ind. Cas. 561; 21 C. W. N. 959; 45 C. 259.

*Reported as 37 Ind. Cas. 965- [*Ed.*]

rent sought to be recovered was mentioned in the body of the document. Here it would appear from the judgment of the lower Appellate Court that in the *pottah* the total rent is stated to be Rs. 2-4-0 only and that the disputed items are shown in a tabulated form common in Chittagong and in that form is also shown a sum as the total amount payable for the land. Though this total is admittedly shown as payable in instalments I must hold on the materials before me that the learned Subordinate Judge has given good reason for holding nevertheless that these two items of 1 anna 6 pies the value of cocoanut and 4 annas 6 pies the value of Beggar were not recoverable as part of the rent. The important point to my mind is that though the instalments include these amounts nevertheless the body of the lease provides that the cocoanuts are to be supplied and the labour to be performed specificially on a single occasion only. As the learned Subordinate Judge correctly states :—"If the vet and Beggar merely consisted of definite sum of money then they would have been looked upon as part of the rent being a definite sum like it." But the *kabuliyat* shows that they were intended to be performed specifically with a money equivalent in case of breach. Had there been no such stipulation for specific performance the plaintiff's case would in my opinion have been irresistible. But this clause in the lease makes it distinguishable from other cases in which similar amounts have been held to form part of the consolidated rent.

It was also contended that the plaintiff has in his favour an entry in the Record of Rights and that the presumption arising from that entry has been unrebutted. The presumption has, however, been rebutted by the evidence of the lease itself Ex. 1. It is further contended that the previous decree in a rent suit in which these amounts were recorded by the plaintiff operates as *res judicata*. The learned Subordinate Judge is undoubtedly right in holding that the decree without the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realised from year to year. As was pointed out in one of the cases relied on behalf of the appellant in the main case of *Radha Charan Ray Chowdhury* v. *Golak Chandra Ghose* (2) the payment of the disputed amount for a large number of years without objection does not prevent the question as to the legality of the payment being raised in this suit.

For the above reasons I hold that the decision of the lower Appellate Court was right and I accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 31 C. 834; 8 C. W. N. 529.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1092 OF 1923.

January 29, 1924.

Present:—Mr. Justice Moti Sagar.

JHANDA—PLAINTIFF—APPELLANT

versus

SAPURAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Mother, whether can alienate property of minor—Suit to recover property alienated—Ancestral debt, liability to pay.

The mother of a Muhammadan minor has no power, under the Muhammadan Law, as *de facto* guardian of the minor to alienate or charge the immoveable property of the minor, even if the transaction is for the benefit of the minor. Any such alienation is void *ab initio*. [p. 773, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 45 I. A. 73; 28 C. L. J. 409; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1032; (1919) M. W. N. 91; 9 L. W. 518 (P. C.), followed.

Kapura v. *Shankar Das-Mul Chand*, 48 Ind. Cas. 303; 108 P. R. 1918, *Rao Vinayak* v. *Laxman*, 44 Ind. Cas. 51; 14 N. L. R. 56, *Qamaruddin* v. *Fakhruddin*, 51 Ind. Cas. 796, *Laloo Karikar* v. *Jagat Chandra Saha*, 62 Ind. Cas. 428; 25 C. W. N. 258; 33 C. L. J. 256, *Monmohini Das Gupta* v. *Basanta Kumar Das Gupta*, 69 Ind. Cas. 753; (1922) A. I. R. (C.) 458; 36 C. L. J. 190, referred to.

A Muhammadan minor who sues to recover immoveable property alienated by his mother during his minority as his *de facto* guardian, is liable to satisfy a proportionate share of any ancestral debts due from the estate, before he can recover his share in the property. [p. 774, col. 1.]

Laloo Karikar v. *Jagat Chandra Saha*, 62 Ind. Cas. 428; 25 C. W. N. 258; 33 C. L. J. 256, relied on.

Second appeal against the decree of the District Judge, Hoshiarpur, dated the 23rd January 1923, confirming that of the Munsif First Class, Hoshiarpur, dated the 10th July 1922.

Sheikh *Niaz Mohammad*, for the Appellant.

Lala *Rup Ram* for Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The only question to be determined in this second appeal is whether the plaintiff is or is not bound by the sale of his immoveable property made

by his mother as *de facto* guardian during his minority. The learned Judges of the Courts below have found that the sale was made for the benefit of the plaintiff, and, following *Kapura* v. *Shankar Das-Mul Chand* (1) and *Rao Vinayak* v. *Laxman* (2) have dismissed the suit.

On the present appeal by the plaintiff it has been argued that the decisions relied on cannot be regarded as good law in view of the pronouncement made by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (3). I am of opinion that this contention is well-founded and must prevail. In the case of *Imambandi* v. *Mutsaddi* (3) a Muhammadan widow without having been legally appointed guardian of her minor children transferred their shares in the property of their deceased father to certain persons who sued for a declaration of the title and status of their vendor, and also for a decree for possession of the shares covered by the deed of sale. It was held by the Judicial Committee that under the Muhammadan Law the mother was entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child, and that she had no power as *de facto* guardian to alienate or charge the immoveable property. It was further held that the transferee was let into possession of the property under such unauthorized transfer, he would not be entitled to resist an action in ejectment on behalf of the infant as a trespasser. This authority has since been followed in a large number of cases by the various High Courts in India and may now be taken to have definitely settled the law on a subject on which there was formerly a great divergence of opinion; [See *Qamruddin* v. *Fakhuruddin* (4), *Laloo Karikar* v. *Jagat Chandra Saha* (5) and *Monmohini Das Gupta* v. *Basanta Kumar Das Gupta* (6)]. From this point of view it is clear that the sale by the mother even if it was for the personal benefit of the minor, does not confer a valid title on the vendee.

(1) 48 Ind. Cas. 306; 108 P. R. 1918.
(2) 44 Ind. Cas. 51; 14 N. L. R. 56.
(3) 47 Ind. Cas. 513; 45 C. 878; 45 I. A. 73; 28 C. L. J. 409; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 23 C. W. N. 70; 5 P. L. W. 276; 20 Bom. L. R. 1032; (1919) M. W. N. 91; 9 L. W. 518 (P. C.).
(4) 51 Ind. Cas. 796.
(5) 62 Ind. Cas. 428; 25 C. W. N. 258; 33 C. L. J. 256.
(6) 69 Ind. Cas. 753; (1922) A. I. R. (C.) 458; 36 C. L. J. 190.

Mr. Rup Ram for the defendants, however, argues that this point was never taken in any of the Courts below and that the only ground upon which the plaintiff contested the sale was that it had not been made for his benefit. He further argues that it has now been definitely found by the learned District Judge that the sale was made for the benefit of the plaintiff and that the finding being one of fact cannot be impugned in second appeal. I am unable to agree with this contention. A reference to para. 2 of the plaint clearly shows that the plaintiff distinctly stated that the sale was void *ab initio* and that he was not in any way bound by it. As an additional reason for setting aside the sale he further stated that even if it was found that the sale was not absolutely void, it was not for his benefit and could, therefore, be avoided by him. In my opinion the question as to the illegality of the sale by reason of the fact that it was made by an unauthorised person was distinctly raised in the pleadings and I consequently overrule the contention.

Next, it was contended that the parties were governed by Customary Law and that the rule laid down in *Imambandi* v. *Mutsaddi* (3) which was clearly a case under the Muhammadan Law, could not apply to the facts of the present case. This contention is equally untenable. A reference to the *Riwaj-i-am* of the Hoshiarpur District makes it clear that even under the Customary Law the mother is not the guardian of the property of the minor but is only the guardian of his person up to a certain age. From the replies given in answer to question 27 it is further clear that even the guardian of the property has no power under that law to make a permanent transfer of the property and that he is authorised to charge only the moveable property of the minor in case of urgent necessity. I must, therefore, hold that the sale was void *ab initio* and wholly ineffectual so far as the rights of the present plaintiff were concerned.

The learned District Judge, however, has found, and this finding has not been contested by the learned Vakil for the appellant, that the plaintiff was entitled to 4 *kanals* 9¼ *marlas* of land only in the holding which was transferred to the defendants in April 1914, and that there was a charge of Rs. 515 thereon created by his grandfather which the plaintiff was bound

to pay before he could get possession of the land in suit. It appears that 23 *kanals* 12 *marlas* of land were sold to the defendants for Rs. 2,845 and that out of these 23 *kanals* 12 *marlas* the plaintiff was entitled only to 4 *kanals* 9¼ *marlas*. There was a charge of Rs. 2,057 against 17 *kanals* 17 *marlas* created by the plaintiff's grandfather. There can be no doubt that the plaintiff was bound to pay a proportionate share of the debts due from the estate before he could recover his share in the property. In *Laloo Karikar* v. *Jagat Chandra Saha* (5) which was a case exactly on all fours with the present case, the sale of the minors' share made by their mother was set aside, but it was held that each of the heirs was liable to satisfy the ancestral debt to the extent of his share in the assets. In the present case it has been found as a fact that the plaintiff's share of the debts is Rs. 515. The plaintiff is consequently bound to pay this sum before he can recover possession of his share.

I accordingly accept the appeal and setting aside the order of the learned District Judge, direct that the plaintiff will recover possession of his share but he will pay the sum of Rs. 515 to the defendant vendees within three months from this date, and that if the amount is not deposited in Court within the time specified, the defendants will be entitled to realize the sum in execution by sale of the share of the plaintiff. Parties shall bear their own costs throughout.

Z. K. *Appeal accepted.*

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 18 OF 1923.
February 24, 1924.
Present :—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Shah and Mr. Justice Marten.

WILLIAM K. HEWSON—PETITIONER
versus
ETHEL M. HEWSON—RESPONDENT.

Divorce Act (IV of 1869), s. 7—Divorce petition—Domicil—Adultery, evidence of—Submission by respondent, whether sufficient—Adultery with unnamed person—Relief, grant of.

Unless it is shown that the parties to a divorce petition are domiciled in British India, the Divorce Act gives no jurisdiction to the Courts to hear the petition. [p. 774, col. 2.]

Alfred Wilkinson v. *Grace Emily Wilkinson*, 77 Ind. Cas. 654; 47 B. 843; 25 Bom. L. R. 945; (1923) A. I. R. (B.) 321, referred to.

An allegation to the effect that the parties are domiciled in British India ought to be contained in every petition under the Divorce Act. [*ibid.*]

A mere submission, not an admission, by the wife that she had committed adultery with some unknown person is insufficient evidence to establish adultery. [p. 775, col. 1.]

Per *Marten, J.*—In a petition for divorce founded on adultery with a named person and also with some person or persons unknown, relief cannot be granted in respect of the latter allegation, unless leave to dispense with the named co-respondent is first obtained from the Court. [*ibid.*]

Saunders v. *Saunders*, (1897) P. 89; 66 L. J. P. 57 and *Rush* v. *Rush*, (1920) P. 242; 89 L. J. P. 129; 122 L. T. 792; 64 S. J. 323; 36 T. L. R. 302, referred to.

Civil reference made by the Commissioner, Sind, under ss. 17 and 20 of the Indian Divorce Act.

Mr. *W. B. Pradhan*, for the Petitioner.

Mr. *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.

Macleod, C. J.—In this case the Judicial Commissioner of Sind has passed a decree *nisi* for dissolution of marriage in favour of the petitioner, William Knox Hewson, on the ground that his wife had committed adultery with some unknown person. It now comes before us for confirmation. In the first place, we may point out that there is no allegation in the petition that the parties are domiciled in British India. Unless it is shown that they are domiciled in British India, the Indian Divorce Act gives no jurisdiction to hear the petition. That is an allegation which ought to be contained in every petition under the Indian Divorce Act. In any event we should have to send the case back if we thought the decree was right, so that the evidence of domicil should be on the record. But we think on the evidence before the learned Judicial Commissioner that the petitioner was not entitled to a decree. He alleged in his petiton adultery of his wife with one Sydney Judd, and he further alleged that his wife had become pregnant by the said Sydney Judd and had a miscarriage. The evidnce to prove adultery between the respondent and the co-respondent fell very far short of what would be required by a Divorce Court and accordingly the learned Judicial Commissioner dismissed the petition against him, and quite rightly in my opinion. The only evidence, therefore, of adultery would lie in the submission by the respondent that

she had miscarriage, after she had become pregnant by some one other than her husband. The petitioner did not even take the trouble to prove by any evidence that his wife had as a matter of fact a miscarriage. Undoubtedly she was in the hospital for a certain time up to June 6, 1922, and it would have been a simple matter from the hospital records to prove whether or not she had a miscarriage. But there is nothing left on which a decree for dissolution could be granted except the submission, not the admission, of the respondent that she had a miscarriage. We cannot, therefore, confirm this decree. The petition is, therefore, dismissed.

Shah, J.—I concur.

Marten, J.—As to the want of jurisdiction in the absence of an Indian domicil reference may be made to the recent case of *Alfred Wilkinson* v. *Grace Emily Wilkinson* (1).

Then on the point that the decree is one founded on adultery with some person or persons unknown, the ordinary practice is that leave to dispense with a named co-respondent must first be given by the Court before relief can be granted on such a petition. This will be found in Halsbury, Vol. XXI, pp. 505-6, paragraph 1030. I may also refer to *Saunders* v. *Saunders* (2) and *Rush* v. *Rush* (3) both decisions of the English Court of Appeal on this point. In the present case no such leave was obtained. Indeed the petition itself does not allege adultery with any unknown person. It is founded solely on an allegation of adultery with the co-respondent Judd which the learned Judge held was not proved.

Then as regards the question whether it is permissible for spouses to deny sexual intercourse when in fact they are living together, I had to consider that point in *Codd* v. *Codd* (4). I may also refer to Halsbury, Vol. II, p. 429, paragraph 725, and *Russell* v. *Russell* (5) which was recently decided by the English Court of Appeal. It is, I think, permissible to give that evidence, but it must be scrutinized with great care; and it will be borne in mind that such eivdence, though admissible in a Divorce Court, may perhaps be inadmissible in legitimacy proceedings where the paternity of the infant is in question.

But here one most important point of evidence has not been properly proved, namely, the alleged miscarriage. The so-called evidence is little better than mere hearsay. I agree, therefore, that this petition must be dismissed. I regret that in the view I take it is impracticable for us to redraft this petition and start matters *de novo*. The petitioner, if he wishes to pursue the matter, will have to start again with a new petition, and produce proper evidence to support it. In my opinion these petitions for divorce should be carefully scrutinized or else the risk of fraudulent or collusive decrees being obtained is substantially increased.

N. H. *Petition dismissed.*

(1) 77 Ind. Cas. 654; 47 B. 843; 25 Bom. L. R. 945; (1923) A. I. R. (B.) 321.
(2) (1897) P. 80; 66 L. J. P. 57.
(3) (1920) P. 242; 89 L. J. P. 120; 122 L. T. 732; 64 S. J. 323; 36 T. L. R. 302.
(4) 84 Ind. Cas. 71; 25 Bom. L. R. 339 at p. 342; 47 B. 634; (1924) A. I. R. (B.) 132.
(5) (1923) W. N. 243.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 168 OF 1922.
January 7, 1924.

Present:—Mr. Baker, J. C.

SHEONARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BABULAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Partnership, entered into by Manager—Members, whether partners—Dissolution of partnership—Acknowledgment of debt, whether binding on other partners—Agency—Presumption.

A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners. [p. 777, col. 1.]

Grande Gangayya v. *Grande Venkataramiah*, 43 Ind. Cas. 9; 41 M. 451; 6 L. W. 708; (1917) M. W. N. 805; 22 M. L. T. 527; 31 M. L. J. 271, relied on.

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorised to do so, and such authority cannot be presumed. [p. 777, col. 2.]

Rajagopala Pillai v. *Krishnasami Chetti*, 8 M. L. J. 261 and *K. R. V. Firm* v. *Sathyavada Seetharamaswami*, 21 Ind. Cas. 631; 37 M. 146; 25 M. L. J. 591, relied on.

Seshi Ammal v. *Vairavan Chettiar*, 47 Ind. Cas. 953; 42 M. 15; 8 L. W. 503; 24 M. L. T. 332; (1918) M. W. N. 806; 35 M. L. J. 669, distinguished.

The presumption of agency does not exist in the case of a partnership which has ceased to be a going concern. [*ibid.*]

Premji Ludha v. *Dossa Doongersey Lowji*, 10 B. 358 at p. 362; 5 Ind. Dec. (N. S.) 626 and *Watson* v. *Woodman*, (1875) 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47, relied on.

Lalta Prasad v. *Babu Prasad*, 4 Ind. Cas. 708; 32 A. 51; 6 A. L. J. 953, distinguished.

Appeal against the decree of the District Judge, Nimar, dated 18th January 1922, in Civil Appeal No. 163 of 1921.

Dr. *H. S. Gour*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The plaintiffs sued to recover Rs. 1,939 odd from the defendants alleging that the deceased Dayaldas and the defendants were all joint and jointly owned a shop, with which the plaintiffs had dealings, and that during his lifetime Dayaldas was the manager of the joint family and shop and after his death the defendant No. 1, Sheonarain, had been the manager and that acknowledgments had been executed by Dayaldas during his lifetime and since his death by defendant No. 1 on his own behalf and for defendant No. 2 who is the minor son of Dayaldas. The defendant No. 1 denied that Dayaldas and he formed a joint Hindu family, or that Dayaldas was the manager or that he had any connection with the shop, but admitted passing acknowledgments and stated that he had passed them not for himself but for defendant No. 2. The relationship was also disputed.

The First Court held that Dayaldas, the father of defendant No. 2, was the uncle of defandants Nos. 1 and 3 and that Dayaldas and the defendants were joint in interest and carried on a joint shop, and decreed the plaintiffs' claim against all the defendants.

On appeal the District Judge of Nimar held that Dayaldas was adopted by Bisandas, his grandfather's brother, that he was originally the uncle of defendants Nos. 1 and 3, and that by his adoption he ceased to belong to their family and there was no real jointness between defendant No. 1 and Dayaldas, although they lived together and held everything in common. There is no evidence as to re-union and, therefore, there was no jointness in the sense of a joint family under the Hindu Law, but the grain shop really belonged to Dayaldas and the three defendants as a joint partnership. Though they were not actually a joint family, but as they carried on business representing that they were a joint family, they are now estopped from denying the truth of this representation, even though that did not represent the true legal position. Defendant No. 1 is *de facto* guardian of defendant No. 2. They were in every sense partners with a managing partner, and all their possessions were the assets of a joint partnership, and the acknowledgments, which formed the basis of the plaint, were executed by defendant No. 1 for himself and as guardian of the minor, defendant No. 2, and must be taken as made on behalf of the shop or partnership and bind all the defendants. The District Judge passed a decree against defendant No. 1 personally and against defendants Nos. 2 and 3 to the extent of the assets of Dayaldas lying in their hands.

The defendants make this second appeal.

It is contended that there is no pleading or issue on the question of estoppel; the question being a mixed question of fact and law must be left out of consideration. There was no issue as regards partnership. Assuming there was a partnership, it was dissolved on the death of Dayaldas in 1916. There is no pleading that a fresh partnership was entered into. As regards defendant No. 2 it is argued that unless it is shown that defendant No. 1 had authority to keep the debts alive, defendant No. 2 is not liable; defendant No. 1, being merely a *de facto* guardian, has no authority to bind him. Defendant No. 3 is major and brother of defendant No. 1, and is not liable for debts due from the firm of Dayaldas, as defendant No. 1 had no power to acknowledge the debts on his behalf. There is no evidence that the acknowledgments were for the benefit of the minor, and defendant No. 1 has been held liable as manager of a joint Hindu family, which he is not. Money was due from Dayaldas, and defendant No. 1 could not undertake to pay it.

On the findings of fact recorded by the lower Appellate Court it is clear that the defendants and Dayaldas did not form a joint family under the Hindu Law, though they traded jointly. The case is, therefore, not governed by the principles of the Hindu Law but by the law of partnership, and on the findings of the lower Appellate Court it must be held that Dayaldas and defendants Nos. 1 and 3 traded in partnership and that the debt in question was incurred by the partner-

ship. Therefore, under s. 261 of the Contract Act the estate of the deceased Dayaldas would be liable, the obligation being incurred before his death. Defendant No. 2, however, who is a minor, was not a partner with his father and does not become one on his father's death, as the District Judge appears to suppose.

In view of the adoption of Dayaldas by a distant relative, defendants Nos. 1 and 3 must be considered to be strangers. A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners: *cf. Grande Gangayya* v. *Grande Venkataramiah* (1) and under no circumstances will the death of Dayaldas make his minor son a partner with defendants Nos. 1 and 3. The acknowledgments or some of the acknowledgments purport to be made by defendant No. 1 on behalf of defendant No. 2. Admittedly defendant No. 1 is not the natural guardian of defendant No. 2, whose mother is his guardian, nor has he been appointed guardian by the Court. Defendant No. 1 has no authority to bind defendant No. 2 by any acknowledgment, nor can he bind defendant No. 2 as a representative of the deceased partner.

It was held in *Rajagopala Pillai* v. *Krishnasami Chetti* (2) that where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorized to do so. There is no special authority in this case. In these circumstances, I am of opinion that the view of the lower Appellate Court that defendant No. 2 is bound by the acknowledgments is incorrect. So far as defendant No. 1 is concerned, he is bound as a surviving partner by his own acknowledgment. Under s. 249 read with s. 263 of the Contract Act and s. 143 of the Contract Act he will be personally liable.

The case of *Seshi Ammal* v. *Vairavan Chettiar* (3) quoted by the learned Pleader for the respondents, is on a special point, which does not arise in this case, except in so far that the surviving partner represents the partnership actually, and a decree against him can be executed against the assets of the partnership in his hands. A personal decree in that case was passed against him because he as surviving partner had incurred the debt himself subsequent to the death of the deceased partner.

As regards defendant No. 3, he was also a partner, but I doubt if he can be bound by the acknowledgments executed by defendant No. 1. The fact that he was joint with defendant No. 1 does not in this particular case make any difference, as his being a member of the joint family does not make him a partner, as already explained in the case of *Grande Gangayya* v. *Grande Venkataramiah* (1). So far as his relations as a partner are concerned, it was held in *K. R. V. Firm* v. *Sathyavada Seetharamaswami* (4) that an acknowledgment made by one partner does not bind the other partners in the absence of proof that they authorized such acknowledgment or payment, and such authority cannot be presumed. It must be remembered that at the date of the acknowledgments in question the partnership must be considered to have been dissolved by the death of Dayaldas. If the defendants Nos. 1 and 3 continued to carry on the business, they must be regarded as having formed a fresh partnership and the acknowledgment of the debt incurred before the death of Dayaldas must be considered as one made in the course of winding up what was no longer a going concern. In my opinion, therefore, the case would fall within the ruling in *Premji Ludha* v. *Dossa Doongersey Lowji* (5) which follows *Watson* v. *Woodman* (6) that the presumption of agency does not exist in the case of a partnership which has ceased to be a going concern. The case of *Lalta Prasad* v. *Babu Prasad* (7) relied on by the District Judge, may be distinguished on the ground that the partnership was a going concern, which is not the case here.

I am, therefore, of opinion that the decree of the lower Appellate Court must be set aside and the suit dismissed as against defendants Nos. 2 and 4. The appeal of defendant No. 1 is dismissed

(1) 43 Ind. Cas. 9; 41 M. 454; 6 L. W. 708; (1917) M. W. N. 805; 22 M. L. T. 527; 34 M. L. J 271.
(2) 8 M. L. J. 261.
(3) 47 Ind. Cas. 958; 42 M. 15; 8 L. W. 503; 24 M. L. T. 392; (1918) M. W. N. 806; 35 M. L. J. 669.

(4) 21 Ind. Cas. 634; 37 M. 146; 25 M. L. J. 501.
(5) 10 B. 358 at p. 362; 5 Ind. Dec. (N. S.) 626.
(6) (1875) 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47.
(7) 4 Ind. Cas. 708; 32 A. 51; 6 A. L. J. 953.

with costs. Respondents will bear the costs of defendants Nos. 2 and 3 throughout.

Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 8 OF 1923.

March 24, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Kajiji and Mr. Justice Crump.

PANDU DAGADU MAHAR—DEFENDANT—APPELLANT

versus

JAMNADAS CHOTUMAL MARWADI—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 14 (2)—Execution petition in right Court—Proceedings continued in wrong Court—*Bona fide *proceedings—Exclusion of time.*

Where two separate Courts at different places have a common Judge who sits for a certain number of days in the month in each Court, and an execution application presented in one of the Courts which has jurisdiction, is taken up and disposed of in the other Court which has no jurisdiction, because the Judge happens to be sitting at that place, and the proceedings are eventually set aside in appeal, the decree-holder is entitled, in a subsequent application for execution, to exclude the time occupied in the proceedings in the wrong Court till the decision of the appeal under s. 14 (2) of the Limitation Act.

Letters Patent Appeal from the decision of Marten, J. (disagreeing with Pratt, J.), in Appeal under Letters Patent No. 5 of 1922 and reported in 76 Ind. Cas. 317 from the decision of Shah, J., in Second Appeal No. 750 of 1921, summarily dismissing an appeal from the decision of the District Judge, Poona, in Appeal No. 263 of 1920, reversing the order passed by the Subordinate Judge at Vadgaon, in Darkhast No. 29 of 1919.

Mr. *V. D. Limaye*, for the Appellant.

Mr. *Patvardhan* (and with him Mr. *D. G. Dalvi*), for the Respondent.

JUDGMENT.

Macleod, C. J.—In this case the plaintiff obtained a decree on November 27, 1907, in the Vadgaon Court in the Poona District, for possession of certain property. By a Darkhast No. 29 of 1919 he is now seeking to execute that decree and an objection has been taken by the judgment-debtors that the *darkhast* was barred by limitation.

That question depends on a further question whether the *darkhast* of June 7, 1916, was itself in time. The *darkhast* before that was dated April 10, 1912, and admittedly unless some of the period between April 10, 1912, and June 7, 1916, is excluded the *darkhast* of June 7, 1916, was out of time. The *darkhast* of April 10, 1912, was properly filed in the Vadgaon Court but thereafter as that Court had to sit for a certain number of days in a month at the Haveli Court, a notice was issued that the Judge would be sitting in the Haveli Court to hear that *darkhast*. The defendants did not appear and the Judge sitting in the Haveli Court made the warrant for possession absolute. The defendant objected to that order on the ground that the Court had no jurisdiction to pass that order sitting in the Haveli Court and appealed to the District Court which on February 26, 1913, set aside that order. The plaintiff appealed to the High Court but on February 3, 1915, that appeal was dismissed. The *darkhast* was finally brought on board in the Vadgaon Court on June 30, 1915, when it was struck off owing to the absence of the plaintiff. When the plaintiff sought to proceed with the execution of *Darkhast* No. 29 of 1919 he was confronted by the plea of limitation. The District Judge directed the Subordinate Judge of Vadgaon to proceed with the execution. Against that order an appeal was filed to the High Court which was summarily dismissed by Mr Justice Shah. In the Letters Patent Appeal there was a difference of opinion between Mr. Justice Marten and Mr. Justice Pratt, so under cl. 36 of the Letters Patent the opinion of the Senior Judge which was in favour of the appeal being dismissed prevailed. The defendants have filed a further appeal under the Letters Patent.

There is no authority on the question which we have to decide. Mr. Justice Marten was of opinion that s. 14, (2) was intended to protect a party from time running against him during the pendency of a *bona fide* proceeding which might eventually prove abortive by reason of want of jurisdiction or some similar cause. He referred to the decision in *Hira Lall* v. *Budri Dass* (1) where it was held that a proceeding to enforce a decree taken *bona fide* and with due diligence before a Judge

(1) 7 I. A. 167; 2 A. 792; 6 C. L. R. 561; 3 Shome L. R. 211; 1 Ind. Jur. 426; 4 Sar. P. C. J. 157; 3 Suth. P. C. J. 761; 1 Ind. Dec. (N. S.) 1090 (P. C.).

whom the party *bona fide* though erroneously believed to have jurisdiction, was a proceeding within the meaning of s. 20, Act XIV of 1859, whether the Judge actually decided that he had jurisdiction, or supposing himself to have jurisdiction acted accordingly. The only distinction from the present case is that in that case there was no *darkhast* filed in the proper Court in which time was running when the wrong applications were made, and as they were held to have been made *bona fide*, in a Court which had no jurisdiction, the time taken up in making those applications was excluded. Here undoubtedly there was a *darkhast* filed on April 10, 1912, which was filed in the proper Court, and there would be a difficulty in determining whether the proceedings taken up by the Judge on his own motion apparently when sitting in another Court were proceedings of a different character to the proceedings originally taken in the Vadgaon Court. But if the proceedings in the Haveli Court are considered as original *darkhast* proceedings taken *bona fide* in a Court without jurisdiction then undoubtedly the time from April 15, 1912, would have to be excluded. We do not think that in this case the plaintiff ought to suffer because when the proper proceedings were in the Vadgaon Court, the Judge sitting in the Haveli Court wrongly entertained the *darkhast*. For the purpose of this application, we think the notice of April 15, 1912, and the steps taken therein should be treated as a separate proceeding and not as appertaining to the original proceeding which was properly filed in the Vadgaon Court. It was only owing to the fact that the Judge was sitting for part of his time at the Vadgaon Court, for part of his time in the Haveli Court, and for part of his time in another Court, that a case of this nature could possibly arise. I very much doubt whether the framers of the Indian Limitation Act could have contemplated the possibility of a Judge being right in taking up certain proceedings when sitting in one Court and wrong in taking up the same proceedings when sitting in another Court.

The appeal, therefore, must now be dismissed with costs.

Kajiji, J.—I agree.
Crump, J.—I agree.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 118 OF 1923.
January 28, 1924.

Present:—Mr. Kinkhede, A. J. C.

MADHORAO—JUDGMENT-DEBTOR—APPLICANT

versus

MANOHARLAL—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 90—Execution of decree—Sale—Application to set aside sale—Procedure—Duty of Court.

If a litigant believing that he has certain valid grounds to urge against certain proceedings going on in his case, puts forward his grievance in the form of a petition, justice and equity require that the matter should be disposed of one way or the other by formal orders dealing with the points raised. It is not intended that the Courts should be so technical as to throw away the application practically without any orders. [p. 780, col. 2; 781, col. 1.]

Courts are bound to dispose of matters coming up for consideration before them by an adjudication in some form or other whether the same be an order or a judgment or a decree. [p. 781, col. 1.]

A summary rejection of an application to set aside an auction-sale on the ground of fraud, without an enquiry or an adjudication thereon, is not warranted by law. Such an order is liable to be set aside in revision. [*ibid.*]

Application for revision against an order of the Commissioner, Nerbudda Division, Hoshangabad, in Revenue Appeal No. 10-B of 1922, dated the 1st March 1923.

Messrs. *Atmaram Bhagwant* and *D. P. Tiwari*, for the Applicant.

Mr. *S. B. Gokhale*, for the Non-Applicant.

ORDER.—This revision arises out of Collector's proceedings which took place in connection with the execution of decrees passed in Civil Suits Nos. 123 of 1918 and 63 of 1919 between the parties to the present revision. The decrees were mortgage-decrees and they were sent out for execution to the Collector with a C form dated the 5th October 1920. The proceedings went on from time to time. About the middle of the year 1921, the Deputy Commissioner sanctioned the sale and field No. 323 only was first ordered to be put to auction. It was to be held at Multai on 2nd July 1921. The decree-holder Manohar Lal became the auction-purchaser of the field for Rs. 500 but the Collector thought it to be a low price and consequently the sale was not sanctioned. The auction was again ordered to be held at Multai on 6th September 1921. This time the sale was knocked down for Rs. 550. The case was fixed for confirmation of sale

for 10th October 1921. The Sub-Divisional Magistrate, however, thought that if the property were to be sold in pieces it may suffer in point of value and utility. He, therefore, refused to confirm the sale and ordered the whole property to be sold at Multai on 10th November 1921. As some mistake was found in C form, it was sent to Civil Court to be corrected and the property was ordered to be re-sold after correction of C form, on a fresh date. The sale was to be accordingly held at Multai on 15th February 1922. The Deputy Commissioner, however, fixed reserved price for each field and directed that as soon as enough price was fetched by bids for each field, the sale would be stopped, and cancelled the warrant. Consequently the property was not sold then, but the sale was again adjourned. It was accordingly held on 28th April 1922 but there were no bidders. The judgment-debtor then applied for amalgamation of case No. 125 of 1918 but no orders appear to have been passed in time. Fresh proclamation and fresh sale were ordered to be made and held, fixing 1st July 1922 as the date for sale at Betul. The sale was held on 1st July 1922 but this time the decree-holder's bid was of Rs. 1,200 only, although the reserved prices which were originally fixed at Rs. 5,400 were reduced to Rs. 2,500. The Deputy Commissioner, therefore, gave further directions as regards the manner of proclamation as the order-sheet entry dated 4th July 1922 would show, and a long date was given. The sale was accordingly ordered to be held on 4th December 1922 at Betul. The sale was accordingly held and the decree-holder purchased all fields for Rs. 2,253, the reduced reserved price this time being Rs. 2,245. The Sub-Divisional Officer recommended to the Deputy Commissioner that the decree-holder's bid may be accepted and fixed the case for confirmation of sale. Judgment-debtor's petition dated the 3rd January 1923 objecting to the confirmation presented to the Sub-Divisional Officer was summarily rejected by him, without even calling upon the decree-holder to reply to the several allegations made therein. On 4th January 1923 the case was put up before the Deputy Commissioner for confirmation with a recommendation that the sale may be confirmed. Accordingly on 5th January 1923 the record came before the Deputy Commissioner for the sale being confirmed. The judgment-debtor made a petition that day under O. XXI, r. 90 of the C. P. C., setting forth several objections. The application dated the 5th January 1923 was summarily rejected by the Deputy Commissioner in the following words: "Application rejected. Sale is on the point of being confirmed. Told. File with case. 5th January 1923." The sale was accordingly confirmed by a separate order dated 5th January 1923.

Against the order summarily rejecting the petition dated 5th January 1923 the judgment-debtor preferred an appeal to the Court of the Commissioner, but there also he got no hearing, the Commissioner having summarily disposed of the appeal in the following words: "This is the third effort by the judgment-debtor to postpone the sale of his property. No ground is shown for my interference and the appeal is summarily rejected." This order dated the 1st March 1923 is the subject-matter of the present revision. The main grievance of the judgment-debtor is that his objections have not been considered for what they are worth and disposed of according to law. It is contended and I think rightly that the order of summary rejection passed by the Deputy Commissioner was improper under the circumstances, and that enquiry ought to have been held by him as to how far the sale was vitiated by material irregularity and fraud in publishing and conducting the sale. Amongst other things the judgment-debtor Madhorao had alleged that the existence of the third mortgage-decree in Suit No. 125 of 1918 was not disclosed in the proclamation of the sale and, therefore, it constituted an irregularity which vitiated the sale. That the decree-holder by the practice of fraud had prevented several bidders from going to the place of auction, and that this resulted in a substantial injury to him was a serious allegation which required thorough enquiry. The judgment-debtor also raised other pleas of fact and law in his petition.

The point which I have to consider is whether the Deputy Commissioner as also the Commissioner were justified in dealing with the matter in the summary fashion in which they acted towards the judgment-debtor and his objections. In my opinion if a litigant believing that he has certain valid grounds to urge against certain proceedings going on in his case, puts forward his grievance in the form of a petition, justice and equity require that the matter

should be disposed of one way or the other by formal orders dealing with the points raised. It is not intended that the Courts should be so technical as to throw away the application practically without any orders. The word "order" has been defined in s. 2, cl. (14) of the C. P. C. It means the formal expression of any decision of a Civil Court which is not a decree. The word "decree" has also been defined as meaning the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and includes the determination of any question within s. 47 of the C. P. C. Similarly the word "judgment" is defined as meaning a statement given by the Judge of the grounds of a decree or order. If we carefully scrutinise these three definitions it is very abundantly clear that the Courts are bound to dispose of matters coming up for consideration by an adjudication in some form or the other, whether the same be an order, or a judgment, or a decree. I am, therefore, of opinion that as the question whether the sale held on 4th December 1922 was properly held or was vitiated by any irregularities or fraud, was raised by the judgment-debtor in his petitions dated 3rd January 1923 and 5th January 1923, the Deputy Commissioner was bound under law to give an adjudication one way or the other on the several points urged by him in the petitions. The Court was bound to record its formal expression of adjudication thereon. The Deputy Commissioner's failure, therefore, to give such adjudication was improper and unjustifiable. No doubt under s. 37 (1) of the Land Revenue Act II of 1917, the appellate authority can summarily reject an appeal. But in the particular circumstances of the case such summary rejection was not proper and does not appear to me to be warranted by law. The objections if upheld are likely to result in the sale being set aside. If the judgment-debtor's allegations about the fraud on the part of the decree-holder be held proved, then on that score alone the sale is bound to be set aside. It was absolutely necessary in the interests of both parties as also of justice that the lower Courts ought not to have summarily rejected the judgment-debtor's petitions. In declining to consider the objections I think the Courts below have acted with material irregularity in the exercise of the jurisdiction vested in them by law. In the interests of justice I think it is necessary that I should interfere in revision with orders of this kind. I, therefore, set aside the order of the Commissioner, dated the 1st March 1923. This necessarily rips open the Deputy Commissioner's order refusing to consider the application dated the 5th January 1923 and confirming the auction-sale. As the powers delegated to the Collector have now been withdrawn, the case is remanded to the Civil Court in whose decree the sale was ordered, for disposal according to law after holding an enquiry into the truth or otherwise of the facts alleged by the judgment-debtor. If on enquiry the Court be satisfied that the judgment-debtor sustained substantial injury by reason of the irregularities or fraud alleged by him the sale must be set aside.

With these remarks I allow the petition for revision. The Pleader's fee shall be Rs. 25.

Z. K. *Petition allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 976 OF 1922.

July 17, 1924.

Present:—Mr. Justice Suhrawardy, and Mr. Justice Duval.

JOYRAM CHANDRA LAHIRI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISNU CHARAN BISWAS—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenant not put in possession of whole holding—Suspension of rent—Abatement of rent.

Where a portion of a holding is let out to a lessee and the lessor subsequently lets the holding to another lessee and is unable in consequence to put the latter in possession of the whole holding, there will be a full suspension of the rent in respect of the whole holding until such time as the landlord puts the lessee in possession of the whole holding. Where, however, the lessee is aware at the time when the lease is granted to him that a portion of the holding is in the possession of another there will not be a suspension of the whole rent but only a proportionate abatement of it. [p. 782, col. 2.]

Manindra Chandra Nandi v. *Narendra Chandra Lahiri*, 52 Ind. Cas. 13; 46 C. 956; 23 C. W. N. 585 and *Narendra Chandra Lahiri* v *Manindra Chandra Nandi*, 67 Ind. Cas. 800; 49 C. 1019; 26 C. W. N. 826; (1922) A. I. R. (C.) 153, followed.

Appeal against the decree of the Subordinate Judge, Faridpur, dated the 30th of January 1922.

Babus *Girija Prasanna Sanyal* and *Induprokas Chatterjee*, for the Appellants.

Babu *Santimoy Mazumdar*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to recover rent in respect of a holding consisting of 15 *bighas* on a *jama* of Rs. 12-5-4¾ for the years 1323 to 1326. The defendant is an auction-purchaser in a rent-sale which was held in 1916. His case is that, as a matter of fact, he did not get possession of one plot of land purchased in execution of the rent decree measuring 12 *cottas* and 11 *chitaks* as the landlord who brought the holding to sale had on the 2nd September 1907 leased out that plot, which was originally a part of the holding the subject of the rent-sale, to one Chandra Kanta. The learned Subordinate Judge affirming the decision of the Munsif has dismissed the suit on the ground that as the landlord had dispossessed the tenant or rather had not given the tenant an opportunity of getting in possession of a part of the holding by leasing a part of it to Chandra Kanta, the whole rent is suspended.

In appeal the only question urged before us on behalf of the appellants is that there should have been an abatement of rent and not suspension of the whole rent. A large number of authorities have been put before us as to whether this is a case for suspension of rent or a case for abatement of rent. As we have said this case is not one where the landlords have themselves dispossessed the present tenant. The landlord dispossessed the previous tenant against whom he obtained the rent decree by letting out one of the plots to Chandra Kanta, but when he put the property to sale in execution of the rent decree he obtained against the previous tenant, he included this particular plot, which he had taken out of the tenancy by the execution of the *pottah* to Chandra Kant in the lands to be sold in execution of the decree and the present respondent purchased it in the auction-sale on the faith of the representation that this plot was a part of what he purchased. The general principle is that if a portion of the land is let out to a lessee and the lessor lets it again to a subsequent lessee and is unable in consequence to put the latter in possession of the whole holding there will be a full suspension of rent in such a case. For this principle we may refer to the case of *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1). The respondent's case is that he relies on the decision of that case and that under those circumstances he is entitled to get suspension of rent for the whole tenancy until such time as the landlord puts him in possession of this one plot. On the other hand, the plaintiffs-appellants' case is as they set out in the plaint that there was a mistake in the Record of Rights. It appears that though Chandra Kanta's *pottah* is dated 1909, in the Record of Rights dated 1912 this plot, recorded as plot No. 521 was recorded as part of the tenancy which has now by the auction-purchase become the tenancy of the respondent. The plaintiffs also alleged that, as a matter of fact, the tenant is not entitled to get suspension of rent but only an abatement of rent because he was well aware when he purchased the holding at the auction-sale and took possession that plot No. 521 had already been transferred to Chandra Kanta. It will appear from the evidence that, as a matter of fact, respondent himself is a witness and proved the execution of the *pottah* in this very suit. The plaintiffs have, therefore, urged that this is a case for abatement and in this connection rely on the case of *Narendra Chandra Lahiri* v. *Manindra Chandra Nandi* (2), where it has been ruled that when a tenant knows at the beginning of the tenancy that some of the land of the tenancy is in the possession of another, he will not be entitled to have the rent suspended but only be entitled to reduction of rent of that portion. We have been referred to no case that has dealt exactly with what the position would be in the case of an auction-purchase in a rent suit. But this principle appears to us to be of general application and the general rule will be that there will be suspension of rent in cases where the landlord has, by his auction, dispossessed or where the lessee has not owing to his action been able to take possession of a part of the holding sold; and the exception will be that there will be an abatement of rent where this has occurred with the knowledge of the tenant before he entered into the land that a portion of it was in the possession of

(1) 52 Ind. Cas. 13; 46 C. 956; 23 C. W. N. 585.
(2) 67 Ind. Cas. 800; 49 C. 1019; 26 C. W. N. 826; (1922) A. I. R. (C.) 153.

another. In the present case, however, though we have been referred to the evidence there is no finding by either of the Courts below as to whether, as a matter of fact, the present respondent had knowledge of the transaction of 1909 transferring plot No. 521 to Chandra Kanta so that it had ceased to be a portion of the holding which he purchased in the rent execution case in 1916. We consider that, for a proper decision as to whether this is a case for suspension of rent or abatement of rent, an issue on this matter should be decided.

We, therefore, set aside the decrees of the Courts below and under O. XLI, r. 23 remit the case to the First Court first to come to a decision after taking evidence, if necessary, on the issue as to whether the defendant was aware that plot No. 521 (corresponding to plot No. 4 of the *pottah*) had been given by a *pottah* by the landlord to Chandra Kanta before his purchase under the rent decree in 1916, if it finds that the defendant was so aware, he will only be entitled to abatement of rent which will be for that Court to calculate. If, on the other hand, it finds that he was not so aware the suit will, in accordance with the general rule to which we have referred, stand dismissed. The appellants must pay the respondent his costs in this Court. Costs of the lower Courts will abide the result.

Z. K. *Appeal allowed; Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2193 OF 1920.
December 20, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

NADHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAJO—DEFENDANT—RESPONDENT.

Custom—Succession—Daughter v. *Collaterals—Self-acquired property—Sandhu Jats of Amritsar District.*

By the custom prevailing among Sandhu Jats of the Amritsar District, daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property.

Second appeal from a decree of the District Judge, Montgomery at Lahore, dated the 12th June 1920, confirming that of the Senior Sub-Judge, Montgomery, dated the 15th November 1919.

Mr. *Ralli* for Mr. *M. Sleem*, for the Appellants.

Mr. *B. D. Qureshi*, for the Respondent.

JUDGMENT.—This second appeal has been admitted on a certificate granted by the District Judge under s. 41 (3) of the Punjab Courts Act. The question at issue is whether by the custom prevailing among Sandhu Jats of the Amritsar District daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property. The District Judge found in favour of the daughter declining to rely upon the answers to questions 60 and 61 of Mr. Craik's Customary Law of the Amritsar District. We have to-day considered these very answers in the case of *Naraini* v. *Jawahir Singh* (Civil Appeal No. 2194 of 1920) and have held that this *riwaj-i-am* is a strong piece of evidence in favour of the custom mentioned therein. In that case no doubt there was some slight evidence in addition in favour of the view that collaterals were preferred to a daughter even in the case of non-ancestral property. In the present case there is no instance produced by either party. We have found that in the case of the parties in the other case who were *kamboks*, the entry in the *Riwaj-i-am* should be relied upon and we see no reason to come to a different decision in the case of Sandhu Jats.

We, therefore, accept the appeal and setting aside the order of the lower Courts grant the plaintiffs a decree declaring that the alienation of the self-acquired property of Kahan Singh by his widow to one of his daughters should not affect their reversionary rights after the death of *Musammat* Rajo, and we direct that the plaintiffs' costs throughout should be borne by the defendant *Musammat* Rajo.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 424 OF 1923.

August 15, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

KALI CHARAN ROY, SECRETARY TO THE GHATAIL SAMMILANI DHANBHANDAR COMPANY, LIMITED—DECREE-HOLDER—APPELLANT

versus

MOHESH CHANDRA GHOSH AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Instalment decree—Entire amount becoming due on default in payment of one instalment—Waiver—Limitation, commencement of.

Where an instalment decree provides that the decree-holder will be entitled to sue for or take out execution for the entire amount on default in payment of any one instalment, the entire amount becomes due on such default and time begins to run against the decree-holder from the date of such default. [p. 784, col. 2.]

The fact of the decree-holder not enforcing the right given to him under the decree by attempting to realise the entire amount which falls due on default in payment of one instalment does not in itself amount to a waiver for all time to come, nor has such waiver the effect of modifying the terms of the decree. [p. 785, cols. 1 & 2.]

Case-law discussed.

Appeal against an order of the Additional District Judge, Mymensingh, dated the 18th of June 1923, affirming that of the Subordinate Judge, Fourth Court of that District, dated the 2nd of December 1922.

Babu *Bimol Chandra Das Gupta*, for the Appellant.

Babu *Iswar Chandra Chakravarty*, for the Respondents.

JUDGMENT.—This is an appeal by the decree-holder against an order of the Court below holding that the application for execution was barred by limitation. The facts are that a decree was passed against the judgment-debtors, made payable by 32 half yearly payments from the year 1319 to the year 1334 *B. S.* There were several payments made by the judgment-debtors; but there was default made by them in respect of the instalment due for *Magh* 1324 (January 1918). On the 23rd *Aghrayan* 1325 (9th December 1918) a portion of the *kist* for *Magh* 1324 (January-February 1918) was paid by the judgment-debtors and accepted by the decree-holder. After that no other payment was made and the present application was presented by the decree-holder on the 24th April 1922, for execution for the balance of the decretal amount. Both the Courts below have held that as the application was made more than three years after the date of default of the last unpaid instalment the application was barred by limitation.

Two points have been urged by the learned Vakil for the appellant on his behalf. The first and the more important contention is that by payment and acceptance of the overdue instalment there was a waiver and the effect of it is that the decree is to be considered as an ordinary decree without the consequence of non-payment of instalments attached to it. It is also suggested that the waiver may amount to place the decree-holder in a position to realise such instalments as remained unpaid within three years of the application for execution. With regard to the effect of waiver by payment and acceptance of overdue instalments, there is no controversy for the point is settled by a series of decisions. The only point, therefore, that needs considerations is as to the result of this waiver. The learned Vakil for the appellant argues that payment and acceptance of overdue instalments is tantamount to giving up the rights of the parties under the terms of the decree and it makes it optional on the part of the decree-holder to claim the amount due under the decree treating such instalment in respect of which default is made as an overdue instalment. In short, his argument is that the waiver in the present case amounts to a modification of the decree in so far as it says that on default being made of any particular instalment the decree-holder will have the option to realise the entire amount. There is a stipulation in the decree that on the failure by the judgment-debtors to pay an instalment the decree-holder will be entitled to take out execution for the entire amount. We are unable to hold with the appellant that the effect of the waiver is to cause any modification in the terms of the decree. See the observations of the learned Chief Justice (Sir Lawrence Jenkins) in the Full Bench case of *Kashiram* v. *Pandu* (1).

His next contention in this connection is that the decree giving option to the decree-holder to take out execution of the entire amount in default of one instalment leaves it at his will either to treat the entire amount due or to claim each instalment as it falls due as an overdue instalment. The

(1) 27 B. 1 at p. 12; 4 Bom. L. R. 688.

facts of this case which have been found by the Court below are that there was no payment by the judgment-debtors after December 1918 and execution having been taken out in 1922 is clearly barred by limitation. The contention of the decree-holder that it is open to him to treat each instalment as an overdue instalment and take out execution for it and that he is entitled to the instalments that were payable within 3 years before the application for execution is, in our opinion, without force and in this connection we would refer to several rulings of this Court on the point. The first case which is one which has been followed by all subsequent cases and lays down the law clearly is that of *Hurri Parshad Chowdhry* v. *Nasib Singh* (2). At page 547* the learned Judges observe as follows: "We cannot hold that mere abstinence from suing can amount to waiver, or that there can be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment. Nor do we think that any distinction can be drawn, as has been attempted in this case to be drawn, between a case in which it is provided that on non-payment of an instalment the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for. There seems no reason why limitation should begin to run in the one case and not in the other." This view has been followed in *Jadab Chandra Bakshi* v. *Bhairab Chandra Chukerbutty* (3) and *Girindra Mohun Roy* v. *Bocha Das* (4). The High Courts of Madras and Bombay have also adopted the same view. The Allahabad High Court has taken a different view and is of opinion that when option is given to the decree-holder he may treat either the entire decretal amount as one payable on default of one instalment or he may treat each instalment as it falls due as then becoming payable. This view, however, has not been adopted by this Court. See *Hurri Pershad Chowdhury* v. *Nasib Singh* (2). The result of these authorities is two-fold. First, if the instalment decree provides that the decree-holder will be entitled to sue for or take out execution for the entire amount on default of any one instalment the entire amount becomes due on such default and time begins to run from the date of such default. Secondly, the mere fact of the decree-holder not enforcing the right given to him under the bond by attempting to realise the entire amount which falls due on default of one instalment does not in itself amount to a waiver for all time to come. Applying these principles to the facts of the present case it appears that apart from the acceptance out of time of part of the *Magh kist* of 1324 a further default was made at any rate in respect of the all subsequent *kists* and there was no waiver of these *kists* with the result that time should be counted from the date the next *kist* fell due and, therefore, this application which was filed in April 1922 must be held to be barred by limitation.

The next point which is raised by the appellant is that the decree as it stands entitles the decree-holder to take out execution at his option. We have referred to this contention in considering the previous point. But it is also urged that, in the circumstances of this particular case, the decree-holder ought to be allowed to recover in execution the instalments which remained unpaid within three years from the date of the application for execution. This point was not raised in any of the Courts below nor in the grounds of appeal to this Court. Even if it were raised there was no payment after December 1918 and there was no waiver of the condition contained in the decree, namely, that the entire amount will become due on the failure of payment of one instalment. We fully agree with the view taken by the Courts below. The appeal must be dismissed with costs, we assess the hearing-fee at two gold *mohurs*.

Z. K.

Appeal dismissed.

(2) 21 C. 542; 10 Ind. Dec. (N. S.) 992.
(3) 31 C. 297.
(4) 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004.

*Page of 21 C.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1976 OF 1921.

July 15, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

FIRM ARJUNDAS-HARIRAM AGARWALLA—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 73, 151, 161—Railways Act (IX of 1890), s. 72—Carriage of goods—Late delivery—Liability of Railway Company—Negligence—Burden of proof—Damages, measure of.

Under s. 72 of the Railways Act, a Railway Company, in the absence of a special contract between the consignor and the Railway, occupies the position and suffers from the liabilities of a bailee imposed by ss. 151 and 161 of the Contract Act. In such a case the loss or non-delivery in proper time of goods entrusted to the Railway Company for carriage is *prima facie* evidence of negligence and the burden of disproving the negligence lies on the Railway Company, and the latter cannot shake off its statutory liability by pleading pressure of work or avoidable accident. [p. 787, cols. 1 & 2.]

Where a Railway Company fails to deliver goods in the ordinary course and the goods come to a fallen market, the difference between the market value of the goods at the time they would have been sold if they had been carried according to the contract and their market value at the earliest period at which they could have been brought to the market after delivery to the consignee will be the measure of damages recoverable. [p. 788, col. 1.]

Under the Explanation to s. 73 of the Contract Act in estimating the loss or damage arising from a breach of contract the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Where, for instance, delivery of goods is contributed to by the inaction or negligence of the consignor this fact must be taken into consideration in fixing the date with reference to which the market value of the goods must be ascertained for the purpose of assessing damages for late delivery.

Appeal against a decree of the District Judge, Nadia, dated the 27th of August 1921, affirming that of the Munsif First Court at Kushtia, dated the 11th of December 1920.

Dr. *Dwarkanath Mitter*, Babus *Satyendra Nath Mitter* and *Debendra Nath Mandal*, for the Appellant.

Babu *Surendra Nath Guha* and Mr. *Nur-ud-din Ahmad*, for the Respondent.

JUDGMENT.—This was a suit by the plaintiff against the Secretary of State for India as owner of the Eastern Bengal Railway for damages for late delivery of a bale of cloth. The case for the plaintiff is that he booked 9 bales of cloth on 21st September 1918 at the Armenian Ghat Station of the Eastern Bengal Railway in Calcutta for despatch to Kushtia. He also booked 6 bales on the 24th September 1918 at the same station for Kushtia. The consignment of 9 bales reached Kushtia on the 24th September and plaintiff took delivery of them on giving a clear receipt, but he subsequently discovered that one of the bales he had taken delivery was a bale booked by one Ramdeo Mahadeo on the same date at the Armenian Ghat Station for one Bhagawan Das at Kushtia. The plaintiff made over that bale wrongly delivered to him to Bhagwan Das and complained to the Goods Clerk at Kushtia that he had not received one of the 9 bales consigned by him on the 21st September. On the 28th October 1918, the plaintiff sent a notice of claim to the Traffic Manager and on the 20th November he got delivery of the missing bale. He further alleged that on account of the negligence of the Railway Authorities and the consequent delay in the delivery of the bale he sustained damages to the extent of Rs. 930, the market for those goods having in the meantime considerably fallen. He then brought the present suit after serving the necessary notice on the Agent of the Eastern Bengal Railway.

The defendant contended that the notice was not legally valid, that the delay was not due to the negligence on the part of the Railway Administration but to the neglect of the plaintiff to help them in tracing the bale when asked to do so, and that the lost bale was not of the consignment of the 9 bales but it was of the consignment of the 6 bales and that plaintiff's men were negligent in not seeing that the bale was properly labelled by the Booking Clerk at the Armenian Ghat Station at the time of delivery. The defendant stated that in the circumstances the plaintiff was not entitled to any damages and that in any event the claim for damages was excessive.

With regard to the legality of the notice it was held by the Munsif that it was legal and valid and this objection was no further pursued. On the merits, the learned Munsif found that at the time when the bales were booked, there was a huge traffic in goods at the Armenian Ghat Station owing to the approach of the *Durga Pujas* and hence the mistake in omitting to put the Railway mark on the missing bale must be due to pure accident. He further presumed that since the plaintiff's man took delivery at Kushtia of Bhagwan Das' bale mistaking it for his own, the omission must

have been due to the plaintiff's man not being able to identify the correct bale at the Armenian Ghat Station. He sums up his conclusion thus:— "I must hold that the exchange was purely accidental and plaintiff's man is liable for it." He further held that the lost bale was of the consignment of 9 bales and not of 6 bales as alleged by the defendant. The last finding of the Munsif was not challenged in appeal and the case in the lower Appellate Court and in this Court also proceeded on the assumption that the lost bale was one of the consignment of 9 bales. In the above view, the learned Munsif dismissed the plaintiff's suit; on appeal by the plaintiff, the learned District Judge affirmed the decree of the Munsif on the finding that "there was no neglect on the part of the Railway Authorities in delivering the missing bale to the plaintiff and the delay was due more to the negligence of the plaintiff in not supplying all information for tracing out the missing bale than to any negligence on the part of the Railway staff of the defendant." The plaintiff has appealed to this Court and it is urged on his behalf that the learned Judge has erred in law in casting on the plaintiff the onus of proving negligence of the Railway Authorities. We think there is much force in this contention. As there was no special contract between the Railway and the plaintiff, under s. 72 of the Railways Act the Railway occupied the position and suffered from the liabilities of a bailee imposed by ss. 151 and 161, Indian Contract Act. The consequence of this liability is that the loss or non-delivery in proper time of goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of disproving negligence, therefore, lies on the bailee *Surendra Lal* v. *Secretary of State for India* (1), *Nanku Ram* v. *The Indian Midland Railway Co.* (2) and *Hirji Khetsey & Co.* v. *B.B.&C. I. Ry.* (3). Section 76 of the Railways Act points in the same direction. The learned Judge has expressed himself on this question in these words "The onus lay heavily upon the plaintiff to prove the negligence on the part of the Railway Authorities, and it was the bounden duty of the plaintiff to show this negligence very satisfactorily." After making some observations on the evidence the learned Judge remarks: "I think the plaintiff has not discharged his onus satisfactorily." We are of opinion that this view is incorrect in law and that the burden of proving want of negligence is on the defendant.

The onus of disproving negligence being on the defendant, the next question for consideration is, whether he has been able to discharge it. The Courts below assume that the delay in the delivery of the bale was due to plaintiff's negligence firstly in not seeing that the bale was properly labelled before despatch by the Goods Clerk and secondly in not responding to the call of the Railway to come and identify an odd bale found lying unclaimed at Armenian Ghat. This neglect on the part of the plaintiff may affect the measure of damages and the principle on which they should be assessed but cannot exonerate the defendant from the legal liability of disproving his negligence. The lower Courts have further assumed that the mistake must have been due to the rush of work at *Puja* time and to the probability of the plaintiff's man either refusing to identify or making a mistake in identifying the bale at the time of delivery to the Railway Authorities at Armenian Ghat. There is no evidence in support of these surmises and the case ought not to be decided upon suspicions or suppositions in the absence of proof. When a carrier receives goods under a contract of carriage he cannot shake off his statutory liability under s. 151 of the Contract Act by pleading pressure of work or avoidable accident. As to the plaintiff's man making any mistake when he was handing over the bales to the Railway for transmission there is absolutely no evidence on this point. In the above view, we hold that the defendant has failed to discharge the onus that lies on him of proving want of negligence on his part, as the defendant has offered no other explanation for the delay in delivery. On the evidence there is no reason to disbelieve the fact that the plaintiff's man did, as a matter of fact deliver, 9 bales to the Clerk who gave a Railway receipt for the same. The question then arises whether any damages for loss of market were due and if so on what principle are they to be assessed. The plaintiff has claimed damages on the difference between the price he paid for the bale in the market and the price of such cloth on the day when it was

(1) 38 Ind. Cas. 702; 25 C. L. J. 37.
(2) 22 A. 361; A. W. N. (1900) 111; 9 Ind. Dec. (N. S.) 1274.
(3) 25 Ind. Cas. 241; 39 B. 191; 16 Bom. L. R. 467.

delivered to the plaintiff, namely, the 20th November. We think that he is not entitled to calculate damages on this basis. The law as to measure of damages in a case like the present is thus summarised in Addision on Contracts, 11th Edition, page 1072: "Generally speaking when a carrier fails to deliver articles of merchandise in the ordinary course, and the goods come to a fallen market, the differenee between the marketable value of the goods at the time they would have been sold if they had been carried according to the contract, and their marketable value at the earliest period at which they could have been brought to the market after the delivery to the consignee, will be the measure of damages recoverable." Under s. 73, Explanation, of the Contract Act, in estimating the loss or damage arising from a breach of contract the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. The facts found by the Courts below are that the Railway Authorities were using their best endeavours to trace out the missing bale, that the Goods Supervisor at the Armenian Ghat Station wrote on the 9th October 1918 to the plaintiff to help the defendant to trace out the missing bale to which the plaintiff did not respond, that the plaintiff did not up to the last moment supply the Railway Authorities with his identifying marks and description to enable the defendant to find out whether the odd bale found at Armenian Ghat at the end of September was the missing bale and that after due enquiry on 14th November 1918 the Railway Authorities learned that that particular bale belonged to the plaintiff and despatched it at once to the plaintiff. On these findings we think that the delay in delivery is partly due to the unjustifiable conduct of the plaintiff, of which he cannot in justice and fairness take advantage. In our judgment the justice of the case requires that the last day of which the market value should be taken into calculation ought to be the day on which the plaintiff would in ordinary course have received the goods if he had complied with the request contained in the letter of the 9th October 1918. The learned Judge believes that the letter reached the plaintiff which must be on the 10th October. Had he attended to it immediately the bale could have been despatched on 11th and delivered to the plaintiff on the 14th October. The plaintiff is, therefore, entitled to damages calculated at the difference, if any, in the market price of the goods on the 24th September 1918 when the other bales of the same consignment were delivered and that on the 14th October 1918.

The result of the foregoing considerations is that the appeal succeeds in part, the decree of the Court below dismissing the plaintiff's suit is reversed and the plaintiff's suit is decreed to the extent and in the form above indicated. The case will be remitted to the First Court for ascertaining the amount, if any to which the plaintiff may be entitled according to this judgment. Parties will be at liberty to adduce further evidence to prove market rates on the 24th September 1918 and the 14th October 1918 but for no other purpose. Costs will abide the result.

Z. K. *Appeal allowed in part.*
Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 320 OF 1923.
August 4, 1924.

Present :—Mr. Justice Kanhaiya Lal.

PARBHU DAYAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TIRBHUWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 8—Contract Act (IX of 1872), s. 43—Dismissal of suit for default in absence of some defendants, effect of—Fresh suit, whether maintainable—Joint tenants, liability of, for rent, nature of—Suit against some tenants dismissed, whether can be continued against others.

Under r. 8 of O. IX of the C. P. C. the law contemplates a partial or a total dismissal of a suit for the default of the plaintiff, and in either case it precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But a fresh suit in respect of the same cause of action against defendants who were absent on the date of the dismissal of the suit is not barred. [p. 789, col. 2.]

Bukharam v. *Ramji*, 23 Ind. Cas. 878; 10 N. L. R. 39, relied on.

The liability of joint tenants for the payment of rent is joint and several and the effect of section 43 of the Contract Act is to exclude the right of any one of joint tenants to claim to be sued along with his co-tenants, and a judgment obtained against some only of the joint tenants, which remains unsatisfied, is no bar to a second suit on the contract against the other joint tenants. [*ibid.*]

Muhammad Askari v. *Radhe Ram Singh*, 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236, *Abdul Aziz* v. *Basdeo Singh*, 17 Ind. Cas. 89; 34 A. 604; 10 A. L. J. 183, *Joy Gobind Laha* v. *Monmatha Nath Banerjee*, 35 C. 580, and *Moolchand* v. *Alwar Chetty*, 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449, relied on.

Second appeal from the decree of the District Judge, Ghazipur, dated the 1st December 1922.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent for 1326 to 1328*F*. A previous suit was brought for arrears of rent for the same period against the present defendants. One of the defendants, Tirbhuwan Singh, attended on the date fixed for its hearing but he filed no defence and was not examined. The plaintiffs and the other defendants were absent. The suit was, therefore, dismissed for default.

The sole question for consideration in this case is whether the present suit is maintainable in respect of the same cause of action under O. IX, r. 9 of the C. P. C. The Courts below have dismissed the claim, holding that the plaintiff was precluded from bringing a fresh suit in respect of the same cause of action, because one of the contesting defendants had attended, when the suit was dismissed for default. Order IX, r. 3, lays down that where neither party appears, when a suit is called on for hearing, the Court may make an order that the suit be dismissed. But such a dismissal does not preclude the plaintiff from bringing a fresh suit for the same relief subject to the law of limitation against the same defendant. So far as the defendants, Makundi Singh and Dip Narain Singh, were concerned, it may well be said that neither party appeared when the suit was called on for hearing; and as against them the dismissal was one for default of both the parties. As regards Tirbhuwan Singh, the Court ought to have either taken his defence or asked him whether he admitted the claim or denied it. The rent claimed was fixed in a previous proceeding between the parties under s. 36 of the Agra Tenancy Act (U. P. Act II of 1901). If Tirbhuwan Singh admitted his liability, it was open to the Court under O. IX, r. 8, C. P. C., to have decreed the claim as against him in accordance with that admission. If he denied it, the suit was liable to be dismissed against him for default with the consequence mentioned in O. IX, r. 9 of the C. P. C. The law contemplates a partial or a total dismissal of a suit for the default of the plaintiff under r. 8 and in either case it precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But as pointed out in *Bakharam* v. *Ramji* (1) a fresh suit in respect of the same cause of action against the defendants, who were absent, is not barred.

The rent claimed was due in respect of the joint tenancy and could have been recovered under s. 43 of the Indian Contract Act (IX of 1872) from any one or more of the joint promissors. As laid down in *Muhammad Askari* v. *Radhe Ram Singh* (2) the effect of s. 43 is to exclude the right of a joint contractor to claim to be sued along with his co contractors; and a judgment, obtained against some only of the joint contractors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. In *Abdul Aziz* v. *Basdeo Singh* (3) it was similarly held that the liability of the joint holders of a fixed rate tenancy for the payment of rent was joint and several; and the failure of a plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representatives of a deceased tenant was no bar to the continuance of the suit against the remaining defendants. In *Joy Gobind Laha* v. *Monmatha Nath Banerjee* (4) and *Moolchand* v. *Alwar Chetty* (5) a similar view was taken. In fact it was held in the latter case that a release by the decree-holder of some joint debtors from a liability under the decree did not operate as a release of the other judgment-debtors from their liability.

The plaintiff is, therefore, entitled to recover the whole rent from the remaining defendants, Makundi Singh and Dip Narain Singh, each of whom was jointly and severally liable for the whole arrears claimed as much as the defendant Tirbhuwan Singh, against whom the claim was somehow or other dismissed for default. This appeal must, therefore, be allowed and the claim of the plaintiff will stand decreed

(1) 23 Ind. Cas. 878; 10 N. L. R. 39.
(2) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.
(3) 17 Ind. Cas. 89; 34 A. 604; 10 A. L. J. 183.
(4) 35 C. 580.
(5) 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449.

with costs here and hitherto against the defendants, Makundi Singh and Tirbhuwan Singh, who will bear their own costs throughout. The defendant Tirbhuwan Singh, against whom the claim stands dismissed, will get his separate costs, if any, from the plaintiff-appellant in all the Courts.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 922 OF 1922.

July 10, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

Sreemutty KRISHNA KAMINI DASI *Shebait* OF *Sri Sri* RADHA MADAN MOHAN JEW DEB THAKUR—DEFENDANT No. 3—APPELLANT

versus

Kumar PRATAPENDRA CHANDRA PANDEY—PLAINTIFF AND NALINI MOHAN GHOSH AND ANOTHER—DEFENDANTS Nos. 1 AND 2—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 167—Encumbrance, annulment of—Service of notice, proof of.

It is imperative on a person asking for the annulment of an encumbrance under s. 167 of the Bengal Tenancy Act to prove due service of notice. [p. 791, col. 1.]

Profulla Nath Tagore v. *Shital Khan*, 47 Ind. Cas. 97; 22 C. W. N. 788 and *Radhey Koer* v. *Ajodhya Das*, 7 C. L. J. 262, followed.

The mere production of the order-sheet of the Collector is not sufficient to prove due service of notice within the meaning of s. 167 of the Bengal Tenancy Act. [*ibid.*]

Appeal against a decree of the Additional District Judge, Murshidabad, dated the 31st of January 1922, affirming that of the Subordinate Judge of that District, dated the 13th of December 1920.

Babus *Ram Chandra Mazumdar* and *Tarakeswar Pal Chaudhury*, for the Appellant.

Babu *Bankim Chandra Mukherjee*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff for possession of two fisheries appertaining to the *darputni* right in some *mouzahs* purchased by the plaintiff at a sale in execution of a rent decree. The plaintiff took possession of those fisheries along with the other properties purchased by him on the 9th June 1915. On the 3rd December 1915 he applied to the Collector under s. 167, Bengal Tenancy Act, to annul the encumbrance held by the defendants in respect of those fisheries. The appellant (defendant No. 3) had set up a *seputni* right under the *darputni* which the plaintiff wanted to avoid. The notice was served by the Sub-Divisional Officer. Subsequently when the plaintiff discovered that there was no strict compliance with the provision of s. 167, Bengal Tenancy Act, he filed a second application on the 5th August 1918 and notices were again served on the defendants. The present suit is by the plaintiff for recovery of these *jalkar*. The defence was that the defendant was not personally liable as she had endowed the *jalkars* in favour of a *Thakur*. There was objection as regards the jurisdiction of the Court; and it was submitted that the defendant's *seputni* was not an encumbrance but was a protected interest. Lastly it was urged that the *seputni* right was not legally annulled and that the notices given by the plaintiff were not legal. The plaintiff's claim in respect of one of the *jalkars* called Naugra Buran was dismissed. His suit with regard to the *jalkar masua* was decreed by both the Courts below. The defendant No. 3 who was the appellant in the Court below has appealed to this Court on three grounds. In the first place, she has urged that the plaintiff has failed to prove his title to the *jalkar*. With reference to this objection the First Court has observed that it is alleged in the plaint that the *jalkar masua* is within the above *mouza* and there is no denial on this point in the written statement. The learned District Judge has also proceeded on the defendant's written statement and found that the plaintiff was clearly entitled to the *jalkar*. The appellant urges that want of denial on the part of the defendant does not create title in the plaintiff and that it was the duty of the plaintiff to prove his title to the *jalkar*. It should be mentioned in this connection that the defendant as *seputnidar* under the *durpatni* purchased by the plaintiff is in possession of the fishery. We fail to see on what ground she can object to the plaintiff's claim as the holder of the superior interest. It appears from the judgments of the Courts below

that this point was not seriously pressed and there was no discussion on it.

The second contention of the appellant is that notice under s. 167 was served more than a year after the confirmation of sale. This is based upon the fact that the first application of the plaintiff was considered infructuous inasmuch as notice was served by the Sub-Divisional Officer not specially empowered under s. 167. Admittedly the first notice was served within a year of the date of the plaintiff's obtaining possession of the *jalkar*. The plaintiff, therefore, complied with the provisions of s. 167 and as the learned Judge has observed, the plaintiff is not responsible for the subsequent conduct of the Subordinate Officer of the Collector in issuing the notice. Apart from that we find that by a notification published in the *Calcutta Gazette* dated the 7th January 1915 all the Sub-Divisional Officers of places to which the Bengal Tenancy Act applies were empowered to issue notices under s. 167. Then again both the Courts have found, and we see no reason to differ from them, that the application made by the plaintiff on the 5th August 1918 was virtually asking the Collector to issue the notice in pursuance of the plaintiff's application of the 3rd December 1915, and the notice that was issued before the number of the first application. We do not think that there is any substance in this objection.

The third point is with reference to the opinion expressed by the learned District Judge that the service of notice was sufficiently proved by the production of entries in the order-sheet stating that the notices had been duly served. As a proposition of law this opinion of the learned District Judge is open to criticism. It has been held in several cases that a mere production of the order-sheet is not sufficient to prove due service of notice and for good reason as under s. 167, Bengal Tenancy Act, the encumbrance shall be deemed to be annulled from the date on which the notice is served. That makes it imperative on the plaintiff asking for the annulment of an encumbrance to prove due service of notice and in the absence of such proof the cause of action fails. See the cases of *Prafulla Nath Tagore* v. *Shital Khan* (1) and *Radhey Koer* v. *Ajodhya Das* (2). Now in this case it appears that in the written statement no objection was taken with regard to the service of notice. The only objection taken was that the notice given by the plaintiff was illegal. There was no issue on the question of the service of notice. The portion of the 6th issue which runs as follows: "Has it been legally annulled by the plaintiff" has reference to the objection of the defendant on the ground that the notice was not served within one year from the date of sale. The learned Subordinate Judge of the First Court has observed. "The defendants' objection is that the notices are not legal. Service of notice is not denied." He goes on to discuss the objection with regard to the issue of notice within a year from the date of sale and he ends by saying that the objections taken by the defendant on the ground that notice was not issued within a year and that the notice was signed by the plaintiff's *ammukhtear* and not by the plaintiff fail and the issue is decided in the plaintiff's favour. It is, therefore, manifest that the only objection with regard to the notice that was urged before the First Court was with regard to the plaintiff's application under s. 167 not being within time and secondly, that the notice was signed by the plaintiff's *ammukhtear*. No issue was joined with regard to the service of notice and there was no sufficient evidence directed to this point. If this objection were taken directly and an issue framed in respect of, it would not have been very difficult for the plaintiff to prove service of notice through his men and other evidence that might be available. Though we do not agree with all the reasoning of the learned Judge of the Court below, we think that the decision arrived at by him is correct.

All the points taken by the appellant having failed this appeal is dismissed with costs.

Z. K *Appeal dismissed.*

(1) 47 Ind. Cas. 97; 22 C. W. N. 788.

(2) 7 C. L. J. 262.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 338 OF 1923.

December 8, 1924.

Present:—Mr. Dalal, J. C.

NAGESHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DARSHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Hindu joint family—Partition, suit for, by one member of family—Res judicata.

A suit for partition by a member of a joint Hindu family, to which all the members of the family are made parties and in which all matters in dispute between the members of the family are decided, must be regarded as a suit brought by the plaintiff in his representative capacity under Expl. VI, s. 11 of the C. P. C., and all matters decided in the suit operate as *res judicata* between the different members of the family.

Parsotam Rao Tantia v. *Radha Bai*, 6 Ind. Cas, 692; 32 A. 469; 7 A. L. J. 451 and *Gandharp Singh* v. *Nirmal Singh*, 54 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529, relied on.

Appeal against a decree of the Sub-Judge, Fyzabad, dated the 14th August 1923, modifying that of the Probationary Munsif, Sultanpur, dated the 29th March 1923.

Mr. *Rajeshwari Prasad*, for the Appellants.

Mr. *Bishambhar Nath*, for Respondents Nos. 1 to 8.

JUDGMENT.—Nageshar and his nephews Rup Narain and Nand Kishore sued for possession of certain properties on the ground that they were joint family properties. The properties in suit were of three kinds :—

(1) properties identical to those which were the subject of a suit brought by Ram Kalap, defendant No. 9 and nephew of Nageshar, in 1919 which resulted in a decree;

(2) properties omitted from that suit;

(3) properties of Gajadhar uncle of Nageshar.

The Trial Court held that as regards properties No. 1 the suit was *res judicata* and the plaintiffs were entitled to succeed on the basis of the decisions in the suit of Ram Kalap, that as regards properties No. 2 they were not proved to belong to the family, and that as regards No. 3 the finding was in three parts. Gajadhar had a daughter *Musammat* Rajwanta to whom he had gifted certain specific properties of his own. These properties became her *istridhan* and the Trial Court pointed out that Nageshar had not proved that he was the heir to *Musammat* Rajwanta's *istridhan* property. As regards the rest of the property left by Gajadhar it held that the contesting defendants No. 1 to 8 had been in adverse possession and the plaintiff Nageshar had not been in possession within the period of limitation.

Another ground was that Nageshar had not proved himself to be the next heir to property of Gajadhar on the death of *Musammat* Rajwanta.

On these grounds it decreed the plaintiffs' suit as to their share in properties No. 1 and dismissed the rest of the suit. The plaintiffs appealed and the defendants objected by way of appeal. The plaintiffs' appeal was dismissed and the contesting defendants' appeal was allowed.

The plaintiffs have, therefore, appealed as regards all the three properties here

This is a second appeal. As regards properties No. 1, I agree with the Trial Court that the matter is *res judicata*. The present plaintiffs were defendants in the other suit and so were the contesting defendants of the present suit. All the matters in dispute between the members of the family and joint owners were decided in the first suit and those decisions are now binding on the contesting defendants. Practically Ram Kalap's suit was one in his representative capacity under Expl. VI to s. 11. In a proper decree the Court ought to have separated in that suit the shares of the plaintiff of the present suit. Those issues cannot now be re-opened. The learned Counsel for appellants referred to the cases of *Parsotam Rao Tantia* v. *Radha Bai* (1) and *Gandharp Singh* v. *Nirmal Singh* (2). The principles enunciated in those rulings as governing the cases of partition apply here and the matter in dispute between the plaintiffs and the contesting defendants here is covered by the provisions of s. 11. The Trial Court's decree, therefore, with regard to those properties shall be restored.

As regards the other properties Ram Kalap omitted them from his suit. This is strong evidence of the fact that these properties did not belong to the family of joint co-sharers. The plaintiffs themselves have urged that Ram Kalap must be taken to have sued in his representative capacity and the plaintiffs who were defendants in the

(1) 6 Ind. Cas. 692; 32 A. 469; 7 A. L. J. 451.
(2) 54 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529.

former suit did not object to the omission of these properties from Ram Kalap's suit. I hold that these properties do not belong to the family and that the plaintiffs have no share therein.

As regards Gajadhar's property the appellants' learned Counsel admitted that the plaintiffs had failed to prove that they were *istridhan* heirs of *Musammat* Rajwanta, so the appeal must fail with respect to the property included in the deed of gift in favour of Rajwanta. He pressed his appeal with respect to the balance of the property of Gajadhar only. On that point I hold the Subordinate Courts to be correct. Defendants Nos. 4, 6, 7 and 8 had no right to succeed to Gajadhar's property on the death of *Musammat* Rajwanta and they are also in possession of specific lots of this property. It cannot, therefore, be said that some of the heirs of Gajadhar on the death of *Musammat* Rajwanta are in possession on behalf of other heirs. The principle does not apply here that the possession of a co-sharer cannot be adverse. When defendants Nos. 4, 6, 7 and 8 took possession of portions of the property they must have done so adversely, and similarly the other defendants could not have taken possession of the property as co-sharers but must have done so adversely. As this is my finding I need not refer to the third reason given by the Subordinate Courts for dismissing the plaintiffs' suit with respect to Gajadhar's property.

In the result I restore the decree of the Trial Court in favour of the plaintiffs with proportionate costs of all the Courts. The rest of the appeal is dismissed with proportionate costs of all the Courts.

Z. K. *Appeal partly accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1058 OF 1922.

July 30, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

KASEM SHEIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARAKESWAR DUTTA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 21, 178, 179—Landlord and tenant—Construction of lease—Fixed rate tenancy—Contract, freedom of.

Section 178 of the Bengal Tenancy Act was enacted in order to safeguard the interests of *raiyats*. The scope of that section is to prevent certain contracts between landlord and tenant, the effect of which may be to place the *raiyat* out of the protection afforded to him by the Bengal Tenancy Act. Therefore, no contract between a landlord and tenant can override the express terms of the Act. [p. 794, col. 1.]

An agreement the effect of which is to prevent a tenant who is a settled *raiyat* of a village from acquiring a right of occupancy under s. 21 of the Bengal Tenancy Act falls within the purview of s. 178 of the Act and is void. [*ibid.*]

Where the effect of a *kabuliyat* and an agreement executed simultaneously was that the plaintiff let out certain land to the defendant as a *kaimi jama* which appeared to be heritable, and there were covenants in the *kabuliyat* which restrained the tenant from excavating a pond or tank and cutting trees, and the tenant agreed to pay additional rent for any additional area that may be found by measurement in his possession but was not to be entitled to claim reduction of rent for diminution in area, and also undertook to pay in future any sum that might be assessed by the original *maliks* of the land or by the Government:

Held, (1) that the effect of the documents was to create a permanent *mukarrari* tenancy and that the lease was, therefore, governed by s. 179 of the Bengal Tenancy Act; [p. 794, col. 2.]

(2) that it was, therefore, open to the parties to enter into a contract on any terms agreed upon by them, for instance, that the defendant should vacate the land on receipt of a certain sum agreed upon by the parties. [*ibid.*]

Golam Rahman Mistri v. *Gurudas Kundu Choudhury*, 76 Ind. Cas. 586; 38 C. L. J. 350; (1923) A. I. R. (C.) 505, followed.

Appeal against a decree of the Judge, Jessore, dated the 20th of February, 1922, reversing that of the Munsif, Second Court at Magura, dated the 4th of February, 1921.

Babus *Mohendra Nath Ray* and *Ramgati Sarkar*, for the Appellants.

Babus *Bireswar Bagchi* and *Narendra Chandra Basu*, for the Respondents.

JUDGMENT.—This is an appeal from a suit brought by the plaintiff-respondents for enforcement of the terms of an agreement embodied in a registered agreement and a *kabuliyat* executed by the parties on the 24th *Aswin* 1319. By this contract the plaintiffs leased out a certain *jama* to the defendant as *kaimi* at the rate of Rs. 2 per *bigha*. In the agreement executed by the defendant in favour of the plaintiff there is a clause that if the plaintiffs returned to the defendants a sum of Rs. 300 which the defendants had paid to the plaintiff as premium on account of the lease the defendants would vacate the land in their favour. The plaintiff's case is that they offered this sum of money to the defendant several times but he refused to accept it, and, therefore, on the terms of the agreement between the parties they brought this suit to enforce

the contract embodied in this agreement. The Court of first instance found for the defendant and dismissed the suit holding that the agreement and the *kabuliyat* were not simultaneous, and that the contract between the parties was in contravention of s. 178, Bengal Tenancy Act, and, therefore, bad and not legally enforceable. The plaintiffs appealed and the District Judge has reversed the decision of the lower Court and decreed the plaintiffs' suit on the view he has taken of the contract which in his opinion does not contravene the provisions of s. 178, Bengal Tenancy Act. The learned Judge found that the two documents were written out and executed at one and the same time and, therefore, together constituted a contract between the parties. He meets the argument of the defendant that the contract contravenes the provisions of s. 178 of the Bengal Tenancy Act which prohibits any agreement the effect of which will be to prevent the acquisition of an occupancy right or to entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the Bengal Tenancy Act, by saying that there was no occupancy right in existence on the date of the agreement, and, therefore, the agreement could not operate to destroy that right or to entitle a landlord to eject a person who was not his tenant at the time when the contract was entered into. This, in our opinion, is too narrow a construction of s. 178. That section was enacted, as has been observed in several cases, in order to safeguard the interests of *raiyats*. The scope of that section is to prevent certain contracts between landlord and tenant, the effect of which may be to place the *raiyat* out of the protection afforded to him by the Bengal Tenancy Act. It, therefore, enacts that the rights conferred by the Bengal Tenancy Act upon the *raiyat* cannot be destroyed by means of any agreement; in other words, no contract between landlord and tenant can override the express terms of the Bengal Tenancy Act. The effect of the present agreement is to prevent the defendant who has been found to be a settled *raiyat* of the village acquiring the right of occupancy in the land in suit under s. 21 of the Bengal Tenancy Act. The view, therefore, taken by the learned Judge is that because at the time when the agreement was entered into there was no right in the defendant, the agreement could not in any sense contravene the provisions of s. 178, Bengal Tenancy Act, is not correct. But we think that the decree passed by the learned Judge may be maintained on another view of the case. The two documents taken together constitute a contract to the following effect. The plaintiff lets out the land to the defendant as a *kaimi jama* which means a permanent tenancy. There are also expressions in the document making it heritable. With regard to the rent, the rate is fixed at Rs. 2 per *bigha*. There are restrictive covenants such as the defendant will not be entitled to excavate a pond or tank or to cut trees. The tenant further agrees to pay additional rent for any additional area that may be found by measurement in his possession but shall not be entitled to claim reduction of rent for diminution in area. He also undertook to pay in future any sum that might be assessed by the original *maliks* of the land or by the Government. The entire contract leaves no doubt in our mind, that what the parties intended was to fix the rent in perpetuity at a certain rate. Our view is supported by the case of *Golam Rahaman Mistri* v. *Gurdas Kundu Choudhry* (1). The contract there, was very similar in terms to the contract in the present case and it was held there that the restricted covenants such as mentioned there did not prevent the tenancy from being regarded as a tenancy at a fixed rate of rent. The result, therefore, is that by the contract a permanent *mokarari* tenancy as created in favour of the defendants such being the routine of the lease is governed by s. 179, Bengal Tenancy Act, under which the plaintiff and the defendant were at liberty to enter into a contract on any terms agreed upon by them. The plaintiffs are, therefore, entitled to sue for specific performance of the contract, namely, that the defendants should vacate the land on receipt of the agreed amount. It has been found by both the Courts below that the plaintiffs offered this amount to the defendants several times before the expiration of the period mentioned in the contract. In the view that we have taken in this case, as stated above, it is not necessary to consider most of the other points that have been raised by the learned Vakils on both sides.

One other point has been raised which requires consideration and that there is a stipulation that if the defendants do not vacate the land according to the contract,

(1) 76 Ind. Cas. 586; 38 C. L. J. 350; (1923) A. I. R. (C.) 505.

they will be liable to pay Rs. 300 to the plaintiffs. It is argued that this amount should be considered as a penalty. It is found that since the defendants occupied the land they never paid rent and unlawfully refused to give back the land to the plaintiffs. On these findings and taking all the circumstances of the case into consideration we do not think that the amount of compensation Rs. 300 is excessive.

We accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 371 OF 1922.
February 7, 1923.
Present:—Mr. Justice Campbell.

BANWARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEO CHAND—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 42—Incidental remarks in judgment concerning property not in dispute, whether admissible.

The fact that a judgment is relevant under s. 42 of the Evidence Act would not render remarks made in that judgment incidentally about property which was not then in suit, admissible in evidence in a subsequent suit. [p. 795, col. 2.]

Second appeal from a decree of the District Judge, Karnal, dated the 30th of August 1921, reversing that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 13th May 1921.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The suit from which this second appeal has resulted was by five persons, purporting to act on behalf of the whole proprietary body of the village of Khairpur in the Rohtak District, for an injunction to restrain the defendant, Sheo Chand, another proprietor, from building on a plot in the village *abadi* which was asserted to be *shamilat* land and to be the site of an old *chaupal*. The First Court decreed the suit and ordered the building to be demolished. The District Judge accepted the appeal of Sheo Chand and dismissed the suit. The plaintiffs have come to this Court on second appeal.

In 1914 there was a previous suit by Sheo Chand and other proprietors against two other proprietors named Nanak and Lala for a similar injunction restraining them from building upon another plot of *shamilat* land within the *abadi*. This suit was tried by Sheikh Fazal Ilahi, Subordinate Judge, and was dismissed by him. In his judgment he remarked that the evidence of both sides proved that no portion of the village *abadi* land was left unoccupied except the plot then in dispute and another small plot which he described. He recorded another remark that the proprietors had already got the old site of the *chaupal* to build on. These remarks were admitted by the Courts below in the present suit as evidence that the site now in dispute was that of an old *chaupal* which had fallen down before the date of Sheikh Fazal Ilahi's judgment of the 21st August 1915.

The judgment of *Sheikh* Fazl Ilahi plainly was not admissible in evidence to prove anything of the kind. The learned District Judge has referred to s. 42 of the Indian Evidence Act which enacts, that judgments, other than those mentioned in s. 41, are relevant if they relate to matters of a public nature relevant to the enquiry, and he considered that Sheikh Fazal Ilahi's judgment related to a matter of a public nature, that is to say presumably, the right of one co-sharer in common village land to deprive the rest of the village proprietors of the use of that land by appropriating it exclusively to himself. Assuming that Sheikh Fazal Ilahi's judgment falls within this definition, which is doubtful, the fact would not render admissible in the present case remarks made incidentally about another plot which was not then in suit. The proper way to prove that the site in question was unoccupied at the time of Sheikh Fazal Ilahi's judgment and that it was the site of a former *chaupal*, was to produce the witnesses who stated this to Sheikh Fazl Ilahi. The questions of law involved in this case cannot be decided until there is a finding on the facts which is based upon evidence legally admissible. The question of the length and nature of Sheo Chand's exclusive possession of the land in suit is material. It was asserted in the plaint that he had only begun his building four days before the suit was lodged. This assertion was not denied in the defendant's written statement and must be deemed to have been admitted by him. No doubt in his written statement he said that the building had been completed by

the date of the written statement, which was the 14th March, 1921; but the suit was filed on the 25th February 1921, and there was nothing impossible in finishing a building of the character alleged to have been constructed in the interval. There was evidence, however, that he had been in exclusive possession previously and there was other evidence to the contrary. The veracity of the two sets of witnesses was measured by Sheikh Fazl Ilahi's judgment and the District Judge's ultimate conclusion that there was formerly a *chaupal* on the site and that it fell down prior to 1915, is based upon the evidence recorded by the Trial Court read in the light of Sheikh Fazl Ilahi's judgment. On the other hand it is claimed by the present appellants to have been shown by Sheikh Fazl Ilahi's judgment that at the time of the institution of the 1914 suit the land in question was not in the exclusive possession of any one, and also that partition is impracticable of the land of the village site because there is only this and another small plot left unoccupied.

The objection to the admissibility of Sheikh Fazl Ilahi's judgment was raised by Sheo Chand in the lower Appellate Court, and, although he was the successful party there, he has raised it again in this Court, evidently because he recognises that the learned District Judge's decision of law on the facts found by him is open to attack. The learned District Judge has not mentioned the latest authorities on the points at issue, namely, *Manji* v. *Ghulam Muhammad* (1), and the judgment of the Division Bench which upheld that decision in Letters Patent Appeal and is reported as *Manji* v. *Ghulam Muhammad* (2).

I accept the appeal, set aside the order of the lower Appellate Court and return the case for re-decision on the evidence on the record without reference to any remarks made in Sheikh Fazl Ilahi's judgment. After coming to his findings of fact the learned District Judge should, in considering the authorities to guide his final decision, refer to the judgments mentioned above as well as to any others that may seem to him applicable to the circumstances of the case.

In this Court the parties will bear their own costs.

Appeal accepted.

Z. K.

(1) 57 Ind. Cas. 207; 1 L. 249.
(2) 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 877 OF 1922.

August 26, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

ASHUTOSH ROY—PLAINTIFF—APPELLANT

versus

CHAIRMAN OF THE COMMISSIONERS OF THE RAMPORE BOALIA MUNICIPALITY—DEFENDANT AND ANOTHER —*Pro forma* DEFENDANT—RESPONDENTS.

Co-sharers, rights of—Exclusive user, whether justified—Remedy—Injunction—Discretion of Court—High Court, interference by.

One co-sharer has no justification to change, without the consent of his co-sharers, the state of possession of the joint property as enjoyed by the co-sharers. [p. 798, col. 1.]

Dijendra Narain Roy v. *Purnendu Narain Roy*, 8 Ind. Cas. 171; 11 C. L. J. 189, *Ananda Chandra* v. *Parbati Nath*, 4 C. L. J. 198, *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh*, 27 Ind. Cas. 465; 21 C. L. J. 253 and *Israil* v. *Samset Rahman*, 21 Ind. Cas. 861; 41 C. 436 at p. 442; 18 C. W. N. 176; 19 C. L. J. 47, followed.

Where a co-sharer is unreasonable and obstructs another co-sharer in making beneficial use of the joint property the remedy of the latter is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharers. [*ibid.*]

Watson & Co. v *Ram Chand Dutt*, 17 I. A. 110; 18 C. 10; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7, distinguished.

The remedy by way of injunction is a discretionary matter but the discretion must be exercised on recognised principles and should not be arbitrary. Where the discretion has not been so exercised the High Court will interfere with the order of the lower Court if it is inconsistent with sound principles. [p. 799, col. 1.]

Appeal against a decree of the Subordinate Judge, Rajshahi, dated the 17th of December 1921, affirming that of the Munsif, Boalia, dated the 31st of May 1919.

Dr. *Naresh Chandra Sen Gupta* and Mr. *Jotindra Mohan Chowdhury*, for the Appellant.

Babu *Nirode Bandhu Roy*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiff against the Chairman of the Commissioners of the Rampur Boalia Municipality as the principal defendant in a suit for an injunction against the defendant.

The question which arises for decision in this second appeal relates to the rights of tenants-in-common, who are in joint possession of a certain piece of land, as

to the mode of enjoyment of such joint rights.

The facts which gave rise to the litigation between the parties shortly stated are these :—That a tank called Bakultala tank within the Municipal limits of Rampur Boalia Municipality belonged in equal shares to the father of the plaintiff and the father of the *pro forma* defendant. The Municipality finding that the tank was insanitary, after serving the necessary notices, took possession of the tank and filled it up with earth at their own costs and it is not disputed that the Municipality was entitled to retain possession of the filled up site under the provisions of s. 200 (2) of the Bengal Municipal Act, after it was filled up in or about the year 1912. The owners were called upon to pay the costs of filling up the tank and take its possession back. The plaintiff paid his half share of the costs and with the consent of the Municipality in 1916 took joint possession of the site which measures about 5 *cottas* in all. It is also not disputed that since then both the plaintiff and the Municipality were in joint possession of the re-claimed land, although the plaintiff alleged that he was in sole occupation of it. In fact the site was left vacant and nobody exercised any visible act of occupation or user but it was in evidence that the Municipality kept the place clear of jungles and shrubs although the plaintiff also claimed to have cleared the jungles on the lands and made exclusive user of some sort. The Munsif, however, found, to quote his own words, "thus eventually the plaintiff and the principal defendants are in the position of co-sharers in joint possession of the disputed land which was, in fact, *patit* land, without any special or particular act of possession by any side in the same, all these three years before suit, and the law of joint owners will apply in a case like this." This view of the Munsif has been accepted by the Subordinate Judge also.

The Municipality conceived the idea of constructing houses for the accommodation of their sweepers on about $1\frac{3}{4}$ *cottahs* of this site and when preparation for building the huts were being made "All the people of locality headed by Hari Nath Sen" protested against the action of the Municipality and the plaintiff opposed the intended user of joint land for accommodation of *methors* as a nuisance to the neighbourhood and also on the ground that the site was close to his Kalibari.

The Municipality, however, decided to proceed with the work and before any work had been actually done, the present suit was instituted on the 25th September 1918 for a declaration of the plaintiff's right and for a permanent injunction restraining the Municipality from erecting the proposed huts and latrines for the accommodation of Municipal sweepers and *methors*. An *ad interim* injunction was issued but was dissolved on the objection of the defendants, the Municipality. The houses and the latrines were constructed by the Municipality during the pendeny of the suit.

The learned Munsif found plaintiff's title and possession as I have stated before but disallowed the main prayer but granted an injunction for the removal of the latrine and made no order as to costs.

On appeal by the plaintiff, the Subordinate Judge dismissed the appeal with costs.

I shall first endeavour to state some of the principles which are necessary to consider the determination of the question which arises in this case, namely, were the Municipality justified in building the houses on land which was in joint possession, in spite of the protest of their co-owner the plaintiff and if not, is the plaintiff entitled to the mandatory injunction prayed for.

In the case of *Dijendra Narain Roy* v. *Purnendu Narain Roy* (1) following the case of *Ananda Chandra* v. *Parbati Nath* (2). Mr. Justice Mookerjee laid down the rule as follows:—

"Each co-owner is in theory interested in every infinitesimal portion of the subject-matter and each has the right irrespective of the quantity of interest, to be in possession of every part and parcel of the property jointly with the others."

In the case of *Lokenath Singh* v. *Dhwarkeshwar Prasad Narayan Singh* (3), it was laid down that "Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants."

(1) 5 Ind. Cas. 171; 11 C. L. J. 189.
(2) 4 C. L. J. 198.
(3) 27 Ind. Cas. 465; 21 C. L. J. 253.

In the case of *Israil* v. *Samset Rahman* (4), it was laid down: "If a co-owner with the tacit consent of his co-sharer, is in the sole occupation of a portion of joint property, he is not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used."

From the principles I have just quoted it follows that one co-sharer has no justification to change without the consent of his co-tenant, the state of the possession as enjoyed by the co-tenants. According to the findings of the Courts plaintiff and the defendants were in joint possession of these 5 *cottahs* of land and the moment the Municipality attempted to take this land into their exclusive occupation the plaintiff protested. When the Municipality in disregard of this protest persisted in their determination the present suit was instituted. I do not see why the plaintiff should not be restored to his original position. There was no acquiescence here nor is there any equitable consideration which would justify the Court to refuse to give the plaintiff his just right.

The Courts below seem to think that the objections of the plaintiff were not reasonable. Is the plaintiff bound to justify the validity of his objections or to suit the convenience of his co-tenant? It was not his business. In the circumstances of this case, it appears to me that the objections of the plaintiffs were not mere fanciful. He had a right to insist that his own property should not be put to an use which was repugnant to his feelings, and in fact the whole neighbourhood objected to the erection of those houses. In case a co-sharer is unreasonable and obstructs his co-tenant in making beneficial use of the joint property, the remedy of the tenant-in-common is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharers.

It has been argued by the learned Vakil for the respondent on the authority of the case of *Watson & Co.* v. *Ram Chand Dutt* (5), that here as in that case joint possession should not be awarded to the plaintiff. I do not think that this case will help the defendants. It is one of those cases which lie just near the border line and that is the reason why both the District Judge and the High Court gave decrees enforcing the claim of the plaintiffs in that case as to the 14 annas of the property to which the Watsons had no title. If the facts are closely examined it would appear that the strict right of the plaintiffs were modified on two main grounds. It appears that the Watsons were in possession of the entire land until the 14th of September 1893 when the leases of the 14 annas-share to the Watsons under the Dutts expired and after that the Watsons "continued in possession and to cultivate and sow it with indigo as they had done during the continuance of the leases :" see page 118*.

Here, therefore, there was no change made by the Watsons in the nature of the existing possession, all that they did was to refuse to allow the Dutts to come in and to take joint possession to the extent of their share. Therefore this case does not fall within the rule "that a co-sharer is not entitled to change the nature of existing state of things."

In the present case, joint possession of the parties was disturbed by the Municipality and that in spite of the protest of the plaintiff. There can be no justification for such a high-handed proceeding.

Then their Lordships pointed out it would be against public policy in Bengal, to allow a large tract of valuable land to lie uncultivated "until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which in ordinary course in a large estate would probably occupy a period including many seasons," etc. After expressing themselves in the language quoted above their Lordships say: "In Bengal the Courts of Justice, in cases when no specific rule exists, are to act according to justice, equity and good conscience and if, in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would be scarcely consistent with the rule above indicated to restrain him."

Therein is the key to the judgment of their Lordships.

In the present case there are no grounds on which it can be said that the plaintiff has lost his undoubted rights to insist upon the continuation of the existing state of the possession of the common lands.

(4) 21 Ind. Cas. 861; 41 C. 436 at p. 442; 18 C. W. N. 176; 19 C. L. J. 47.

(5) 17 I. A. 110; 18 C. 10; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. s.) 7.

*Page of 17 I. A.—[*Ed*].

It was next urged by the learned Vakil for the respondent that there was no ouster of the plaintiff because the Municipality did not deny the title of the plaintiff.

It was held in the case of *Debendra Narayan Singh* v. *Narendra Narayan Singh* (6) that "when there is an actual turning out or keeping out of possession there is an ouster." This is what has happened in the present case.

It was lastly urged on behalf of the respondent that remedy by an injunction is a discretionary matter and this Court should not interfere with the decree of the Courts below. Injunction was granted in this case but it was limited to the latrines. It seems that the Courts below thought in the present case the plaintiff was seeking an injunction on the ground of actionable nuisance forgetting that the case was based on the ground of infringement of the rights of a co-owner by another co-owner. The plaintiff's remedy should not have been limited but should have included the whole subject-matters of the suit. The discretion of the Court must be exercised on recognised principles and should not be arbitrary. Where the circumstances of a case demand it the High Court has frequently interfered with the orders of the lower Courts if they were inconsistent with sound principles.

The defendants cannot complain if they are now compelled to restore the property to its original condition by the removal of the huts built on the land which they persisted in building in spite of the institution of the suit.

In the result the judgments and decrees of the lower Courts are modified and the suit of the plaintiff is decreed in full and the defendants are directed to remove all the buildings and restore the land to its original condition. The plaintiff will get his costs in all Courts. We direct that the building should be removed within two months from this date and in default the plaintiff will be entitled to get them removed in execution of the decree.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

(6) 51 Ind. Cas. 976; 23 C. W. N. 900; 29 C. L. J. 501.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 920 OF 1922.

August 7, 1924.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Chakravarti.

PRAN MOHAN DAS AND OTHERS—DEFENDANTS Nos. 1, 3, 4 AND 5—APPELLANTS

versus

HARI MOHAN DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 127—Gift on basis of ante-nuptial agreement, validity of—Possession transferred—Unregistered deed—Part-performance, doctrine of, applicability of.

Plaintiff promised to make a gift of a house to his daughter as her dower at the time of her marriage and the latter's husband agreed to marry her on such a promise having been made by her father. After the marriage plaintiff transferred possession of the house to the daughter and subsequently executed an unregistered deed of gift in her favour. The daughter and her husband continued in possession of the house for several years and then sold it to certain other persons. In a suit by the plaintiff to recover the house against his daughter and the transferee from her:

Held, that the transfer having been made on the basis of an ante-nuptial agreement there was good and valid consideration for it, and that the donee having been put in the possession and having held such possession for a number of years was justified in resisting the claim of the plaintiff on the principle of the doctrine of part-performance of a contract, and that the plaintiff was estopped from urging that the transfer was invalid as not being evidenced by a registered deed. [p. 800, col. 2.]

Case-law discussed.

Appeal against a decree of the Subordinate Judge, Maldah, dated the 18th January 1922, reversing that of the Munsif, Second Court at Maldah, dated the 13th January 1919.

Babus *Jogesh Chandra Roy* and *Rajendra Chandra Guha*, for the Appellants.

Babus *Sarat Chandra Roy Chowdhury* and *Nagendra Nath Bhattacharya*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This second appeal by the defendants Nos. 1 and 3 to 5 arises out of a suit brought by the plaintiff for the recovery of possession of a brick-built house. The suit was dismissed by the learned Munsif but has been decreed on appeal by the learned Subordinate Judge. The facts are shortly these:—The house in question admittedly belonged to the plaintiff and was also admittedly in possession of the defendant No. 2 and her husband, until it was sold by defendant No. 2 to the de-

fendants "Nos. 3 to 5 by a registered *kobala* in 1916. The plaintiff's case is that he permitted defendant No. 2, his daughter and her husband to occupy the house as a matter of favour and their possession was permissive and as they have sold the house to the defendants Nos. 3 to 5 he has brought this suit for recovery of possession of the house with mesne profits. The defence of the defendant No. 2 was that the plaintiff promised to make a gift of the house to the defendant No. 2 as her dower at the time of her marriage and the husband of defendant No. 2 agreed to marry her on such a promise having been made by her father; that she obtained the house as a gift from her father in 1907, and she and her husband possessed the same in that right, until they sold the house to defendants Nos. 1 and 3, 4 and 5 for Rs. 401 by a registered *kobala*, in the year 1916, executed by defendant No. 2 and that since then the purchasers are in possession of the house .The defence of the other defendants is the same and they further pleaded that since their purchase they have made considerable improvements in the house.

It appears that although defendant No. 2 was put in possession of the house after her father made a gift of it to her, no registered conveyance was executed by the plaintiff who it is alleged executed an unregistered deed of gift in favour of defendant No. 2 in 1909.

The learned Munsif found that "the plaintiffs agreed to give the house to Charubala (defendant No. 2) and that this induced the bridegroom party to agree to this marriage" and overruling the objection of the plaintiff that the transfer was invalid as there was no registered deed, gave effect to the transfer and dismissed the suit.

On appeal by the plaintiff the learned Subordinate Judge did not set aside any of the findings arrived at by the learned Munsif and on the contrary he found from the recital of the unregistered deed of 1909, "that the house was given to the defendant No. 2 according to a promise made at the time of marriage and also on account of natural love and affection." In spite of these findings the learned Subordinate Judge held that the plaintiff was entitled to recover the house from the defendants. It is difficult to understand the judgment of the learned Subordinate Judge as to what the real ground of his decision is. It seems that he held that the gift was invalid under the provisions of s. 127 of the Transfer of Property Act.

The learned Vakil for the appellants contended that there was good and valid consideration for the deed because the transfer was made on the basis of an antenuptial contract and that the donee having been put in possession and having held such possession for a number of years was justified in resisting the claim of the plaintiff on the principle of the doctrine of part-performance of a contract and relied upon the case of *Syam Kishore De* v. *Umesh Chandra Bhattacharjee* (1) and the cases cited in that decision.

The learned Vakil for the respondent relied on the cases of *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (2) and *Gulabchand* v. *Fulbai* (3) in support of the proposition that the contract set up by the defendant was not valid and he further contended that the learned Subordinate Judge did not intend to find that there was any consideration except that of natural love and affection.

We are of opinion that there is no doubt that the learned Subordinate Judge did not disturb the findings of the Munsif which have been already set out and the learned Subordinate Judge has accepted the passage which he quotes from the unregisterad deed as correct. There is, therefore, a finding by the Courts below that there was ante-nuptial promise by the plaintiff which became a binding contract when the marriage followed. The validity of such contracts is well-established. In the case of *Gobinda Rani Dasi* v. *Radha Ballabh Das* (4), Mr. Justice Mookerji held that such contracts are valid and binding.

The cases cited from *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (2) and *Gulabchand* v. *Fulbai* (3) are clearly distinguishable on the ground that they are what may be called marriage brokerage contracts for procurement of marriages and are opposed to public policy.

We are, therefore, of opinion that the contentions of the learned Vakil for the appellants are well-founded and that the contract is valid in law. That being so the

(1) 55 Ind. Cas. 154; 24 C. W. N. 463; 31 C. L. J. 75.

(2) 3 Ind. Cas. 554; 32 M. 185; 18 M. L. J 403; 4 M. L. T. 1.

(3) 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649.

(4) 7 Ind. Cas. 118; 15 C. W. N. 205; 12 C. L. J. 173.

defendants are entitled to rely on the cases which estop the plaintiff from urging that the defendants could not resist plaintiff's claim as the transfer was not evidenced by a registered deed.

Mr. Justice Mookerjee after reviewing a number of the earlier cases of this Court, which have been affirmed by the Judicial Committee of the Privy Council, in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (5) observed in the course of his judgment in the case of *Syam Kishore De* v. *Umesh Chandra Bhattacharjee* (1) referred to above that "the decisions are based on the well-known doctrine of equity enunciated in *Walsh* v. *Lonsdale* (6) that under certain circumstances equity regards that as done which should have been done." The rule thus laid down clearly applies to the present case.

On the whole we think that this appeal should succeed and the judgment and decree of the learned Subordinate Judge are set aside and those of the Munsif are restored with costs in all Courts.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

(5) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 42 C. 801; (1915) M. W. N. 621; (P. C.).

(6) (1882) 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 134 OF 1924.

July 28, 1924.

Present:—Mr. Justice Venkatasubba Rao.

RAMANUJA NAIDU AND OTHERS—PLAINTIFFS Nos. 1 TO 3, 5 AND 6—PETITIONERS

versus

MUTHU K. R. V. ALLAGAPPA CHETTY AND ANOTHER—DEFENDANT AND PLAINTIFF No. 4—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. II, Art. 17—Civil Procedure Code (Act V of 1908), s. 92—Scheme suit—Prayer for temporary mandatory injunction for deposit of money by defendant—Court-fee payable.

Where in a suit under s. 92, C. P. C., for removal of a trustee, for appointment of fresh trustee and for framing a scheme, the plaintiffs prayed for the issue of a temporary mandatory injunction to compel the defendant to deposit in Court a sum of money alleged to be due from the defendant to the trust:

Held, (1) that the prayer for an injunction to compel the defendant to deposit the money was really one to direct accounts and enquiries and the suit was, therefore, substantially one under s. 92, C. P. C.; [p. 801, col. 2.]

(2) that the Court-fee payable was only Rs. 50 under Art. 17 of Sch. II to the Court Fees Act. [p. 801, col. 2.]

Petition, under s. 115 of Act V of 1908, and s. 107 of the Government of India Act, praying the High Court to revise the order, dated the 7th January 1924 of the Court of the First Additional Subordinate Judge, Madura, in O. S. No. 10 of 1923 (O. S. No. 198 of 1922 on the file of the Court of the Subordinate Judge, Madura).

Mr. *C. S. Venkatachariar*, for the Petitioners.

Messrs. *C. V. Ananta Krishna Iyer*, *P. S. Narayanaswami Iyer* and *D. Ramasami Iyengar*, for the Respondents.

JUDGMENT.—The learned Subordinate Judge has held that a Court-fee of Rs. 2,200 odd is payable on the plaint, and the plaintiff files this Civil Revision Petition attacking the correctness of the order. The suit has been instituted under s. 92 of the C. P. C. in respect of Kudar Alagar and Madhavagopalaswami Devasthanams at Madura. The plaint contains a prayer for various reliefs such as the removal of the defendant from trusteeship, the appointment of a new trustee, the settling of a scheme, etc. In addition, the plaintiffs ask for the issue of a "temporary mandatory injunction" to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 which the plaintiffs claim is due from the defendant to the Devasthanams. The Subordinate Judge has held that a Court-fee is payable on this sum to which the relief mentioned relates.

The only question to be decided is—Is this a suit that falls under s. 92, C. P. C.? Under Art. 17 of Sch. II to the Court Fees Act, if a suit is brought under s. 92, the fee payable upon the plaint is a sum of Rs. 50. A suit to obtain a decree directing accounts and enquiries comes clearly within the express words of s. 92. The Subordinate Judge had committed a slight error in saying that there is a prayer for the issue of a mandatory injunction. As I observed the words used are "a temporary mandatory injunction." In any event, the suit is, in my opinion, substantially one under s. 92; for, all that the plaintiffs in effect ask is, that an account should be taken and that the defendant should be ordered to pay such amount as might be found due from him on such an account being taken. The sum mentioned in the plaint is merely an estimate and plaintiffs' valuation of the relief cannot alter the character of the suit,

The Court-fee paid, therefore, namely, Rs. 50 is the proper fee and I set aside the order of the lower Court and allow the Civil Revision Petition with costs.

V. N. V. *Petition allowed.*

Z. K.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 609 OF 1919.

December 11, 1922.

Present:—Mr. Justice Abdul Raoof, and Mr. Justice Moti Sagar.

HAMAD YAR KHAN—DEFENDANT—APPELLANT

versus

SHANKAR DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 68—Contract Act (IX of 1872), s. 24—Colonization of Government Lands (Punjab) Act (V of 1912), s. 19—Mortgage of tenancy rights—Void contract—Possession of mortgaged property given up by mortgagee—Suit to recover mortgage-money, whether maintainable.

A mortgagee can invoke the help of s. 68 of the Transfer of Property Act only in cases where the mortgage is not void. [p. 804, col. 1.]

Section 68 of the Transfer of Property Act is applicable only to cases where the security is lost to the mortgagee otherwise than by his own fault. A suit to recover the mortgage money is not maintainable where the mortgaged property is lost owing to a default on the part of the usufructuary mortgagee himself. [p. 803, col. 2; p. 804, col. 1.]

Where a part of the consideration of a contract is unlawful, the whole contract must be regarded as void under s. 24 of the Contract Act. [p. 804, col. 2.]

A plaintiff is not entitled to claim a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is forbidden by law. [p. 804, col. 2.]

Defendant, who was the grantee of special tenancy rights in land belonging to Government, executed a usufructuary mortgage of his tenancy rights in favour of the plaintiff in contravention of the provisions of s. 19 of the Colonization of Government Lands (Punjab) Act and put the plaintiff in possession of the tenancy land. The mortgage was for a period of eight years, after the expiry of which the mortgagor was entitled to recover the land from the mortgagee free from the mortgage-debt. The mutation in respect of the transfer was rejected by the Revenue Authorities on the ground that the transfer was in contravention of the provisions of the Colonization of Government Lands (Punjab) Act, and, thereupon, the plaintiff voluntarily gave up possession of the land and brought a suit to recover the mortgage money from the defendant:

Held, (1) that the transfer being in contravention of s. 19 of the Colonization of Government Lands (Punjab) Act was void under s. 24 of the Contract Act, and the plaintiff was not entitled to recover the mortgage money on account of a breach of that contract; [p. 804, col. 2.]

(2) that the contract being void and the possession of the mortgaged property having been lost to the plaintiff not owing to any act or default of the defendant but having been given up by the plaintiff himself, s. 68 of the Transfer of Property Act was not applicable to the case. [*ibid.*]

Kanhai v. *Tilok*, 16 Ind. Cas. 42 and *Har Prosad* v. *Sheo Gobind*, 67 Ind. Cas. 793; 20 A. L. J. 318; (1922) A. I. R. (A.) 134; 44 A. 486, relied on.

First appeal from a decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 7th January 1919.

Dr. *Muhammad Iqbal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The defendant, Hamad Yar Khan, who is an *abadkar* or a grantee of special tenancy rights in about 609 *bighas* of Government land in the village of Nawabpur in the *Tahsil* and District of Shahpur owed a sum of Rs. 5,150 to the plaintiffs on an old *bahi* account. To pay off this debt he executed on the 4th October 1911 a mortgage deed in their favour in respect of this land for Rs. 7,000 the details of which as recited in the deed were as follows:—

	Rs.
Received credit for the debt due on the *bahi* account ...	5,150
To be recovered by means of a money order in *Poh* 1968 ...	50
To be recovered by instalments of Rs. 21-6-9 per mensem from 1st *Har* 1969 till the expiry of the period of mortgage ...	1,800

It was expressly stated in the deed that by this mortgage the entire debt due on the *bahi* account had been paid off, and that thenceforth nothing remained due to the plaintiffs on that account. The period during which the mortgage was to remain in force was fixed at 8 years, and it was agreed that the mortgagees shall not charge any interest on the mortgage money. As to possession it was stipulated that the mortgagees shall remain in possession from *kharif* 1965 to *rabi* 1976 and shall pay themselves off from the profits of the mortgaged property. After the expiry of 8 years the mortgage debt was to be considered extinguished, and possession of the property mortgaged was to be given back to the mortgagor. It appears that in pursuance of the mortgage thus effected the plaintiffs entered into possession of the mortgaged property, and continued to remain in possession thereof till December 1912 when mutation of the mortgage in their favour was refused by the Tahsildar on the ground that the sanction of the

Commissioner for the alienation in question had not been obtained and that it was consequently void. This was presumably done under s. 19 of Act V of 1912 under which private transfers of this nature are absolutely prohibited without the previous consent in writing of the Commissioner. There was a similar provision in Act III of 1893 also which was in force when this mortgage was made with this difference only that under that Act instead of the consent of the Commissioner it was the consent of the Financial Commissioner that was obligatory. On the 4th October 1917 the plaintiffs brought the present suit for the recovery of Rs. 5,550 alleging that the mortgage had failed, that they had been deprived of their security owing to the default of the defendant and that they were consequently entitled to obtain a money-decree. The sum of Rs. 5,550 claimed by the plaintiffs in this suit was made up of the following items:—

	Rs.
Principal debt as shown in the mortgage-deed	5,150
Subsequently advanced ...	50
Damages by way of interest at 12 per cent. per annum from the date of the failure of the mortgage	1,450
Total ...	6,650
Deduct on account of income received for three harvests ...	1,150
Balance	5,500

The defendant raised a variety of pleas, but the main points taken in defence were (1) that the suit was barred by limitation, (2) that the doctrine of *caveat emptor* applied and that consequently the suit was not maintainable, (3) that no damages by way of interest could be claimed, and (4) that the sum of Rs. 5,150 entered in the deed as due on *bahi* account was not really due and had been entered without a settlement of accounts having been arrived at between the parties. The learned Senior Subordinate Judge decided the first two points in favour of the plaintiffs, and held that the suit was within limitation and that the doctrine of *caveat emptor* did not apply. On the 3rd point the Court was of opinion that no damages could be claimed, and on the 4th point also the finding was to a large extent in favour of the defendant, it having been held that a sum of Rs. 2,400 only was claimable by the plaintiffs on the *bahi* account. As a result of these findings the plaintiffs' suit was decreed to the extent of Rs. 2,400 only, and the rest of their claim was dismissed. Against this decree both parties have preferred appeals to this Court, and it has been contended on behalf of the plaintiffs that the Senior Subordinate Judge was in error in not decreeing the suit in its entirety, while the contentions of the defendant are that the suit is not maintainable under the provisions of ss. 23 and 24 of the Contract Act, that it is barred by limitation and that it should be wholly dismissed.

It is unnecessary to enter into the question of the accounts and to determine how much money is due to the plaintiffs nor is it necessary to give any finding on the question of limitation, as we are clearly of opinion that the defendant's appeal must succeed on the first point, and that the plaintiffs' suit should be dismissed *in toto* as not legally maintainable. It is not denied that the mortgage as a mortgage was void and could not be enforced under the provisions of s. 8 of Act III of 1893. It is, however, contended that as the plaintiffs have lost their security owing to the default of the defendant they are entitled under s. 68 of the Transfer of Property Act (the principles of which are applicable to this Province) to obtain a decree for the mortgage money. Now, s. 68 of the Transfer of Property Act on which reliance is placed by the plaintiffs is in the following terms:—

"The mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only:

(*a*) where the mortgagor binds himself to re-pay the same;

(*b*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(*c*) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person."

It is clear from the wordings of this section that it is applicable only to cases where the security is lost to the mortgagee

otherwise than by his own fault, and that a suit for the mortgage-money is not maintainable where the property is lost owing to the default on the part of the usufructuary mortgagee himself. In the present case we do not find any evidence on the record that the loss of security to the plaintiffs was due to any wrongful act on the part of the defendant, or that the latter committed any default in giving delivery of possession or in securing possession of the mortgaged property to the plaintiffs. On the contrary it is clear from the statement of the plaintiff Shankar Das that the loss was brought about by the default of the plaintiffs themselves, and that the defendant is in no way to blame for it. In his statement before the Court on the 21st January 1918 Shankar Das admitted that the defendant had delivered possession on the very day that the document was registered, and that the plaintiffs themselves had given up possession in December 1912 when the *Tahsildar* told them that the mutation had been refused.

In these circumstances there can be no question that the loss was due to the plaintiffs' own default, and that no liability can attach to the defendant so as to bring the case within the purview of s. 68 of the Transfer of Property Act. It should further be observed that the help of s. 68 can be invoked only in cases where the mortgage is not void. To hold otherwise would be tantamount to enforcing an agreement part of the consideration of which was unlawful. It has been repeatedly held that in such cases under s. 24 of the Contract Act the whole contract must be considered to be void. In *Kanhai* v. *Tilak* (1) it was laid down by Chamier, J., that a usufructuary mortgage of an occupancy holding being illegal the mortgagee cannot recover even the money paid on the mortgage. The same principle was reiterated by Lindsay, J., in a very recent case reported as *Har Prasad* v. *Sheo Gobind* (2). In that case a suit was brought under s. 68 of the Transfer of Property Act by a usufructuary mortgagee of an occupancy holding to recover the mortgage money on the basis of a personal covenant to pay it. It was held that the entire contract of mortgage was void under s. 24 of the Indian Contract Act and that no suit even for a money decree could be instituted.

We agree with the view taken in these cases, and hold that the plaintiffs are not entitled to claim a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is forbidden by law.

The next contention of the plaintiffs is that even if the suit is not legally maintainable under s. 68 of the Transfer of Property Act, they are entitled to fall back upon the original contract and to sue on the *bahi* account the correctness of which was acknowledged by the defendant in October 1911 when the mortgage deed was executed. As to this argument, it is sufficient to say that the suit was never based on this ground in the Court below, and that the plaintiffs cannot be allowed at this last stage to introduce an entirely new and inconsistent cause of action which may alter the whole nature of the case, and may necessitate the production of further evidence on the part of the defendant.

For the foregoing reasons we accept the defendant's appeal, and setting aside the decree of the Court below dismiss the plaintiffs' suit, but having regard to the peculiar circumstances of the case we leave the parties to bear their own costs throughout.

Z. K. *Appeal accepted.*

(1) 16 Ind. Cas. 42.
(2) 67 Ind. Cas. 793; 20 A. L. J. 318; (1922) A. I. R. (A.) 134; 44 A. 486.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 808 OF 1922.

June 5, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

GOPAL CHANDRA DUTT—PLAINTIFF—APPELLANT

versus

SURENDRA NATH DUTT—DEFENDANT—RESPONDENT.

*Hindu Law—Widow—Surrender of estate in favour of next reversioner in lieu of maintenance, effect of—Civil Procedure Code (Act V of 1908), s. 11—*Res judicata—*Question of title decided in rent suit.*

A Hindu widow relinquished the whole of the immoveable property of her husband, which she was holding, in favour of the next reversioners of her husband and retained only the moveables and one house for purposes of residence. The reversioners agreed to pay a certain amount of cash and grain to

her annually by way of maintenance. It did not appear that the moveables retained by the widow had any value and whether she had inherited them from her husband :

Held, that there was complete relinquishment of the widow's estate in favour of the reversioners which amounted to a surrender and vested the estate in the reversioners. [p. 806, col. 2.]

Behari Lal v. *Madho Lal Ahir*, 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.), *Ananda Mohan Roy* v. *Gour Mohan Mullick*, 74 Ind. Cas. 499; 28 C. W. N. 713 at p. 714; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929; 50 I. A. 239; 40 C. L. J. 10 (P. C) and *Bhagwat Koer* v. *Dhanukdari Prashad Singh*, 53 Ind Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L W. 105 (P. C.), distinguished.

The decision in a rent suit in which the title of a person is in issue for the purpose of deciding his right to receive a share of the rent, operates as *res judicata* in a subsequent civil suit by him relating to the property. [p. 807, col. 1.]

Ramachandra Rao v. *Ramachandra Rao*, 67 Ind. Cas. 408; 49 I. A. 129; 20 M. L. T. 154; 26 C. W. N. 713; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963 (P. C.), followed.

Appeal against a decree of the Subordinate Judge, Khulna, dated the 19th December 1921, affirming that of the Munsif Third Court, Satkhira, dated the 29th April 1920.

Babus *Amarendra Nath Bose* and *Indu Bhusan Ray*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Anil Chandra Roy Chowdhuri*, for the Respondent.

JUDGMENT.

Duval, J.—This appeal arises out of a suit brought by the plaintiff-appellant against his nephew in respect of a 4-annas share in a certain property. It appears that the whole property in question originally belonged to two brothers, Ram Chandra and Lokenath. Ram Chandra died leaving two sons, Gopal (plaintiff) and Jadu (father of the defendants). Lokenath died leaving a widow, Lakhimoney. After the death of Lokenath, the two reversioners to the estate of Lokenath, *viz.*, Gopal and Jadu entered into an agreement with the widow on the 25th November 1890 by which it was declared that Lakhimoney had surrendered her interest in the immoveable property, retaining only certain moveables and a hut to live in, for maintenance, and in return for that Gopal and Jadu took over the whole property of Lokenath. Jadunath died on the 20th April 1910 and Lokhimoney died on the 19th January 1916. Thereafter in 1917 there was a rent suit in which Surendra Nath Dutt sued a certain tenant Kinoo Sardar for rent in respect of his alleged 8-annas share in a holding within the property. In that suit Gopal was a party and he contested the suit. He alleged that he purchased the holding in execution of a money-decree. His contention further was that on the death of Lakhimoney he had inherited the entire share in the property. It was necessary, therefore, for the learned Munsif and the learned District Judge on appeal first to decide in that suit what share of Lokenath's estate Gopal had, *i. e.*, whether he had as the sole reversioner at the date of the death of Lakhimoney the whole estate which Lokenath had or whether he had only a 4-annas share, Jadu having received the other 4-annas share in the property which originally belonged to Lokenath Dutt in view of the agreement of the 25th November 1890 leading to the transfer by Lakhimoney of her life-interest. In that rent suit the Munsif and the learned District Judge found that Surendra and Gopal were each entitled to 8-annas share of Lokenath Dutt's original share in the holding. After that the present suit has been brought and the main point in issue in the suit before the lower Courts has been whether on the true construction of the document of the 25th November 1890, the whole interest of Lokenath Dutt in the property of which Lakhimoney had only a life-interest passed on that date to Gopal and Jadu or whether that document did not accelerate the inheritance to Lokenath Dutt's estate during the life time of Lakhimoney in that it did not convey the whole of the life-interest of Lakhimoney to those who were at the time the legal reversioners. The learned Munsif and the Subordinate Judge have found that the document did convey the whole of the estate and they also found that the plaintiff-appellant was estopped by his conduct from raising the issue that Surendra on the death of Lakhimoney had no interest in the share which belonged to Lokenath. On the question, however, of *res judicata*, the Subordinate Judge has held that the previous rent suit and the decision therein did not operate as *res judicata* so as to prevent this issue being tried in the title-suit. The points urged by the appellant before us are that there is no estoppel and that on a proper construction of the deed it would appear that it is not one which shows that Lakhimoney sur-

rendered the whole of the life-estate to her reversioners in return for getting a maintenance, for the respondent it is argued that the decision of the lower Court is correct on these two points but it is said that it has incorrectly decided the question of *res judicata*.

On an examination of the deed which is an agreement by the two reversioners then living Gopal and Jadu to give regular maintenance in cash and paddy to Lakhimoney and to allow her to occupy a hut to live in, we find the following recital therein: "You having relinquished in favour of us two brothers, in equal shares, the right and title which you have during your life in all the immoveable properties in your possession with the exception of the residential house in your possession, and having given up possession of the said properties, being divested of the right thereof." In another portion of the document it is said as follows: "We two brothers and our heirs and successors should possess and enjoy in our respective rights, in equal shares, the properties which were in your possession, which you have given us two brothers, during and after your life as to which no one else will be able to make any claim." We also find the following passage in another portion of it: "On your death no one will get or will be able to claim as your successor, the said paddy or money on account of the said fixed allowance, and we and our heirs should get in equal shares, the house of your residence and whatever moveable properties you may have." It is argued for the appellant that this document did not pass the whole of the original interest of Lakhimoney as she retained a house and the moveables and only handed over immoveable properties. But it would appear from other points of the document that there is nothing in it to show that the moveables were of any value or that they had been inherited by her from her husband Lokenath; and as to the house the document itself shows that it was kept only for her residence and its repairs had to be performed by the two brothers. It appers therefore on a proper reading of the document that the only conclusion which can be drawn is that the widow gave up the whole of her life-eatate that she got from her husband to her reversioners and in return they undertook to maintain her by giving her more in the way of paddy and cash yearly than she would have got out of the property and in fact this arrangement continued for 26 years. We find nothing contrary to this in the said document and we can only conclude that in this case there has been whole giving up of the life-estate to the reversioners and so the cases to which we have been referred, *i. e.* the cases of *Behari Lal* v. *Madho Lal Ahir*, (1) and *Ananda Mohan Roy* v. *Gour Mohan Mullik*, (2) do not apply. The case on the other hand similar to the present one is the case of *Bhagwat Koer* v. *Dhanukdari Prashad Singh* (3) in which there was no formal document of surrender made by the widow but the whole of the immoveable property was transferred to the reversioners, she retaining certain moveables and the agreement was made with them for consideration of maintenance; and we hold that in this case, as in fact there has been a complete relinquishment of the property inherited from Lokenath in favour of the reversioners by the deed of 1890. On this ground alone the appeal ought to fail. We consider, however, that the whole suit must fail on the grouud of *res judicata*. In the rent suit to which we have already referred it was clearly in issue as to what was the share of Gopal after the death of Lakhimoney and the learned Munsif in connection with this says as follows: "For the decision of the rent suit the share would have to be determined. Jadunath died in 1317. Lakhimoney died in *Pous* 1322. Ordinarily Gopal would inherit the share of Lakhimoney after her death". He then recites the document and comes to the conclusion that Surendra as the heir of Jadu, the original reversioner, was entitled to the 8-annas share and Gopal was entitled to the other 8-annas share of Lokenath's property. This decision was upheld in appeal. It is argued before us however that as the pleadings have not been filed in this present case, the question of *res judicata* does not arise. It is also suggested that the question of the share of the reversioner was not in issue in the rent-suit. We do not think that there is anything in this

(1) 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.).

(2) 74 Ind. Cas. 499; 28 C. W. N. 713 at p. 714; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929; 50 I. A 239; 40 C. L. J. 10 (P. C.).

(3) 53 Ind. Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.).

contention. It was clearly an issue necessary for the decision of the rent suit, it had to be decided as to whether Surendra had as heir of Jadu, inherited any part of Lakhimoney's estate which originally belonged to Lokenath; and the fact that this was only a rent suit and the case was tried rather summarily does not do away with the effect of the judgment in deciding in a Court of Law the question which is really the subject-matter of the present suit. In this connection we would refer to the concluding words of the Privy Council decision in the case of *Ramachandra Rao* v. *Ramachandra Rao* (4). In our opinion following the principle laid down there we must hold that the decision in the rent suit where the present appellant's title was clearly in issue for the purpose of deciding his right to receive a share of the rent was *res judicata* for the purpose of this suit. In this view of the case it is not necessary for us to deal with the question of estoppel.

The result is that this appeal is dismissed with costs.

Suhrawardy, J.—I agree.

Z. K. *Appeal dismissed.*

(4) 67 Ind. Cas. 403; 49 I. A. 129; 20 M. L. T. 154; 23 C. W. N. 713; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963 (P. C.).

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 130 OF 1922.

December 22, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Fforde.

KHUDA BAKHSH—PLAINTIFF—APPELLANT

versus

NUR MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust—Deed of arrangement—New trustees, appointment of—Trustees, duty of, to call for accounts—Liability of old trustee—Dismissal of trustee—Jurisdiction of Civil Courts.

Where by a private arrangement between persons interested in the administration of a trust, new trustees are appointed to manage the trust properties, they are bound to take steps to acquaint themselves with the state of the trust properties and to get in the trust estate including any funds belonging to the institution. In order to discharge this duty which the law casts upon the trustees, they are entitled to call upon the old trustee to produce the accounts relating to the period prior to the appointment of the new trustees and the old trustee is not justified in ignoring this demand merely on the ground that the arrangement under which the new trustees were appointed did not expressly authorise them to call for the accounts for the period prior to their appointment. [p. 808, col. 1.]

Where under a deed of arrangement power is given to a certain number of trustees to dismiss a trustee and they proceed to exercise that power their action cannot be questioned by the Civil Courts. [p. 808, col. 2.]

Letters Patent Appeal from the decree of Mr. Justice Martineau, in Civil Appeal No. 163 of 1922, dated the 17th May 1922, affirming that of the District Judge, Lahore, dated the 20th December 1921.

Messrs. *Zafrulla Khan*, *Shamair Chand* and Chaudhri *Ghulam Muhammad*, for the Appellant.

Malik *Barkat Ali*, for the Respondents.

JUDGMENT.—The circumstances, which have given rise to the dispute between the parties lie within a narrow compass. The plaintiff, Khuda Bakhsh, and the first defendant, Nur Muhammad, were the *mutwallis* of the Kharasian mosque situate in the town of Lahore. It appears that some of the persons interested in the management of the mosque were not satisfied with the administration of the trust property by the above *mutwallis*, and that on the 8th May 1919 an agreement was executed by which a committee of 9 persons including Khuda Bakhsh and Nur Muhammad were entrusted with the duty of managing the mosque and the property pertaining thereto. These 9 persons, who were called *mutwallis*, held various meetings at which there were squabbles among them and on the 27th September 1920 they passed a resolution by a majority of six to three dismissing the plaintiff Khuda Bakhsh from his office of *mutwalli* on account of his refusal to produce the accounts of the income of the trust property for the period prior to the 8th May 1919.

Dissatisfied with the above resolution the plaintiff has brought the present action for a declaration that the resolution is illegal, and for an injunction to restrain the defendants from preventing him from carrying on the management of the mosque and taking part in the affairs of the committee. The Courts below have concurred in dismissing the action, and after hearing arguments advanced on both sides and perusing the relevant documents we are not

prepared to hold that any adequate ground for our interference has been established.

Clause (14) of the agreement alluded to above, which deals with the dismissal of a *mutwalli*, is in the following terms :—

" Should a *mutwalli* in the opinion of six *mutwallis* at least be found dishonest or negligent or should the existence of a *mutwalli* be not useful for the management of the mosque, shops and other *wakf* property of the mosque or should he make unnecessary interference in the management of the mosque, he shall lose his rights and another man of his caste shall be appointed in his place in accordance with the above rules."

Now, there can be no doubt that this clause confers very wide powers on a ⅔rds majority of the *mutwallis*, and it is beyond dispute that six of the nine *mutwallis* concurred in passing the resolution removing the plaintiff from the committee of the management of the institution. The learned Counsel for the plaintiff, however, contends :

(1) that the clause in question does not authorise the defendants to call upon the plaintiff to produce the accounts for the period antecedent to the execution of the agreement; and

(2) that the plaintiff was not informed before the meeting of the 27th September 1920 that the question of his dismissal would be considered, and that the defendants took him by surprise and gave him no opportunity to prepare his defence.

Now, it is true that the liability to produce the accounts for the period of his stewardship prior to the 8th May 1919 is not expressly mentioned in cl. (14), but it is equally certain that the clause, as it stands, does not expressly absolve him from that duty. It is, however, clear that the new trustees were bound to take steps to acquaint themselves with the state of the trust property and to get in the trust estate including any funds belonging to the institution. In order to discharge this duty, which the law casts upon the trustees, they were entitled to call upon the plaintiff to produce the previous accounts, and we do not therefore, think, that he was justified in ignoring the demand. Nor are we prepared to hold that he was taken by surprise. A perusal of the proceedings of the meetings held by the committee of management prior to the 27th September 1920 shows that the question of accounts for the period in question was several times raised, and that it was contemplated that some action in the event of refusal to comply with the request of the trustees would be taken.

It appears that the plaintiff had been managing the affairs of the institution honestly, and that his only objection to the production of the accounts was that the defendants, who were hostile to him, had no authority under the agreement to call upon him to submit the accounts of his stewardship prior to the date of the execution of the agreement. It is clear that the relations between the parties are very strained, and that the defendants too have not carried out the terms of the agreement relating to the removal of the *Imam*. Be that as it may, they have chosen to take advantage of the plenary power conferred upon them by cl. (14) of the agreement, and we do not think that they have exceeded their authority. It is unfortunate that the interests of the institution should suffer on account of constant quarrels among the *mutwallis*, and it was for this reason that we suggested to the parties that they should settle their dispute by a compromise. They were, however, unable to come to terms, and we have no alternative but to determine the appeal upon the technical point discussed above.

We accordingly confirm the judgment of Mr. Justice Martineau and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 340 OF 1923.

August 8, 1924.

Present :—Mr. Justice Wallace and Mr. Justice Jackson.

ATHAMSA ROWTHER—DEFENDANT—APPELLANT

versus

GANESAN AND ANOTHER—PLAINTIFFS Nos. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Order setting aside final decree while retaining preliminary decree, whether "order affecting decision of the case"—Order, whether can be challenged in appeal from final decree—Final decree, application for—Proceeding in suit or in execution—Limitation.

An application to set aside an *ex parte* final decree following an *ex parte* preliminary decree in a mortgage-suit was allowed. The notes paper of the Judge, however, showed that he had called for written statement and draft issues. On the plaintiff contending at the time of re-hearing that not only the final decree but also the preliminary decree which was also *ex parte* had been set aside by the order:

Held, that the prayer in the application and the order thereon and not the notes paper ought to be considered and that the final decree alone was set aside by the order. [p 809, col. 2.]

An application for a final decree in a mortgage suit is a proceeding in a suit and not in execution, and, therefore, only one application is permissible and it must be put in within three years of the preliminary decree. [p. 810, col. 1.]

An order setting aside an *ex parte* final decree while retaining the *ex parte* preliminary decree in a mortgage suit is an order "affecting the decision of the case" within the meaning of s. 105, C. P. C., and its propriety can be challenged in an appeal against a decree finally passed in the suit. [p. 810, col. 2; p. 811, col. 1.]

Gopala Chetti v. *Subbiear*, 26 M. 604; 13 M. L. J. 308 and *Nand Ram* v. *Gopal Singh*, 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130, relied on.

Appeal against an order of the Court of the Subordinate Judge, Negapatam, dated the 6th July, 1923 in A. S. No. 1 of 1923, preferred against that of the Court of the Principal District Munsif, Tiruvalur, in I. A. No. 1220 of 1917, in C. S. No. 248 of 1912.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *K. S. Jayarama Iyer*, for the Respondents.

JUDGMENT.—The respondents had obtained in the Court of the District Munsif, Tiruvalur, against the appellant a preliminary mortgage decree *ex parte* on 2nd September 1912, and a final decree *ex parte* on 15th September 1917. On 20th November 1920, the appellant applied in I. A. No. 39 of 1921 to the District Munsif to set aside the *ex parte* final decree. This was allowed on 17th December 1921. The entry on the notes paper referring to this runs: "*Ex parte* decree set aside as per order on I. A. No. 39 of 1921. For written statement and draft issues adjourned to 6th January 1922." The order itself is headed: "This is a petition to set aside the *ex parte* final decree passed against the petitioner," and concludes "It is ordered that the petition be and the same hereby is allowed." When the re-hearing of the application for final decree came on, it was contended before the District Munsif, a different Judge from the one who passed the order on I. A. No. 39 of 1921 that the notes paper showed that his predecessor had set aside not only the final decree but the preliminary decree as well, because he had called for written statement and draft issues and that, therefore, the whole suit should be taken up again. The District Munsif decided against that contention, found that the application for the final decree was barred by limitation, and, therefore, dismissed the application. On appeal the lower Appellate Court held that the District Munsif's order on I. A. No. 39 of 1921 had set aside both the preliminary and final decrees. He reversed the District Munsif's order and remanded the whole suit for re-hearing. The appellant (defendant) has now appealed against that order.

We think that the lower Appellate Court's view on this matter is clearly wrong. The application to the District Munsif was to set aside the final decree only and this was clearly apprehended by the plaintiff also as is obvious from his counter in the I. A. The order itself, as quoted above, clearly gave what the petitioner in that I. A. asked for and no more. We must go by that order and not by what we think from the District Munsif's note that he intended the order to be. Even from the notes paper it would appear that the entry calling for written statement and draft issues was a mistake, as, on the adjourned date of hearing, it was a counter-statement and not a written statement that was put in and accepted by the same District Munsif and no draft issues were ever put in. The case was disposed of on that counter-statement. It would take much stronger evidence to convince us that the District Munsif deliberately ordered a relief which he was not asked to give by either party. We are quite clear that only the final decree was set aside and the order of the lower Appellate Court remanding the whole suit for trial cannot, therefore, be supported and must be set aside.

We are asked, however, not to accept the District Munsif's finding that the application for final decree was out of time. The preliminary decree was on 2nd September 1912. On 17th March 1913, an application for final decree was made and dismissed because the notice was not served. On 16th March 1916 another application was filed, the fate of which is uncertain. On 23rd March 1917, a third application

was filed, the one now in question. It was commonly believed at that time that applications for final decrees were to be treated as applications for execution and were subject to the rules of limitation governing these. Of late the Courts have laid down that an application for a final decree in a mortgage suit is a proceeding in a suit and not in execution, and, therefore, only one application is permissible and it must be put in within three years of the preliminary decree. Adopting this latter view of the law, the District Munsif dismissed the application of 23rd March 1917 as out of time. The plaintiff contends that, on the same view of the law, the dismissal of his application of 17th March 1913 on the ground that the notice was not served was improper, because no notice was necessary on such an application, and, therefore, his application of 23rd March 1917 may fairly be treated as a continuation of the application improperly dismissed on 17th March 1913. We need not refer further to this question, because we think that the respondent-plaintiff is bound to succeed on another ground and that is that the appellant-defendant's application to set aside the *ex parte* final decree was itself out of time.

The *ex parte* final decree was passed on 15th September 1917. In I. A. No. 39 of 1921, the defendant alleged that he became aware of it on 20th October 1920. He did not file his I. A, until 20th November 1920, one day over the thirty days allowed by law. We have verified that 19th November 1920 was a working day in the Court. No explanation for the delay was offered in the petition or affidavit. *Prima facie*, therefore, his petition was out of time. The point was raised before the lower Appellate Court which disposed it of on two grounds. First, that the ground of limitation was not taken by the plaintiff when I A. No. 39 of 1921 was put in, and secondly, that the plaintiff cannot now take this point in appeal from an order setting aside the final decree since it is not a ground "affecting the decision of the case" within the meaning of s. 105 of the C. P. C. The first point is not a good one. In his counter the plaintiff clearly contended that the application was time-barred although he then thought that the date of the presentation was 11th January 1921. It was a mere quibble to say that he had not taken the point because he made a mistake as to the actual date of presentation of the petition.

As to the second point, it is quite true that certain High Courts have interpreted the words "affecting the decision of the case" in s. 105 as meaning "affecting the decision of case on the merits"—see for example the Calcutta High Court in *Chintamony Dassi* v. *Ragoonath Sahoo* (1), the Allahabad High Court in *Gulab Kunwar* v. *Thakur Das* (2), *Tasadduq Husain* v. *Hayat-un-nissa* (3) and of the Lahore High Court in *Fazal* v. *Hashmati* (4), *Budhu Ram-Honda Ram* v. *Ramzan* (5) and *Sundar Singh* v. *Nigahiya* (6), but all these cases proceed on the principle that when the setting aside of the order has re-opened the hearing of the suit on the merits, the propriety of setting aside of the order cannot be attacked in an appeal in the suit. In our opinion, they do not go beyond that or lay down that in no case can the propriety of an order setting aside an *ex parte* decree be challenged in an appeal against a decree finally passed in the suit. For example, a proper case in which it could be set aside is the case set out in *Gopala Chetti* v. *Subbier* (7), where an *ex parte* decree had been set aside on behalf of a party who had never applied for it to be set aside. In *Nand Ram* v. *Bhopal Singh* (8), a Bench of the Allahabad High Court followed *Gopala Chetti* v. *Subbier* (7), although perhaps it has stated too broadly the general proposition. It seems to us that the present case is another in which an order setting aside an *ex parte* decree may be properly attacked. It is clear that, when the result of the setting aside of the order has been the hearing of the suit *de novo* on its merits, no injustice would be done to anyone by the decision of the case and the final result is not affected. But in the present case the result would be very different. The defendant has deliberately, no doubt, for good reasons from his own point of view refrained from opening the whole suit and only wants the final decree to be re-opened because he thinks he has a good point of limitation which will

(1) 22 C. 981; 11 Ind. Dec. (N. S.) 651.
(2) 24 A. 464; A. W. N. (1902) 136.
(3) 25 A. 280; A. W. N. (1903) 39.
(4) 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916.
(5) 59 Ind. Cas. 676; 33 P. W. R. 1921; 3 L. L. J. 59; 88 P. L. R. 1921.
(6) 72 Ind. Cas. 410; (1923) A. I. R. (L.) 425.
(7) 26 M. 604; 13 M. L. J. 308.
(8) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

enable him to render the preliminary decree futile. So far from courting a decision on the merits he is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside the *ex parte* final decree while retaining the *ex parte* preliminary decree is an order "affecting the decision of the case."

We consider, therefore, that it is open to us to consider the propriety of the District Munsif's order allowing the final decree to be set aside. The application was out of time and we can see no reason for indulgence or for not enforcing strictly the law of limitation. Technicalities may be waived in the case of a party *bona fide* seeking to do justice as well as to get it; but the defendant's lodge is too apparent. He admits the mortgage claim, as he does not challenge the *ex parte* preliminary decree, but seeks to defeat it by a technicality of law affecting the final decree which only became available to him on the later interpretation of the law of limitation. He would seek to enforce the law of procedure against the plaintiff while claiming absolution for himself from the law. He would re-open the suit only to the extent to which it would benefit himself. We are not prepared to relax the law of limitation in favour of such a person. We, therefore, hold that the application to set aside the final decree was out of time. The result is that the final decree of 15th September 1917 stands. We, therefore, reverse the order of the lower Appellate Court and we direct accordingly. The defendant will pay the plaintiff's costs in the lower Courts, he will get his costs in this appeal.

V. N. V. *Appeal allowed.*

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 166 OF 1923.

October 14, 1924.

Present:—Mr. Neave, A. J. C.

MURLIDHAR—DEFENDANT—APPELLANT

versus

FAQIR BAKHSH—PLAINTIFF AND RAHIM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17—Counsel instructed to apply for adjournment—Adjournment refused—Dismissal of appeal, nature of—Appeal, whether lies.

The mere attendance in Court of a Counsel on behalf of the appellant who is not prepared to argue the case does not amount to an appearance of the appellant within the meaning of O. XLI, r. 17 of the C. P. C., and the consequent dismissal of the appeal must be regarded as a dismissal in default and is not open to appeal. [p. 812, col. 1.]

A Counsel on behalf of an appellant made an application for adjournment of the hearing of the appeal and on the adjournment being refused stated that he was not in a position to argue the appeal. The Court then referred to the judgment of the lower Court as clear and well-reasoned and remarked that there was nothing on the face of it to suggest that any mistake had been made either in law or in fact. It wound up with the remark "The appellant's Counsel being unable to argue the appeal I have no alternative, therefore, but to dismiss the appeal with costs."

Held, that the order dismissing the appeal was really one dismissing it in default and was not appealable. [*ibid.*]

(Case-law referred to.)

Second appeal against a decree of the District Judge, Lucknow, dated the 1st February 1923, preferred against that of the Additional Subordinate Judge, Lucknow, dated the 22nd September 1922.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Appellant.

Messrs. *A. P. Sen*, *Zahur Ahmad* and *Ganga Dayal Khare*, for Respondent No 1.

Mr. *Rajeswari Prasad*, for Respondent No. 3.

JUDGMENT.—This is an appeal against an order of the District Judge of Lucknow dismissing the appellant's suit.

A preliminary objection is taken by the respondent that no appeal lies, inasmuch as no decree was passed by the lower Appellate Court, but the appeal was in reality dismissed for default.

The facts of the case as set out in the order of the lower Appellate Court are, that an application was made by Counsel on behalf of the appellants in that Court asking for adjournment, on the ground that their Counsel was unable to appear that day. The Court refused to allow an adjournment, and the Counsel who filed the application on behalf of the appellants stated that he was not himself in a position to argue it. The Court then referred to the judgment of the Court below as clear and well-reasoned, and remarked that there was nothing on the face of it to suggest that any mistake had been made either in law or in fact. It wound up "The appellant's Counsel being unable to argue the appeal, I have no alternative, therefore, but to dismiss the appeal with costs."

It is contended on behalf of the respond-

ent that though the learned Judge does refer to the judgment of the Court below, his dismissal of the appeal is clearly not based on any determination of the merits but only on the failure of the appellant's Counsel to put in an appearance, and his order is really passed, though he does not say so, under O. XLI, r. 17, of the C. P. C. A large number of rulings has been cited from the reports of nearly all the High Courts in India in support of the proposition that the mere attendance at the Court of a Counsel who is not prepared to argue the case does not amount to an appearance of the appellant within the meaning of O. XLI, r. 17. These rulings begin in the case of Calcutta with *Buldeo Misser* v. *Syud Ahmed Hussein* (1), and in the case of Allahabad with *Mansab Ali* v. *Nihal Chand* (2). The question has been discussed at considerable length and the authorities up to that date considered in a Full Bench decision of the Calcutta High Court in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (3), when it was laid down that an application by a Counsel or Pleader who is instructed only to apply for an adjournment, which is refused, is not an appearance within the meaning of the C. P. C., and in such circumstances, the dismissal is one for default. A different view was taken in a Madras case, *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon* (4), but later on that High Court also in *Gapala Row* v. *Maria Susaya Pillai* (5) came into line with Calcutta and Allahabad. The same principle has been adopted by the High Court of Patna in *Lalji Sahu* v. *Lachmi Narain Singh* (6), *Muhammad Bakar Ali* v. *Chulhai Mahton* (7) and *Ramdhan Tewari* v. *Bishun Pragash Narain Singh* (8).

The principle underlying these decisions was enunciated by Sir Arthur Strachey in a Full Bench case in *Lalta Prasad* v. *Nand Kishore* (9), where he pointed out that if Pleaders were not duly instructed and able to answer all material questions relating to the suit, if they were instructed only to apply for an adjournment, then the plaintiff did not appear.

In the few decisions which the learned Counsel for the opposite party has been able to adduce, it does not appear that the reported cases on the subject had been brought to the attention of the Judges who delivered them, and certainly they carry no weight against the general consensus of opinion in the other direction.

The main point taken by the learned Counsel for the appellant is that his client was misled by the fact that the lower Appellate Court passed what purported to be a decree. In these circumstances he supposed that he was bound to file an appeal, and did not realise that he should have made an application to have his case restored to the file. It is true that a formal decree was prepared. This, however, was clearly due to a mistake on the part of the Judge's office, which did not appreciate the real nature of the Court's order. Though this mistake may perhaps have contributed to mislead the appellant it cannot enable him to file an appeal to which he had no right under the Statute. It was the business of his Legal Advisers to discover what the real nature of the order was which had been passed against them, and to take such steps as the law provided to have it set aside if possible.

The preliminary objection must prevail. The order passed by the lower Appellate Court was one under O. XLI, r. 17, against which no appeal is provided by the C. P. C. The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 15 W. R. 143.
(2) 15 A. 359; A. W. N. (1893) 113; 7 Ind. Dec. (N. S.) 947.
(3) 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C W. N. 329 (F. B.).
(4) 26 M. 267.
(5) 30 M. 274; 17 M. L. J. 225.
(6) 47 Ind. Cas. 27; 4 P. L. J. 355.
(7) 52 Ind. Cas. 290; 3 P. L. J. 712.
(8) 54 Ind. Cas. 715; 5 P. L. J. 17; 1 P. L. T. 156.
(9) 22 A. 66; A. W. N. (1899) 176; 9 Ind. Dec. (N. S.) 1075 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 978 OF 1923.
July 23, 1924.
Present:—Mr. Justice Devadoss.
SITHAMRAJU ANANDA RAO AND OTHERS—DEFENDANTS Nos. 1 TO 6—APPELLANTS
versus
Sri Raja VENKATADRI APPA RAO BAHADUR ZAMINDAR GARU—PLAINTIFF—RESPONDENT.

Minor—Guardian ad litem—"Gross negligence,"

what is—Omission to file document, whether negligence —Appeal, second—Finding as to negligence—Mixed question of law and fact.

Where a guardian of a minor omits to put forward a plea which he should have put forward or fails to defend a suit which he ought to have defended, he would be guilty of negligence. But where a suit is prosecuted with due diligence, the mere fact that a certain document which might have helped the party was not filed in evidence is not by itself sufficient to show that there was "gross negligence" on the part of the guardian who conducted the litigation on behalf of the minor. [p. 814, col. 1.]

To afford a ground for relief in subsequent proceedings, the negligence attributed to a guardian must be gross negligence in law, that is, such negligence as would imply that the person guilty of it neglected to do what was plainly his duty to do or did something which he ought not to have done or omitted to do something which any man of ordinary prudence would have done. [*ibid.*]

Gottepati Subbanna v. *Gottepati Narasamma*, 26 Ind. Cas. 16; 27 M. L. J. 486 and *Parmeswari Pershad Narayan Singh* v. *Sheo Dutt Rai*, 6 C. L. J. 448, distinguished.

The question whether there was negligence or such negligence as would vitiate the proceedings in a Court of Law is not a pure question of fact but a question of mixed law and fact and it is quite competent to the High Court in second appeal to go into the question to see whether there was gross negligence on the part of the minor's guardian in the conduct of a previous suit. [p. 813, cols. 1 & 2.]

Second appeal against a decree of the District Court, Kistna at Masulipatam, in Appeal Suit No. 138 of 1921, presented against that of the Court of the Additional Deputy Collector, Bezwada, in O. S. No. 126 of 1920.

Mr. *V. Ramadoss*, for the Appellants.

Mr. *G. Lakshmanna*, for the Respondent.

JUDGMENT.—The only point argued in this second appeal is whether the plaintiff's claim is barred by *res judicata* by reason of the decision in S. A. No. 1240 of 1911, Ex. V. Both the lower Courts have held that this decision is not binding on the plaintiff inasmuch as he was a minor at the time and his guardian, the Court of Wards, was guilty of negligence. Mr. Lakshmanna who appears for the respondent contends that it is not open to this Court to go behind their finding. But I am unable to accept that contention because the question whether there was negligence or such negligence as would vitiate the proceeding in a Court of Law is not only a question of fact but a question of mixed law and fact. What is gross negligence is not merely a question of fact but one of mixed law and fact and, therefore, it is quite competent to the High Court in second appeal to go into the question to see whether there was gross negligence on the part of the minor's guardian in the conduct of the previous suit. The question involved is as regards the rate of rent for a *baput* wet land. The High Court decided in 1911 in S. A. No. 1240 of 1911, *vide* Ex. V, that the rent payable was not at the rate claimed but at a lower rate, *viz.*, Rs. 2-11-4. In the course of the judgment the learned Judges observe that the question of *res judicata* was raised but there was no clue as to the identity of the lands and the question of *res judicata* was not put in issue in the lower Courts. There was another decision of the High Court which is evidenced by Ex. B-2 in which it was held that the plaintiff was entitled to a higher rate at the rate of Rs. 5. The question is whether the Court of Wards was grossly negligent in not acting upon Ex. B-2 when the suit of 1907 which ultimately came up in S. A. No 1240 of 1911 was filed. In the present case no evidence has been adduced to show that the manager under the Court of Wards was either negligent or that he did not conduct the case of 1907 with due care and diligence. All that is brought forward is that Ex. B-2 was not relied on for the purpose of raising the plea of *res judicata*. We do not know under what circumstances the manager and those who helped him in the conduct of the suit did not rely upon Ex. B-2 and did not raise the question of *res judicata*. The question was sought to be raised before the High Court, but the High Court found that the identity of the parties was not established and, therefore, the previous judgment could not be *res judicata* between the parties, and they also say: "The First Court states that the judgments relating to the previous suit give no clue to the identity of the lands." And they go on to say: "The Judge does not hold that the lands are the same and we have not been referred to any evidence to show that the lands are identical." And they modified the decree of the District Court by giving the plaintiff rent at the lower rate. Mr. Lakshmanna for the respondent contends that the facts appearing in evidence are sufficient to make out such negligence as would be sufficient to vitiate the proceedings in a Court of Law, and he relies upon *Chunduru Ponniyya* v. *Rajam Viranna* (1) in support of

(1) 70 Ind. Cas. 668; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

his contention. In that judgment there is an observation upon which he very strongly relies: "It must be such negligence as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care." This sentence taken from its context no doubt would lend colour to the contention of the learned Vakil. But we have to see under what circumstances that observation came to be made. Where a guardian omits to put forward a plea which he should have put forward or fails to defend the suit which he ought to have defended, no doubt, he would be guilty of negligence. But where a suit is prosecuted with due diligence the mere fact that a certain document which might have helped the party was not filed in evidence is not by itself sufficient to show that there was gross negligence on the part of those who conducted the litigation on behalf of the minor. It is not every kind of negligence that would be a ground for relief in subsequent proceedings. It must be such negligence as would be called gross negligence in law, that is, such negligence as would imply that the person guilty of it neglected to do what was plainly his duty to do or did something which he ought not to have done or omitted to do something which any man of ordinary prudence would have done. There is no evidence in this case that any of the persons responsible for the conduct of the previous litigation were guilty of such negligence. Mr. Lakshmanna relied also upon *Gottepati Subbanna* v. *Gottepati Narasamma* (2). In that case Sankaran Nair, J., who was one of the Judges found that the guardian put forward a false case suppressing the true case, knowing that by doing so he was endangering the right of the minor. He put forward a false claim under a false case of adoption knowing perfectly well that under a Will the minor was entitled to have half the property. It was held in that case that the guardian was guilty of gross negligence and that the proceedings in the suit could not bind the minor. The observation in *Parmeswari Pershad Narayan Singh* v. *Sheo Dutt Rai* (3) is very general. In every case the Court has to see whether the facts are sufficient to make out gross negligence on the part of the guardian. In this case there is no such evidence forthcoming, and, therefore, it cannot be said that the Court of Wards or their agent or the manager who was in charge of the estate of the minor plaintiff's estate was guilty of grsos negligence. Both the lower Courts have come to the conclusion that there was negligence merely on the fact that the previous judgment, Ex. B-2, was not relied upon in the suit of 1907. Both the Courts have gone wrong, and I have no hesitation in holding that there was not gross negligence or such negligence as would be sufficient to vitiate the proceedings in a Court of Law. That being so, Ex. V is binding on the plaintiff as well as on the defendants.

Mr. Lakshmanna further contends that the plaintiff is entitled to ask for *asra* or share of the produce. But this contention was negatived in the previous suit; for the learned Judges say: "If the plaintiff was entitled to revert to the *waram* rate or claimed to revert to it and the higher rate was agreed to be paid in settlement of that claim, the contract would be supported by consideration. That was the case in some of the decisions referred to by the Judge. But those are not the facts here. And following these decisions we hold that the *patta* must be modified by disallowing the rate of Rs. 5 and inserting the lower rate." The questions now raised were actually raised and decided in the previous suit, and, therefore, the plaintiff is not entitled to re-open them.

In the result the appeal is allowed so far as the 6th appellant is concerned who is the only person who is now supporting the appeal; and the decrees of the lower Courts would be modified by inserting Rs. 2-11-4 instead of Rs. 5, 6th appellant is entitled to proportionate costs throughout.

Appellants Nos. 1 to 5 have settled the disputes with the respondent, and filed a compromise petition. A decree will be drawn up in terms of the compromise petition, so far as they are concerned.

V. N. V. *Appeal allowed.*
Z. K.

(2) 26 Ind. Cas. 16; 27 M. L. J. 485.
(3) 6 C. L. J. 448.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 257 OF 1923.

October 17, 1924.

Present:—Mr. Dalal, J. C.

BADRI NARAYAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AGENT, B. N. W. RAILWAY, GORAKHPUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Goods consigned to Railway Company for carriage—Risk Note Form "B"—Loss of goods—Damages, suit for—Burden of proof—Risk Note signed by person delivering goods, validity of.

Where goods are delivered to a Railway Company for carriage and the Risk Note is signed by the person who actually delivers the goods to the Railway, the Risk-Note is binding on the consignor and the consignee. [p. 815, col. 2.]

Where goods are consigned to a Railway Company for carriage under Risk-Note Form "B" and are lost in transit the burden of proving that the loss was caused by the wilful negligence of the Railway Administration or the wilful negligence of or theft by its servants lies on the plaintiff. [p. 815, col. 1.]

Second appeal against a decree of the Additional Sub-Judge, Gonda, dated the 16th May 1923, preferred against that of the Munsif, Tarabganj at Gonda, dated the 7th July 1922.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *G. N. Mukerji*, for the Respondents.

JUDGMENT.—A merchant sued two Railway Companies for the price of the entire consignment lost in transit. It was booked at the Victoria Terminus Station under Risk Note "B". This Risk Note absolves the Railway Company from a claim for damages unless the consignee can prove that the loss was caused by the wilful negligence of the Railway Administration or the wilful negligence of or theft by its servants. The burden of proof in such a case lies on the consignee. In the present case the plaintiff succeeded in the First Court but lost in the lower Appellate Court. This is a second appeal.

Two points were urged by the learned Counsel for the plaintiff:—

(1) that the Risk Note Form "B" was not valid and that, therefore, the Railway Company was not protected and (2) that the evidence on the record proves either wilful negligence of or theft by the Company's servants.

The Risk Note is signed by one Yaswant Bal Krishna broker. He was the man who took the bale to the Railway Station for delivery. The argument was that he was not an agent of the consigning firm of Shiva Dayal-Mutsaddi Lal, that that firm entrusted the package to its own servant and that that servant had no authority to pass on the duty to this broker.

According to this argument, under the circumstances of the case, the broker was not the proper person to sign the agreement under s. 72 (2) (*a*). If such a contention were allowed, all business would be at a stand-still and merchants except possibly in this particular case would suffer much more than the Railway Company. The Act very properly provides for the signing of the agreement by the person actually delivering the package to the Railway Administration. It will be ridiculous to expect that in every case the Company should attempt to find out whether the person who actually brought the package had authority to sign the Risk Note on behalf of the consigning Company or not. Yaswant Bal Krishna was the person who delivered the package to the Railway Company and was, therefore, the proper person to sign the agreement. The consignor and the consignee would be bound by such signature. If, of course, Yaswant Bal Krishna had not signed his own name but had signed the name of some Company, it might have been argued that it was the duty of the Railway Administration to discover whether this person signing the name of some body else on the Risk Note had the authority or not to sign as an agent. Such a case does not arise here. I hold that the Risk Note was valid.

There is no evidence of any wilful negligence of or theft by the Company's servants. Reference was made to the evidence on the record of Railway servants both in the Trial Court and during an enquiry held by the Railway Administration. It was pointed out that the bale was missed according to the testimony of the Railway servants between Colonelganj and Gonda Kachchehri. The case as put before this Court on behalf of the plaintiff was that the theft was really committed at Colonelganj while the train was waiting there for 21 minutes and there was no proper watch kept through the wilful negligence of the Company's servants. The evidence on the record does not support such a conclusion. The train did wait at the Colonelganj Station for 21 minutes but the Guard says that a watchman was sent out to watch and that he himself found

all the seals intact when the train arrived and just before the train departed after he had made over the line-clear to driver. Stress was laid on a statement of the Guard that when the train was starting he did not notice the watchman. That, however, does not prove that the watchman deputed to watch was not doing his duty.

It was further urged that the train had slowed down between Colonelganj and Maijapur (a station which was passed by the train and where it did not stop) through wilful neglect of the Company's servants. Such delay in the running of a train is common and cannot be taken as negligence or as a contributing cause to theft. Any way, the slowing down of the train would not lead to the presumption that the theft was committed by the Company's servants and such slowing down does not amount to negligence. The seals were intact at the Colonelganj Station and the seal of one waggon from which this particular bale was missed was found broken when the train reached Gonda Kachchehri. The probable conclusion is that theft was committed while the train was running and not by the Company's servants or through their negligence.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 43 OF 1923.

September 19, 1924.

Present:—Mr. Dalal, J. C. and Neave, A.J.C.

Syed SIRAJ AHMAD—JUDGMENT-DEBTOR—OBJECTOR—APPELLANT

versus

Syed IBNUL HASAN AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 20—Land acquired by adverse possession, whether ancestral.

Land acquired after litigation on ground of adverse possession against a *taluqdar* to whom it originally belonged, is not ancestral property within the meaning of s. 20 of the Oudh Laws Act.

Appeal against an order of the Subordinate Judge, Rae Bareli, dated the 2nd August 1923.

Mr. *H. K. Ghose*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Rae Bareli dismissing an objection filed by the defendant in an execution case. The only ground urged before us is that the land against which execution has been taken out is ancestral property within the meaning of s. 20 of the Oudh Laws Act and that as such it cannot be sold except with the sanction of the Local Government and by the Collector.

This question was dealt with by the Subordinate Judge in his discussion of issues Nos 2 and 4 framed by him and he found after going into the matter that the land was not ancestral land. The learned Counsel for the appellant relies, first, on cl. (*b*) of the Explanation to s. 20 defining ancestral land as "land forming an estate or part of an estate as defined in the Oudh Estates Act, 1869." Now, on the learned Counsel's own recital of the facts, the land in question no longer forms part of such an estate. It came into the possession of the defendant-appellant after litigation on the ground of his adverse possession against the *taluqdar*. Obviously when it passed out of the *taluqdar's* ownership it ceased to form part of such a *taluqdari* estate and ceased also to retain the character of such an estate.

Then the appellant's learned Counsel falls back as his second line of defence on cl. (*a*) of the Explanation. Here again the history of the land and its acquisition is against him. It cannot be said that his client has either directly or indirectly inherited the land from the proprietor or that it has been owned continuously as is required by cl. (*a*).

There is no force in this appeal which is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 909 OF 1922.
December 23, 1922.
Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.
Musammat GURDEVI—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Poisoning—Cause of death, proof of.

Before a person can be convicted of murder by poisoning, it is essential to prove that the death of the deceased was caused by poison and that the poison was administered to him by the accused. Where the cause of death cannot be ascertained with certainty, a conviction for murder by poisoning cannot be sustained.

Appeal from an order of the Sessions Judge, Sialkot, dated the 29th August 1922.

The Public Prosecutor, for the Respondent.

JUDGMENT.—This is a jail appeal by a female prisoner from a conviction and sentence of transportation for life under s. 302, Indian Penal Code.

The deceased of whose murder she has been convicted was her husband named Jagat Singh, of about 50 years of age. His account of the event according to his dying declaration was to the following effect:—"The appellant cooked food for him as usual and served him with it on the evening of the 12th June last. It consisted of *chapatis* and porridge or *saluna*. He perceived that the porridge was bitterish and enquired from her why it was so. She replied that it was slightly burnt. After partaking of it he complained of dryness in the throat and spasm in his stomach and took some milk but this produced no relief. Then he went to the house of Kesar Singh *sufed posh* and expressed to him the suspicion that his wife had administered some poison to him in food as he had beaten her two or three days previously for carrying on a love intrigue with Fateh Singh."

Kesar Singh sent a *chowkidar* to the Police Station which was only one mile off, to report there. A Head Constable arrived on receiving the report and found Jagat Singh in a critical condition. Therefore, he recorded his dying declaration and then sent him to hospital for treatment. He was vomiting and purging and died in hospital on the ensuing morning at 5 40 A.M. The Sub-Assistant Surgeon who attended him in the hospital suspected poisoning by arsenic. The *post mortem* signs, noted by the Civil Surgeon were that the brain, lungs and stomach were congested and the pupils were dilated. The cause of death was not stated but the stomach with its contents and pieces of viscera were sent to the Chemical Examiner because there was suspicion of an irritant poison, such as arsenic. The matter vomited and purged by the deceased was also sent to the Chemical Examiner. He found opium in the stomach and its contents and mercury in the matter vomited and purged. The Civil Surgeon could not explain how these two different poisons could exist one in the stomach, and the other in the matter vomited and purged. Obviously if the man died of a mercurial poison or of opium or of both, these drugs should have been found in the viscera.

But there was against the appellant her confession made before a Magistrate in the course of Police investigation to the effect that Fateh Singh Jat had illicit intimacy with her, that the deceased discovered it and beat her, that Fateh Singh gave her a pill of aconite to administer to her husband to kill him and, that accordingly she mixed a portion of the pill in the porridge and that he was seized with vomiting after eating it and died on the ensuing morning. She produced the rest of the pill which was sent to the Chemical Examiner who reported that there was no poison in it. She retracted the confession during the Magisterial enquiry and stated that she was tutored by the Police to make the said confession. Before the Sessions Judge she repeated the story of the pill and added that it was supplied to her by Fateh Singh to be administered to the deceased to cure him of impotency. The learned Sessions Judge disagreeing with the majority of the Assessors arrived at the conclusion that the circumstantial evidence reviewed above was sufficient to bring the charge of murder home to the appellant. But before convicting her of murder it was essential to prove (1) that the death was caused by a poison, and (2) that the poison was administered to the deceased by the appellant. Admittedly there was no direct evidence as to (2) and the evidence on (1) was inconclusive and highly unsatisfactory, because as already stated the cause of death was not proved at all. The learned Sessions Judge says in his judgment that

the Civil Surgeon and the Sub-Assistant Surgeon were unable to say what poison was actually administered and that there was no evidence on the record to show what poison had been administered. The appellant's own confession was not true because the deceased did not die of aconite poisoning nor was aconite found in the pill produced by her. The Sessions Judge himself was of opinion that the confession was false and that no reliance could be placed on it. We are, therefore, of opinion that the evidence on the record is quite insufficient to establish the charge. The learned Public Prosecutor also stated that he could not support the conviction and that there was no case against the appellant.

Therefore, we accept the appeal and order release of the prisoner from jail forthwith.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 442 OF 1924.

October 20, 1924.

Present:—Mr. Justice Mukerji.

SAMOKHAN—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 182, 211—Information to Police—Definite charge of offence—Offence.

There is an essential difference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, s. 211 of the Penal Code applies.

Accused laid a clear and definite information before the Police to the effect that there was a dacoity in his house and that certain particular persons had taken part in it. It was found that no dacoity had taken place and that, at any rate, the persons mentioned by the accused never took part in the dacoity:

Held, that the accused was guilty of an offence under s. 211 of the Penal Code.

Kashi Ram v. *Emperor*, 82 Ind. Cas. 167; 22 A. L. J. 829; 10 O. & A. L. R. 918, followed.

Criminal revision from an order of the Sessions Judge, Agra, dated the 19th July 1924.

Mr. *Saila Nath Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Two points have been urged in this case. The first one is that the offence was really one under s. 182 of the Indian Penal Code, and not one under s. 211 of the same Code. The finding is that the applicant laid a clear and definite information before the Police, to the effect that there was a dacoity in his house and certain particular persons took part in it. It has been found that no dacoity took place, and at any rate the persons mentioned never took part in the dacoity. The question in the circumstances is whether the case falls under s. 211 of the Indian Penal Code or not.

The latest pronouncement upon the point is by Walsh, A. C. J., and Ryves, J., in the case of *Kashi Ram* v. *Emperor* (1).

It seems to me that there is an essential difference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, s. 211 of the Indian Penal Code applies. In my opinion the conviction is right.

As regards the sentence the applicant was fortunate enough to have the original sentence reduced by the learned Sessions Judge, to one of nine months' rigorous imprisonment.

Having regard to the fact that the charge brought by the applicants fell within the second portion of s. 211, a sentence of nine months' is a light one. I refuse to interfere with the sentence. The application is rejected.

Z. K. *Application rejected.*

(1) 82 Ind. Cas. 167; 22 A. L. J. 829; 10 O. & A. L. R. 918.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 169 OF 1924.

July 17, 1924.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Mukerji.

NAYAN ULLAH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 109, 147, 149, 150, 188, 304—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238—Riot—Person charged with actual culpable homicide, whether can be convicted of

constructive culpable homicide—Minor offence—"Doubt" under s. 236, meaning of—Hiring person to commit riot and riot, whether same transaction—Person hired, acquittal of, effect of, on person charged with hiring—Disobedience of order and abetment of disobedience—Common object.

Ordinarily a person cannot be convicted at a Sessions trial of an offence with which he has not been charged. The exceptions to this rule are to be found in ss. 237 and 238 of the Cr. P. C. [p. 819, col. 2.]

Section 238 of the Cr. P. C. has no application to a case where a man who is charged with actual culpable homicide is convicted of constructive culpable homicide, inasmuch as constructive culpable homicide cannot be said to be a minor offence compared with actual culpable homicide. [*ibid.*]

The doubt referred to in s. 236 of the Cr. P. C. must be a doubt as to the application of the law to proved facts. The section has no application where there may be a doubt as to facts which constitute one of the elements of the offence. [p. 819, col. 2; p. 820, col. 1.]

Where a person is charged with an offence under s. 304 read with s. 150 of the Penal Code and the charge against him is a definite one of having engaged or employed a particular person to commit culpable homicide not amounting to murder, and the Jury holds that the latter did not commit the culpable homicide, the person charged with having engaged or employed him cannot be convicted of constructive homicide under the provisions of s. 150 of the Penal Code. [p. 820, col. 1.]

The offence of hiring a person to take part in a riot is a separate and distinct offence from the riot itself and ordinarily the hiring and the riot would be separate transactions. There may, however, be circumstances in a case which might justify the Court in holding that the alleged hiring or employing and the riot were part of the same transaction. [p. 820, col. 1.]

Where certain persons jointly enter on certain land in defiance of an order that has been passed under s. 144 of the Cr. P. C., though some of them may be guilty of an offence under s. 188 of the Penal Code and others of abetment of that offence, nevertheless the common object of them all is one and the same. [p. 821, col. 1.]

Criminal appeal against an order of the Additional Sessions Judge, Sylhet.

Mr. *Camell*, Babus *Hemendra Kumar Das* and *Priya Nath Dutta*, for the Appellants.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

Babu *Benoyendra Nath Palit*, for the Complainant.

JUDGMENT.—The eleven appellants before us and two others were tried before the learned Additional Sessions Judge of Sylhet and a Jury on various charges arising out of a riot in the course of which one Kabir Ulla was killed. The first appellant Nayan Ullah was charged with offences of rioting, rioting armed with a deadly weapon and with culpable homicide not amounting to murder by causing the death of Kabir Ulla. The 11th appellant Kedar Nath Chowdhury was charged with the offence of committing riot and for being liable for culpable homicide commited by Nayan Ullah under the provisions of s. 149, Indian Penal Code, and also for being liable for the same culpable homicide by reason of the provisions of s. 150 of the Code. The other accused were charged with rioting and also for being liable for the culpable homicide committed by a member of that unlawful assembly by reason of s. 149, Indian Penal Code. Two of the accused were acquitted. Nayan Ulla was convicted on the unanimous verdict of the Jury of rioting punishable under s. 147, Indian Penal Code, and also of being constructively liable for culpable homicide under the provisions of s. 149, Indian Penal Code; this being an offence with which he had not been charged. Kedar Nath was found guilty by the Jury under s. 304, Indian Penal Code, read with s. 150 Indian Penal Code, and not guilty under s. 147, Indian Penal Code, and s. 304 read with s. 149, Indian Penal Code. The remaining nine appellants were found guilty under s. 147, Indian Penal Code, and s. 304 read with s. 149, Indian Penal Code. The two accused who were acquitted were given the benefit of doubt by the Jury.

The first point taken in this appeal is that the conviction of Nayan Ullah under s. 304 read with s. 149, Indian Penal Code, when he was not charged with such an offence is bad in law. We think this objection must be maintained. Ordinarily a person cannot be convicted at a Sessions trial of an offence with which he has not been charged. There are some exceptions to this rule which are to be found in ss. 237 and 238, Cr. P. C. Section 238 can have no application in this case. Constructive culpable homicide cannot be said to be a minor offence compared with actual culpable homicide with which Nayan Ulla was charged. It has been argued that s. 237, Cr. P. C., might justify this conviction. Section 237, Cr. P. C., provides for conviction of a person of an offence not charged but which might have been charged under the provisions of s. 236, Cr. P. C. That section provides that "if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences". It is a settled law that the doubt referred to in this section must be a doubt as to application of the law to the proved facts and the sec-

tion has no application where there may be a doubt as to the facts which constitute one of the elements of the offence. Here the case for the prosecution on the evidence was that Nayan Ulla had actually caused the death of Kabir Ulla by stabbing him in the neck with a spear. The Jury though they actually returned no verdict on that charge must be held to have found that it was not proved that Nayan Ulla actually inflicted the fatal wound. In fact by acquitting him of the offence charged under s. 148, Indian Penal Code, it would seem that they did not believe the evidence that he was armed with a spear. On the case as made by the prosecution there cannot be any doubt as to what offence would have been committed if the witnesses had been believed. It was clearly a case in which the accused would have been liable under the provisions of s. 304, Indian Penal Code. Taking this view we must hold that the conviction under s. 304 read with s. 149, Indian Penal Code, was illegal and must be set aside.

The next point taken is as regards the conviction of Kedar Nath under s. 304, Indian Penal Code, by reason of the provisions of s. 150. The charge framed against Kedar Nath under these sections is in the following terms. "That you on or about the 1st day of May 1923 at the band Baban Khamar engaged or employed your co-accused Nayan Ulla to join as, or become, a member of an unlawful assembly and that the said Nayan Ulla as a member of such unlawful assembly in pursuance of such engagement or employment committed culpable homicide not amounting to murder by causing the death of one Sheikh Kubir and thereby committed an offence punishable under ss. 304-150 of the Indian Penal Code, and within the cognizance of the Court of Sessions". The charge, therefore, against this accused is a definite one of having engaged or employed one person, the co-accused Nayan Ulla and further Kedar Nath's liablity under this charge is by reason of this Nayan Ulla having committed culpable homicide not amounting to murder. The Jury having found that Nayan Ullah did not commit the murder we hold that Kedar Nath could not on this charge be convicted of constructive culpable homicide under the provisions of s. 150. The Jury should have been directed that on this charge as framed they could not convict Kedar Nath unless they found that the culpable homicide had been committed by Nayan Ullah. Further we find that in explaining this charge to the Jury the learned Sessions Judge seriously misdirected them. He tells them that some of the necessary points of proof are not only that the accused hired or engaged to the person in question but also in the alternative that he prompted or connived at such hiring, etc. This he should not have done as there is no reference to prompting or connivance in the charge as framed. But nevertheless he went on to explain at length what would constitute connivance. He further went on to say "you must find that there had been an unlawful assembly composed of *persons* said to have been hired by the accused, and in the course of which some offence had been committed for which the accused would have been responsible" equally with those who were members "of that unlawful assembly before you can convict the accused." The serious misdirection here is that he speaks "persons" in the plural whereas the charge against this accused was limited to hiring or engaging Nayan Ullah. Further we may remark that it was not necessary that they should find the accused responsible for any offence committed in the course of the riot. If it was found that the accused did hire Nayan Ullah to take part in the riot the provisions of the section would throw the responsibility on him without any finding of the Jury as to his responsibility being necessary. We hold, therefore, that the conviction of Kedar Nath on this charge cannot be upheld.

In connection with this charge a question has also been urged that the whole trial was bad for misjoinder. The offence of hiring a person to take part in riot is certainly a separate and distinct offence from riot itself; and ordinarily the hiring and the riot would be separate transactions. It is hard to understand on what evidence the prosecution sought to establish the charge which had been framed against Kedar Nath under s. 150, Indian Penal Code, read with s. 304, Indian Penal Code. But it would seem that they were such that in the special circumstances of the case we are justified in holding that the alleged hiring or employing and the riot were the same transaction. In the charge the time and place of the hiring or given as the 1st of May 1923 and band Baban Khamar respectively which are the

time and place at which the rioting is alleged to have taken place. It does not appear that there is any suggestion of any meeting between Kedar Nath and Nayan Ullah at Baban Khamar before the time of riot. Further the offence of culpable homicide for which Kedar Nath is sought to be made liable by the operation of s. 150 was committed in the riot and, therefore, it might be said that the offence charged under s. 304/150 was not complete until the riot had taken place. Taking this view we hold that the plea of misjoinder fails.

As regards the remaining accused it is objected that one of the two common objects stated in the charge was not an offence so far as the majority of the appellants are concerned. The common objects so stated are, firstly assaulting the deceased Kabir Ullah and others and secondly disobeying an injunction under s. 144, Cr. P. C. It has been pointed out that only two of the appellants were persons against whom the order of injunction was directed and served. It is, therefore, argued that though they might be guilty of the offence under s. 188 their companions could not be guilty of the same offence. It is argued that committing an offence and abetment of it cannot be the same common object. We are unable to accept this contention. It appears to us that if certain persons jointly enter on certain land in defiance of an order that has been passed under s. 144, Cr. P. C., though some may be guilty of the offence under s. 188, Indian Penal Code, and others of abetment of that offence nevertheless the common object of them all was one and the same object.

It is further urged that the charge under s. 304 read with s. 149, Indian Penal Code against these appellants must fail on account of the acquittal of Nayan Ullah of the substantive offence. But in the charge as framed against these appellants they were made liable for the offence of culpable homicide in consequence of it having been committed by one of the members of the unlawful assembly without the name of Nayan Ullah in the charge. That being so we can see no illegality in the conviction on that charge.

Our attention has been drawn to the omission to draw the attention of the Jury to the fact that one man was killed and one injured on the side of the accused as well as on the side of the complainant. We cannot believe that these facts were not in the mind of the Jury and we regard it as a piece of non-direction of no great importance. On the view we hold we think that the sentences passed on the appellants other than Nayan Ullah should not be greater than that which we pass on Nayan Ullah himself.

For the above reasons we allow this appeal in the case of Kedar Nath. We reverse the conviction and sentence passed on him and direct that he be acquitted. The bail-bond of Kedar Nath will be discharged. We set aside the conviction of Nayan Ullah under s. 304 read with s. 149, Indian Penal Code. But we uphold the conviction of Nayan Ullah under s. 147, Indian Penal Code, and under that section we sentence him to two years' rigorous imprisonment. In the case of the remaining nine appellats we uphold their convictions under s. 304 read with s. 149, Indian Penal Code, and s. 147, Indian Penal Code, but we reduce the sentence passed on them to two years' rigorous imprisonment each.

Z. K.

Appeal partly allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 400 OF 1924.

August 29, 1924.

Present:—Mr. Justice Mukerji.

KESHORI LAL AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 186—Refusal of subordinate to allow superior to check books—Obstruction.

The refusal of a *Patwari* to allow a *Kanungo* to go through his books and to check them is only an act of insubordination and is not a criminal act falling within the purview of s. 186 of the Penal Code. [p. 822, col. 1.]

Criminal revision against an order of the Additional Sessions Judge, Meerut, dated the 17th of July 1924.

Mr. *C. Ross Alston*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The original charge under which the applicants were tried was one under s. 353 of the Indian Penal Code. The applicants were convicted of that offence and were sentenced each to rigorous imprisonment for nine months; and were besides ordered to pay a fine. There was an appeal to the learned Sessions

Judge and he disbelieved that any offence had been committed such as is defined in s. 353. But he held that there was an obstruction in the discharge of the duty of the *Kanungo* within the meaning of s. 186 of the Indian Penal Code and he convicted the applicants of an offence under s. 186 and reduced the sentence of imprisonment for two weeks.

In this Court it has been contended that there was really no case under s. 186 of the Indian Penal Code and the appellants were entitled to an acquittal.

The facts of the case, as found by the learned Sessions Judge, were these: The *Kanungo*, Amir-ud-Din, went to a village of which the applicant, Kishori Lal, was the newly appointed *Patwari*. He took out the *Patwari* for *parthal*. After that he sent for him to check his books. The *Kanungo* suggested that he should have his customary present, locally known as "*fasilana*", of the sum of Rs. 14. The *Patwari* said that he was too young to know of these things and he had better consult his father who was a retired *Patwari*. The father, namely, the applicant Munshi Lal came and did not agree to the payment of the sum demanded. There was thereupon an exchange of hot words and ultimately Kishori Lal went away with his books.

Now the question is whether on this finding a case under s. 186 has been made out.

I am clearly of opinion that s 186 was never enacted to meet a case like this. The most that can be said is that the *Patwari* was grossly insubordinate. But it was not a case of voluntarily causing obstruction to any public servant in the discharge of his public functions. Supposing that no bribe had been demanded by the *Kanungo*. All that happened was that the *Patwari* refused to help the *Kanungo* in going through or checking the books of kept by him. The learned Judge clearly finds that the provocation for hot words came from the *Kanungo*. Even if there was no provocation from the *Kanungo* the refusel of the *Patwari* to allow the *Kanungo* to go through his books and to check them was only an act of insubordination and was not a criminal act.

I allow the application, set aside the conviction of the applicants and the sentence. They are on bail and they need not surrender.

Z. K. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 911 OF 1922.

January 23, 1923.

Present:—Mr. Justice Campbell.

INDAR SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, 325—Attack with chhavis *and sticks—Death caused by* chhavi *blow—Offence.*

The accused, three in number, two of whom were armed with *chhavis* and the remaining one with a stick, on a slight provocation, attacked the deceased and caused injuries to him. One of the accused who was armed with a *chhavi* used the blade of the *chhavi* in attacking the deceased, and the other accused who had a *chhavi* in his hand used the blunt end of the stick and refrained from using the blade. The deceased died as a result of the *chhavi* blow:

Held, (1) that the accused who used the blade of the *chhavi* was guilty of an offence under s. 304 (*ii*) of the Penal Code;

(2) that the remaining two accused must be presumed to have intended at least to cause grievous hurt and were, therefore, guilty of an offence under s. 325 of the Penal Code.

Emperor v. *Bhola Singh*, 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130, relied on.

Appeal from an order of the Sub-Divisional Magistrate, First Class, with s. 30 powers at Moga, District Ferozepore, dated the 31st August 1922.

Mr. *Khazan Singh*, for the Appellants.

Mr. *Mackay*, for the Government Advocate, for the Crown.

Lala *Mulk Raj*, for the Complainant.

JUDGMENT.—In this case six persons were sent up for trial under ss. 304 and 148, Indian Penal Code. The Magistrate held that there was no offence of rioting. He acquitted one of the accused and convicted three under s. 304 read with s. 34. These were Bishna, who was sentenced to seven years' rigorous imprisonment and a fine of Rs. 300, and Indar Singh and Waryam Singh each of whom was sentenced to three years' rigorous imprisonment. The remaining two, Narain Singh and Mahan Singh were convicted under s. 323 and sentenced to six months' rigorous imprisonment.

The finding was that the death of one Harnam Singh had been the result of an attack upon him by Bishna, Indar Singh and Waryam Singh in the course of which Bishna struck him a fatal blow on the head with a *chhavi* and the other two dealt him blows with a stick and with the shaft of a *chhavi*. Narain Singh and Mahan Singh were held to have beaten Arjan

Singh who attempted to rescue Harnam Singh deceased.

The main fact that there was a breach of the peace at the village Mehna on the evening of the 7th March 1922 in the course of which Harnam Singh was fatally injured is not denied. The defence set up in the lower Court by the five convicted persons, all of whom have joined in the appeal before me, that none of them was present has been abandoned. The finding of the Magistrate that Bishna appellant struck the deceased on the head with an edged weapon and caused the injury which resulted in his death is also not contested beyond a plea that the evidence indicates that the persons concerned in the disturbance were drunk, that it was dark, and that, therefore, it is impossible to say who struck whom. What has been urged on behalf of the appellants is that the sentence imposed on Bishna is too severe, that s. 34, Indian Penal Code, does not apply to the cases of Indar Singh and Waryam Singh and that there was no complaint of simple hurt caused by Narain Singh and Mahan Singh to Arjan Singh and, therefore, they should not have been convicted.

In regard to Bishna, the evidence is that he used a *chhavi* and that he struck Harnam Singh who was trying to run away. There is no proof of any injuries caused to the appellants or any persons who might be deemed to have been their supporters and what has been elicited shows that there was a one-sided attack on Harnam Singh. It is true that there is no evidence as to previous existence of any serious enmity and that the affair arose out of a petty quarrel of the moment but this is hardly an extenuating circumstance, and Bishna in using a weapon like a *chhavi* on so slight a provocation showed a callous disregard of human life for which he must suffer the consequences. I see no reason for interfering with his sentence.

It is conceded by the learned Counsel representing the Crown that Indar Singh and Waryam Singh cannot be held guilty of an offence under s. 304, and I agree. There is evidence that Waryam Singh was armed with a *chhavi* or *gandasa* but that he refrained from using the blade when striking the deceased. Such conduct is not consistent with a common intention to cause death or to inflict injury likely to cause death. At the same time these two persons are proved to have joined in an attack on Harnam Singh with Bishna who was armed with a *chhavi* and, although they are not proved to have inflicted individually injury amounting to grievous hurt, the act done resulted in death being caused and they must be presumed, as was ruled in *Emperor* v. *Bhola Singh* (1) to have intended at least to cause grievous hurt. That they had a common intention is proved from the method of their attack. Bishna felled the deceased to the ground and Waryam Singh and Indar Singh proceeded to beat him as he lay.

The objection regarding the absence of a complaint under s. 323 against Narain Singh and Mahan Singh has no force. These persons were sent up for trial for an offence under s. 148, Indian Penal Code, and the beating of Arjan Singh was an incident in the riot which they were alleged to have committed. There was no legal obstacle to their being charged and convicted for the lesser offence on it being held that the major offence had not been established.

So far as Bishna is concerned, the appeal is dismissed. I accept the appeal of Indar Singh and Waryam Singh to the extent of altering their convictions to convictions under s. 325, Indian Penal Code, and reducing the sentence in each case to two years' rigorous imprisonment. The appeal of Narain Singh and Mahan Singh is dismissed.

Z. K. *Sentences altered.*

(1) 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

ALLAHABAD HIGH COURT.

CRIMINAL GOVERNMENT APPEAL No. 454 OF 1924.

July 22, 1924.

Present:—Mr. Henry Cecil Walsh, Acting Chief Justice, and Mr. Justice Sulaiman.

EMPEROR—APPELLANT

versus

RAGHUNATH VENAIK DHULEKAR AND ANOTHER—ACCUSED—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 151, 188—Criminal Procedure Code (Act V of 1898), s. 149—Procession passing mosque with music—Order by Police Officer to stop, disobedience of—Offence—"Promulgate", in s. 188, Penal Code, meaning of—"Interpose," in s. 149, Cr. P. C., meaning of.

A Sub-Inspector of Police, on receiving information that a certain procession of Hindus playing music was

about to pass before a mosque, hurried to the scene and ordered the persons forming the procession, who were being led by the accused, to refrain from proceeding in the direction of the mosque with music playing, as there was apprehension of a serious riot if they did so. The accused refused to obey this order and advanced towards the direction of the mosque at the head of the procession playing music:

Held, that the accused were guilty of an offence under s. 151 of the Penal Code. [p. 825, col. 2.]

Per *Walsh, Actg. C. J.*—The word "promulgate" in s. 188 of the Penal Code seems to indicate, if not a formal document printed or written, at any rate, some form of publication. The promulgation need not be in printing or writing, and where a Sub-Inspector definitely conveys an order in a loud voice to a crowd in the street to stop, so that those who are addressed may understand it to be a definite order promulgated by a public officer in authority, and the order is disobeyed, the case would fall within the purview of s. 188 of the Penal Code. [p. 826, col. 1.]

Per *Sulaiman, J.*—A conviction cannot be sustained under s. 188 of the Penal Code unless it is found that the order of which disobedience is alleged was (*a*) promulgated by a public servant to the knowledge of the accused, (*b*) that that public servant was legally empowered to promulgate such an order and (*c*) its disobedience caused or tended to cause obstruction, annoyance or injury or risk of it to a person lawfully employed, or danger to human life, health or safety, or tended to cause a riot or affray. [p. 827, col. 2.]

To be justified in directing a certain act to be done or not to be done is one thing and to be legally empowered to order its commission or omission with the consequence of the disobedience being punishable under s. 188 of the Penal Code is quite another. [p. 828, col. 1.]

The word "interpose" in s. 149 of the Cr. P. C. conveys the idea of actively intervening and not merely a prohibition by word of mouth. [p. 828, col. 1.]

Criminal appeal by the Local Government from an order of the Sessions Judge, Jhansi, dated the 3rd March 1924.

Messrs. *P. L. Banerji, U. S. Bajpai* and *K. N. Laghate*, for the Accused.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Walsh, Actg. C. J.—This is an appeal by Government against an acquittal by the Sessions Judge of Jhansi of two members of the public, who had been convicted and severely sentenced by the District Magistrate for an offence under s. 188 of the Indian Penal Code. They had been charged both under ss. 151 and 188 and the Magistrate, without acquitting under s. 151, held that it was superfluous to consider it. The appeal filed by Government treats the charge as one under s. 188. The complaint against the accused is that they, being two *Brahmans*, and men of education engaged in public life in Jhansi, one of them Raghunath Venaik Dhulekar being a High Court Vakil and the other Atma Ram Kher being also a High Court Vakil and Chairman of the Municipal Board of Jhansi, deliberately disobeyed a lawful order of the Sub-Inspector in the streets of Jhansi in the presence of a large number of people. The Sub-Inspector says that he was fetched by a message, and went on a bicycle in consequence of a report that a procession of a considerable body of Hindus, headed by persons playing English musical instruments, was threatening to pass a Muhammadan mosque playing music, and that there was reason to fear the outbreak of a riot. The witnesses on both sides agree that the playing of music in a procession passing the Muhammadan mosque was known to everybody to be a cause of offence to Muhammadans, and was just the conduct that was likely to lead from small beginnings into an extended fight and riot, with the risk of loss of life. The Sub-Inspector's evidence was that he ordered the music to stop, and he ordered the procession not to advance while playing music in the direction of the mosque, and that the two accused who were by this time in charge of the procession, and who were at the head of it playing musical instruments, defied his authority, told him that he had no power to give such an order, and did in fact make a definite and determined show of disobedience by continuing to play the music, and by advancing a certain number of steps in the direction of the mosque, challenging the Sub-Inspector to use force and to take the instruments from them. That this is a substantially accurate account is perfectly clear upon the evidence. It is sufficiently established even if one confines oneself to the written statement put in by the accused and the witnesses whom they called. Chand Singh one of their witnesses stated that after the Sub-Inspector had ordered them to stop, the two accused took up a drum and drumsticks, and advanced in the direction of the mosque, saying that they would advance playing the instruments, while the Sub-Inspector declared that he would never allow them to do so. The same witness also stated that the Hindus wanted to play music in front of the mosque, and the Muhammadans objected to music being played in front of their mosque. A witness, Debi Prasad, called for the defence, stated that the *Darogha* gave a verbal order, "stop the music and stop the procession", and that the accused insisted on

advancing with music, and did so for two or three paces. He further stated that there had been trouble between the Hindus and the Muhammadans before the *Ramlila*, during *Ramlila*, and since *Ramlila*, over the question of music in front of the mosque. Babu Bodh Raj, who is also a Vakil in Jhansi, and a correspondent for various newspapers, also stated that the communal feeling was very strained over the question of music in front of the mosque, and although the accused declared in their written statement that they intended the Snb-Inspector no harm, this witness states that the Sub-Inspector asked him not to mention the matter in his newspapers, clearly showing that the conduct of the accused was not in the public interest, but was calculated to put the Sub-Inspector in a difficulty, so that if a riot took place, which he might have prevented, he would get into trouble, whereas on the other hand if he exceeded his rights and went beyond what was justified in his interference with the accused, he might equally get into trouble with his superiors. There is a serious confiict between the written statement of the accused and the evidence of one of the prosecution witnesses whom they have mentioned. They declare that there were no Muhammadans before the mosque, that several were summoned to the spot and were asked by the Sub-Inspector whether they had any objection to the music, and they said "yes", but that they also said that there were no Muhammadans who would attack the procession if it passed the mosque. The point made by the written statement is a foolish one, because nobody can guarantee that no Muhammadan will use force. The accused professed, by their superior wisdom, to know that there was no risk of a riot, and both in their statement to the Sub-Inspector, and in their written statement, they have definitely taken the ground that the Sub-Inspector was wrong in thinking that there was any risk, and that they, the accused, knew better, but the prosecution witness Musawwir Husain said that he was at the mosque, that there were about 250 Muhammadans inside and outside the mosque, and that they were threatening to lay out corpses if the music was not stopped. On this evidence it is perfectly clear that the Sub-Inspector was interposing within the meaning of s. 149 of the Cr. P. C., for the purpose of preventing a cognizable offence, namely, riot and grievous hurt. If the evidence for the prosecution is accepted, the defiance and disobedience to the Sub-Inspector's order by the accused is made much more apparent. I am of opinion that the Sessions Judge took an altogether erroneous view of the evidenee, and misunderstood the charge. He treated the charge as though it was for breach of an order given by the Sub-Inspector not to pass the mosque, but the order clearly was to stop the music and to stop the procession then and there. The Sessions Judge agrees that the accused continued to advance beating drums and indicated that they would only stop to force and he came to the conclusion that they did not in fact disobey the order, because eventually the drums were taken away and the assembly dispersed, and that they only refused to obey without carrying their refusal into actual disobedience. This view seems to me inconsistent with the evidence. To take a simple illustration, if a father forbade his child to light a match in the presence of some highly combustible material, and the child lit the match, the child would be nonetheless guilty of disobedience, because he immediately blew it out and no explosion took place.

Whether the offence is one, which, on the facts as I find them, comes within s. 188 of the Indian Penal Code, is no doubt a debatable question. The principal argument addressed to us was that there was no lawful order by the Sub-Inspector; in other words that he was not authorised to promulgate an order to the accused to stop the music, or to stop the procession. I find great difficulty in accepting this view. But as my brother is of opinion that an offence has been committed under s. 151, it seems to me that justice can be done by convicting the accused under this section, and that it is unnecessary to press the charge under s. 188 as in the circumstances of this case they overlap, and we have power under s. 423 to convict under either of them. I merely content myself with saying, that with reference to the question whether an order by the Sub-Inspector in the street to a person to desist from a particular piece of conduct, or from an act which he threatens to perform, or repeat, is a lawful order within the meaning of the section, it is sufficient to turn to s. 149, Cr. P. C. or to s. 23, or s. 31 of the Police Act (V of

1861.) I do not refer to these sections for the purpose of defining the offence in this case, nor for ascertaining the penalty for a breach of the sections mentioned. To my mind they are relevant as evidence of what may, or may not, be a lawful order by a Sub-Inspector. Section 149, Cr. P. C., authorises him to intervene for the purpose of prevention of a cognizable offence, and I am unable to see why—if he found that intervention in the form of a verbal order given to persons whose conduct appears likely to lead to the commission of such an offence is necessary and sufficient—he should not be held to be authorised to give such verbal order, and to promulgate it in such a manner as he thinks best. Similarly the sections of the Police Act prescribe among other things his duty to prevent the commission of offences and to keep order in the public streets. The point was not argued before us, but the real difficulty which I feel about applying s. 188 is the use in the section of the word "promulgate." This is rather an unusual and technical term for a mere verbal order to halt or stop, such as a commanding officer might give to trops. *Prima facie* "promulgate" seems to indicate, if not a formal document printed or written, at any rate some form of publication. The view that it must be printed or written may be rejected, because a large proportion of the public in India are illiterate and cannot read orders so promulgated, and if a Sub-Inspector definitely conveys order in a loud voice to a crowd in the street to stop, so that those who are addressed may understand it to be a definite order promulgated by a public officer in authority, it is difficult to see how, on the one hand, a sudden crisis is to be otherwise dealt with, and how a person defying the policeman is to be punished, and, on the other hand, where the line is to be drawn between a verbal order loudly promulgated and a mere verbal communication in the nature of persuation or even command quietly communicated to the person whose conduct is complained of, but out of the hearing of other members of the public. This is a question seriously affecting the protection which Courts of law must necessarily give within the law to Police Officers acting within the scope of their authority, and I find a difficulty in holding that the offence in this case does not come within the express terms of s. 188. But as I have said, it is not necessary for me to do more than express my opinion upon this point, as both members of the Court are agreed that an offence has been committed under s. 151, for which we may either order them to be re-tried, or may find them guilty and sentence them under s. 423 and s. 561-A of the Cr. P. C.

Sulaiman, J.—This is a Government Appeal from an acquittal. The case was instituted under ss. 151 and 188 of the Indian Penal Code, but the Magistrate considered that the latter section was more appropriate and convicted the accused under it, sentencing them to six months' rigorous imprisonment and a fine of Rs. 500 each. The Sessions Judge has acquitted them.

Certain facts are not in dispute. There had been considerable religious excitement for some months in Garhia Phatak, a settlement of Railway workmen situated on the outskirts of Jhansi, over the question as to whether Hindu processions with music should be allowed to pass in front of a mosque. In October 1923, during the celebration of the *Ramlila*, a riot had only just been averted by the intervention of the Police and Magistrates.

On Novermber the 13th, the Secretary of the Jhansi *Gaoshala* informed the Superintendent of Police that his society would take out a procession on November the 19th in that quarter. It is strange that if there was really a serious apprehension of a breach of the peace, no steps were taken by the Police to forbid the procession or to require licenses under the Police Act. In fact, as the learned District Magistrate himself has remarked, proper Police arrangements were not made in advance, but when on the 19th of November a *Gaoshala* procession with a band of musical instruments was passing along a route which was to be past the front of the mosque and was actually in sight of it, Sub-Inspector Raghunandan Singh, the Police Officer in charge of the station, came running on a bicycle with the intention of stopping the advance of the procession with music. The Sub-Inspector's statement is that he was aware that there was a strong feeling between Hindus and Muhammadans in Garhia Phatak. On that day he was informed by a constable that a procession had arrived and that there was a danger of trouble in front of the mosque. He ran to the place, saw the procession consisting of some 700 or 800

men and heard the music. He also says that he heard a cry from the Muhammadans (200 or 300 in number and assembled near the mosque) to stop the music. Babu Raghunandan Singh says that he cried out in loud voice several times, addressing the procession generally and the two accused in particular "Stop the music or there will be a riot". He says, he had also called out, "Stop the band, don't advance". He further states that he called out to the crowd: "Go away from here, a riot will occur." and said to the accused, "Remove the crowd from here." The Sub-Inspector says: "The band went on playing 15 to 20 minutes after I had ordered them to disperse and half an hour after my first order to stop the music." As to the advance he says that the procession advanced 6 or 7 paces in spite of his order. He says that the accused were themselves beating drums and advanced a few steps and said that they would not obey orders until force was used. When, however, a constable attempted to take the instrument from the accused's hands, they offered no resistance and deposited them on the ground. He says that he threatened to call a supposed guard behind the mosque to fire and then the crowd retired. This is the gist of the prosecution case.

The accused filed a joint written statement in the Magistrate's Court and their version was as follows:—Sub-Inspector Raghunandan Singh came on a bicycle and shouted, "Stop, lorry has come, you will all be blown up." The procession stopped and at his direction it also moved a few paces back. The two accused advanced forward and asked whether there was any magisterial order prohibiting them from marching with music; the Sub-Inspector said that there was none but that he apprehended a breach of the peace. He would not let them proceed, so they went back to the procession where it stood. Dhulekar accused took the small drum in his hands, and Kher accused the beating sticks. The two beat the drum and took one or two steps asserting their right. The Sub-Inspector asked them to stop drum-beating. They protested and suggested that the only course open for the Sub-Inspector was to take the drum from them. The Sub-Inspector took up the suggestion and asked a constable to take the drum from them. When the latter approached and touched the drum they put it down. They then asked the people to go to their houses, and they all departed.

It is, therefore, common ground that the Sub-Inspector prohibited the accused from playing music or advancing. In the written statement, however, the accused did not, in express terms, admit that the Sub-Inspector also called on the assembly to disperse, nor did they clearly deny that the procession had been ordered to disperse.

The District Magistrate was of opinion that the order to stop the music and not to advance was an order which the Sub-Inspector was legelly empowered to make under s. 149 of the Cr. P. C. and that, therefore, its disobedience was an offence under s. 188 of the Indian Penal Code. The learned Sessions Judge agreed with this view of the law, but came to the conclusion that the conduct of the accused amounted to a mere refusal to obey and not an actual and final failure to comply. He; therefore, acquitted them.

On the evidence it is impossible to hold that there was no disobedience of the order to stop the music and not to advance. The accused themselves were not the drummers. They took over the drum and advanced a few steps while beating the drum. They made it quite clear that they were determined not to obey the order until force was used. They did disobey it, though they offered no resistence when force was attempted. There cannot be the least doubt that they meant to defy the Sub-Inspector's order, and meant to flout him. Even if it be conceded that the accused never intended to persist in their disobedience after force was used, I have no hesitation in saying that they did disobey the order inasmuch as they did advance a few steps and did continue to beat the drum though ordered not to do so.

The accused however cannot be held to have committed an offence under s. 188 of the Indian Penal Code unless it be found that the order to abstain from playing the music or advancing was (*a*) promulgated by a public servant to the knowledge of the accused, (*b*) that that public servant was legally empowered to promulgate such an order, and (*c*) its disobedience caused or tended to cause obstruction, annoyance or injury, or risk of it, to a person lawfully employed, or danger to human life, health or safety, or tended to cause a riot or affray.

The Sub-Inspector was a public servant and the accused had undoubtedly heard

his order. As the order was announced publicly and was addressed to the crowd generally as well as to the accused in particular, it certainly had been "promulgated", and it is not necessary that such an order should be in writing.

I am also of opinion that the disobedience of the accused did cause, to say the least, annoyance to the Sub-Inspector lawfully employed to prevent a breach of the peace. It also did tend to cause a riot as there was no knowing to what extent the procession might not have been incited to go by the open defiance of the accused.

But it is necessary for the prosecution to establish that the Sub-Inspector was "lawfully empowered to promulgate such an order." The contention on behalf of the Crown is that under s. 149, Cr. P. C., every Police Officer can "interpose" for the purpose of preventing the commission of a cognizable offence. It is urged that the word "interpose," is wide enough to cover not only all acts done by him but also all orders given by him. I am unable to give to this word any such wide meaning. Interpose connotes the idea of actively intervening and not merely a prohibition by word of mouth. I am not saying that a Police Officer would not be justified in asking people to do or not to do a thing. Under certain circumstances even a private citizen may be justified in making such requests. But to be justified in directing a certain act to be done or not to be done is one thing, and to be legally empowered to order its commission or omission, with the consequence of the disobedience being punishable under s. 188 of the Indian Penal Code, is quite another.

To hold that under s. 149, Cr. P. C., a Police Officer can pass any oral order he thinks desirable would be to hold that his word is law. If his powers were to be so wide, it would be unnecessary for the Magistrate or the Police to take any precautionary measures in advance, it would be quite sufficient to send down a Sub-Inspector to the scene and let him pass all sorts of sweeping orders, disobedience of which will entail conviction. Such a method, if sanctioned, would deprive the persons concerned of all opportunity to appeal to higher authorities, and they would have to submit to such orders at the peril of a prosecution. I am of opinion that such wide powers vested in a Police Officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated to be within the scope of s. 149, Cr. P. C.

It is still more difficult to hold that a Police Officer can pass orders not only against the persons from whom the commission of an offence is apprehended but also against would-be victims. By considering extreme cases it can be seen at once to what consequences a contrary view is likely to lead. Suppose a dacoit aims a gun at the victim of the dacoity; a Police Officer instead of rushing at the dacoit and preventing him from shooting, the victim, orders the victim to run away; the victim does not move, the dacoit shoots but fortunately misses the shot. Is the victim guilty of the offence of disobeying the order to run away promulgated by a public servant lawfully empowered to promulgate such an order for the purpose of preventing his murder? Or, take the case of a Police Officer who, apprehending that certain robbers are coming to loot a Bank, orders the manager to close the Bank, the manager does not do so. Is he guilty of the offence of disobeying the order?

Of course, a Police Officer is empowered to do many things specifically mentioned in the Code. For instance, under s. 42 he may demand aid in the prevention or suppression of a breach of the peace; or under s. 151 he may arrest a person designing to commit an offence; he may under s. 127 command an assembly of 5 or more persons, likely to cause a disturbance of the public peace, to disperse; and if it does not disperse, he may, under s. 128, proceed to disperse it by force, and he may under s. 149 "interpose" for the purpose of preventing an offence, or under s. 152, to prevent an injury to property. Persons who refuse to disperse or who resist him (and not merely refuse to obey his oral orders) in the discharge of his legal duty, are liable to punishment. But he cannot shirk his duty of interposing effectively by being content with an oral order not to do a certain act and then make the persons ordered liable for disobedience of his orders.

It has next been suggested by the learned Assistant Government Advocate that the officer might have been empowered to pass the order under the Police Act. Sections 30, 30 (A) and 31 have been referred to. One may say at once that the Sub-Inspector nowhere suggested that he purported to act under any of the provisions of the Police

Act. He frankly admitted that he acted under s. 149, Cr. P. C. Further, s. 30 does not apply to a Sub-Inspector. Section 30(A) is inapplicable as there had never been any license previously insisted upon and no conditions were, therefore, violated. The provisions of ss. 30 and 30 (A), if they had been resorted to, would have provided ample powers for the Police (including the Sub-Inspector) to interfere and stop the procession. But that was not done. As to s. 31 it was never suggested at the trial that when the Sub-Inspector ordered the music to be stopped and the procession not to advance, he was trying to keep order on the public road or preventing an obstruction. Section 31, therefore, can have no application; nor have the accused been prosecuted under s. 32 of the Police Act.

I have, therefore, come to the conclusion that the Sub-Inspector was not legally empowered to promulgate the order that the music should be stopped or that the procession should not advance. The accused were accordingly not guilty of any offence under s. 188 of the Indian Penal Code.

I have, however, already said that they were prosecuted under s. 151 of the Indian Penal Code also. The District Magistrate was inclined to believe the prosecution evidence that the Sub-Inspoctor did tell the public to disperse. He considered this to be "most probable" and emphasised that "all the prosecution witnesses say he did." He however considered that as ss. 151 and 188 were practically equal in gravity, it was unnecessary to apply both, particularly as, in his opinion, s. 188, both as regards its Explanation and its illustration seemed more directly applicable. He, therefore, convicted the accused under s. 188 only. The learned Sessions Judge did not at all direct his attention to the offence under s. 151 of the Indian Penal Code.

It cannot be doubted that under s. 127 Cr. P. C., the Sub-Inspector was legally empowered to order the assembly to disperse when he was convinced that it was likely to cause a disturbance of the public peace. There can be no doubt that the Sub-Inspector was fully justified in his apprehension that if the procession advanced while playing the music there would be a riot. It was altogether immaterial whose action would provoke it. Having regard to the fact that feelings were running high, there would most probably have been a free fight on both sides. Under s. 151 of the Indian Penal Code whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace after such assembly has been lawfully ordered to disperse, is liable to punishment.

There can be no doubt that the accused as well as the other members of the procession did not disperse for a considerably long time. If, therefore, the Sub-Inspector did actually order them to disperse, they would be guilty under s. 151.

As the accused in their written statement did not expressly admit that the Sub-Inspector had given an order that the assembly should disperse, and as they actually produced a witness named Chand Singh to say that he never heard the *Darogha* ordering the crowd to disperse, it is necessary to consider what other evidence there is to corroborate the Sub-Inspector's version.

Jagannath Singh, Brahmin, who lives near the mosque in question, has stated that the *Darogha* did address the assembly and told the people to disperse but they did not do so, and that it was when the *Darogha* said to the Head Constable "call the guard—order them to shoot" that the crowd dispersed.

Similarly, Durga Prasad, another witness has stated that the *Darogha* said "Disperse this assembly or there will be a riot" and that in spite of what the *Darogha* had said the band went on playing and the people did not disperse, and the two accused also were there.

A third witness, Musawwir Husain, also says that the people did not retire until the *Darogha* produced his pistol and that they dispersed only after he said that he would call on a guard to fire.

Another witness, Abdul Karim, says that eventually the *Darogha* threatened fire. To his previous orders no one had paid any notice, either to the order to disperse or to stop the music.

Thus all the prosecution witnesses corroborate the Sub-Inspector's statement that he did order the crowd to disperse. It is also natural to suppose that when he found that the leaders of the procession were prepared to defy him and disobey his orders, he would have ordered them to disperse. We have already noted that in the joint written statement filed by the accused there was no express denial of this statement of the

Sub-Inspector. The other defence witnesses also do not expressly say that no order for dispersing was given. It is possible that Chand Singh might not have heard this order of the Sub-Inspector. He, however, admits that the discussion between the *Darogha* and the accused went on for nearly half an hour and that the crowd dispersed at the bidding of the accused after they had put down their musical instruments.

On the evidence, therefore, I am fully satisfied that the Sub-Inspector had ordered the accused and the procession to disperse, and that in spite of that order the accused did continue in the said assembly and did not disperse for a long time. They were, therefore, guilty of an offence under s. 151 of the Indian Penal Code. The whole evidence has been read and discussed before us, and we are justified in convicting them of this offence.

At the same time, I am inclined to believe that the accused persons did not really intend to disobey the Sub-Inspector finally, that is to say, did not intend to force their way forward or to persist in their disobedience even after a show of force. Nor did they in any way intend to physically resist the Sub-Inspector in the discharge of his duty. In view of these circumstances, I am inclined to take a lenient view so far as the question of sentence is concerned. I may, however, add that the accused were given an opportunity to apologize and express their regret but by a written application, they declined to do so and asked their case to be "judged in its true light."

By the Court.—We accordingly allow this appeal and setting aside the acquittal of the accused persons, convict them under s. 151 of the Indian Penal Code and sentence them each to one month's simple imprisonment to date from 21st of August 1924 and to pay a fine of Rs. 500 each or six weeks' simple imprisonment in lieu thereof. Let them be taken to the District Magistrate who will make arrangements for their custody and transit to Jhansi.

Z. K. *Appeal allowed; Convictions altered.*

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 165 AND 182 OF 1924.

July 31, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

SHIEKH ABDUL AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 298, 299—Evidence Act (I of 1872), ss. 24, 25—Trial by Jury—Judge and Jury, functions of—Confession, voluntary nature of—Misdirection—Inadmissible evidence, admission of, effect of—Confessional statement made to Police Officer, admissibility of.

Under s. 298 (1) (*a*) of the Cr. P. C. it is the duty of the Judge in a trial by Jury to decide on the admissibility of the evidence, and he must discharge this duty irrespective of the question whether objection has or has not been taken to the evidence by the parties themselves. In the case of a confession he must decide whether the confession is admissible in evidence or not, that is to say, he must consider whether it has been duly recorded and whether it is free from the infirmities mentioned in s. 24 of the Evidence Act. In dealing with the question of its admissibility he has to determine whether it is voluntary or not. [p. 831, cols. 1 & 2.]

Under s. 299 of the Cr. P. C. the Jury must weigh and value the evidence admitted by the Judge, and in order to do so they also must themselves go into the question as to whether a confession admitted in evidence was made voluntarily, for a free and voluntary statement is some guarantee of its truth. [p. 831, col. 2.]

It is, therefore, the duty of the Judge to place before the Jury the facts and circumstances, *pro* and *con*, with regard to the question whether a confession was voluntary or not and to ask them to form their own conclusions as to the character of the confession. Where the consideration of the question as to whether a confession is voluntary or not is taken away entirely from the Jury, it amounts to a serious omission sufficient to vitiate the verdict of the Jury. [p. 831, col. 2.]

Where evidence of bad character of the accused's complicity in other crimes, confessional statements made to the police and hearsay evidence are admitted, it must be assumed that such admission has prejudiced the accused, and in such a case the trial must be set aside. A verdict based on such inadmissible evidence cannot be upheld. [p. 831, col. 2; p. 832, col. 1.]

In a trial in respect of an offence under s. 395 of the Penal Code the Investigating Police Officer was allowed to depose that one of the accused pointed out to him the route taken by him and his comrades in going to the place where the alleged dacoity was committed and also the place where they divided the booty and where they had first met:

Held, that these were confessional statements and having been made to a Police Officer were inadmissible in evidence. [p. 832, col. 1.]

Where in his charge to the Jury in a case under s. 395 of the Penal Code the Judge failed to give any direction to the Jury with regard to the fact that there was opportunity of recognition and that none of the accused were recognised at the time of occurrence:

Held, that the omission was of vital importance and that the non-direction amounted in law to positive misdirection which vitiated the trial. [p. 832, col. 2.]

Criminal appeals against an order of the Additional Sessions Judge, Sylhet.

Babu *Hemendra Kumar*, for the Appellants.

Babu *Joytish Ch. Guha*, for the Crown.

JUDGMENT.

Mukerji, J.—Appeal No. 165 is by three persons, Sheikh Abdul, Nosim *alias* Nosai and Hazir Ali. Appeal No. 182 is by six persons. Jabedali, Rashid Ali, Isabali, Arjan Hajan, Sheikh Mashu and Abdul Manaf. They have all been convicted under s. 395, Indian Penal Code, and sentenced to various terms of imprisonment on a trial held by the Additional Sessions Judge of Sylhet with the aid of a Jury who unanimously found all of them guilty.

Three out of the nine appellants, namely, Sheikh Abdul, Nasim and Abdul Manaf made confessions which were recorded by Moulvi Mahamed Chowdhuri, then second officer of Karimganj. They subsequently retracted the said confessions alleging that they had made them on account of torture and inducement by the Police. The learned Judge admitted these confessions in evidence and having pointed out to the Jury the various facts and circumstances upon which he held that the grounds alleged in the retractions are not true and also having placed before them the evidence of the recording officer made observations in his charge to the Jury to the following effect: "Taking the evidence and the circumstances and the probabilities into my consideration, I am satisfied that the confessions in question were voluntary and I accordingly hold them to be so. It is for you to decide whether or not they are true." He thus gave the Jury to understand that the question as to whether the confessions were voluntarily or not was one entirely for him, that he had decided that they were voluntary and that all that remained for the Jury to consider was whether they were true or not. This is hardly the proper way to deal with confessions in a trial held with the aid of a Jury. Under s. 298 (1) (*a*), Cr. P. C., it is the duty of the Judge to decide on the admissibility of the evidence, and this duty he has got to discharge irrespective of the question whether objection has or has not been taken to the evidence by the parties themselves. He has, therefore, to decide whether the confessions are admissible in evidence or not, that is to say, he has to consider whether they have been duly recorded and whether they are free from the infirmities mentioned in s. 24 of the Indian Evidence Act. In dealing with the question of their admissibility he has obviously to determine whether they are voluntary or not. Under s. 299, Cr. P. C., the Jury have to weigh and value the evidence admitted by the Judge, and in order to do so they also must themselves go into the question as to whether they were made voluntarily. To judge of the truth or falsity of a statement one must endeavour to find out whether it was voluntarily made; for a free and voluntary statement is some guarantee of its truth. It was not right, therefore, to take away entirely from the Jury the consideration of the question as to whether the confessions were voluntary or not; and it was clearly the duty of the learned Judge to place before them the facts and circumstances, *pro* and *con*, and ask them to form their own conclusions as to the character of the confessions. This has not been done; and in my opinion this was a serious omission sufficient to vitiate the verdict of the Jury.

As observed before, the duty of the Judge is to decide on the admissibility of the evidence. In my opinion there has been a failure in this respect which is really lamentable. The Investigating Police Officer was examined as a prosecution witness in the case. He deposed to the effect that on commencing investigation into the occurrence which forms the subject-matter of the present case he got the report of another burglary in Hatirgol *Mouzah*, about a mile from the house of the victim in the present case, and he went on to depose as follows:—"The complainant in that burglary case named three persons, Nosai, Rashid and Jaifar (the first two being two of the accused in the present case) as having been recognised by her." Further on he deposed as follows:—"In connection with that burglary case I arrested the accused Nosai. In connection with that case he made a confession before the Magistrate. In that confession he also confessed his complicity in the dacoity in Kaileswar's house (meaning the house of the informant in the present case). He implicated Abdul Jaifar, Nur, Samed Ali, Rashid, Muslim and a few others in that confession". All these statements are clearly inadmissible in evidence. They amount to evidence of bad character, complicity in other crimes, confessional statements made to the Police

and pure hearsay evidence which on the face of them deserved to be excluded, and when let in could not but have prejudiced the accused very seriously. Not only did the learned Judge not exclude the said statements but he referred to them and relied on them in his charge to the Jury and this, in my opinion, was a very serious misdirection. The Investigating Police Officer was further allowed to depose that the accused Sheikh Abdul pointed out the route taken by him and his comrades in going to Kaileswar's house and the place where they divided the booty and that the party had met first at Kanai Bazar. These unquestionably were confessional statements, clearly inadmissible as having been made to a Police Officer. They were not only admitted but the attention of the Jury was also pointedly drawn to them by the learned Judge in his charge. There are other pieces of evidence equally inadmissible in the deposition of the said Investigating Officer; for instance, he deposed to the effect that Sheikh Abdul in his statement to him mentioned the names of Manaf, Hajir, Mashoo, Rajan, Nosai and others. In short almost the whole of the examination-in-chief of the witness is a mass of irrelevant matter the admission of which in evidence could not but have resulted in prejudice to the accused. A verdict based on such inadmissible evidence and on such misdirection on the part of the Judge can never be upheld.

The confessions made by the three accused Sheikh Abdul, Nasim Ali and Abdul Manaf were admitted in evidence; but such parts of them as related to the other occurrence should have been excluded as irrelevant.

Turning then to the directions given by the learned Judge on the evidence which is on the record, it appears that there are omissions on vital points which are likely to have prejudiced the accused. There was no direction given as to the circumstances pointing to the fact that there was opportunity of recognition, and the fact that none of the accused were recognised was not even mentioned by the learned Judge. Then there is the very important fact that the articles alleged to have been produced by Abdul Manaf on the 22nd May did not find mention in any of the two lists of properties originally filed by the informant Kaileswar and were mentioned in a supplementary list which he filed the day after they were produced. The Jury were not asked to consider the nature of the articles alleged to have been recovered from the possession of some of the other accused persons and the possibility of a genuine identification of them by the informant. These, no doubt, are mere omissions; but they are omissions on some of the points which are of vital importance and such non-direction amounts in law to positive misdirection.

It is unnecessary to go into further details for I am clearly of opinion that the convictions and sentences passed on the accused cannot possibly be upheld upon such trial as they had in this case.

We have been taken through the whole of the evidence in the case. It appears that beyond some evidence of association which is more or less of a worthless character and statements contained in the retracted confessions of the co-accused there is really no tangible evidence against five of the appellants, *viz.*; Hazir Ali, Jabed Ali, Rashed Ali, Isob Ali and Sheikh Mashu. They should, therefore, be acquitted and discharged. As regards the other four appellants, *viz.*, Sheikh Abdul, Nasim *alias* Nosai, Arjan Hajan and Abdul Manaf, there is some evidence about the nature and sufficiency of which I would refrain from expressing any opinion. While setting aside the convictions and sentences passed against the said four appellants I should leave it open to the authorities to proceed further against them or such of them, if any, if they so desired.

Walmsley, J.—I agree.

I want to add a few remarks only. It seems to me surprising that the learned Public Prosecutor should tender the inadmissible evidence to which my learned brother has referred. He is supposed to possess greater legal qualifications than the Police Officer who conducts prosecution in Committing Court and he ought to exercise his judgment on the evidence which the Police wish to produce. If he had devoted any attention to the Sub-Inspector's evidence he would have seen at once that much of it was barred by the provisions of the Evidence Act; and if he had decided to keep out that inadmissible evidence, he would have been able to shorten the case considerably by excluding the useless evidence about association.

Z. K. *Appeals allowed: Convictions set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 183 OF 1920.
February 28, 1921.
Present:—Mr. Kennedy, J. C., and Mr. Kemp, A. J. C.
EMPEROR—PROSECUTOR
versus
Pir MAHOMED BUX—ACCUSED.

Evidence Act (I of 1872), s. 26—"In custody of Police Officer," meaning of—Confession made to Mashirs, *admissibility of—Criminal Procedure Code (Act V of 1898), ss. 164, 533—Confession, record of —Verification, failure to comply with formalities of, effect of—Irregularity.*

The meaning of the words "in the custody of a Police Officer" in s. 26 of the Evidence Act, cannot be extended by implication to cases beyond what is absolutely necessary, that is, where the person is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the person to whom the confession is made. But where the accused is not arrested or under supervision, and is merely being invited to explain certain circumstances, it would be going further than the section warrants to exclude the statement that he makes, on the ground that he is to be deemed in Police custody. It, however, by no means follows, that because the statement is admissible, therefore, it should not be considered with considerable care to see how far reliance should be placed on such extra-judicial confession. The weight to be given to it depends very much on the circumstances of the case, whether suspicion attached to the accused at the time, whether accused was intelligent or ignorant of the possible result of the confession, what the position of the *Mashirs* was and the like. [p. 834, col. 1.]

The failure to comply with the formalities as to verification at the end of the record of a confession is an irregularity which is cured by s. 533 of the Cr. P. C. [p. 834, col. 2.]

Reference.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

Mr. *Partabsing Sahibsing Shahani*, for the Accused.

JUDGMENT.

Kennedy, J. C.—(*February* 21, 1921).—In this case the accused was tried by Raymond, Additional Judicial Commissioner of Sind, with the help of the Jury for an offence punishable under s. 302, in respect of the murders of Haji Usman and *Musammat* Fatma and also under s. 404, for misappropriating certain property belonging to Haji Usman and *Musammat* Fatma at the time of their death. The Jury found the accused not guilty and the Judge being of the opinion that the ends of justice required it, proceeded to refer the case to the High Court under s. 307, Cr. P. C., for the reasons given in his order.

It seems to me that the evidence against the accused person is overwhelming. He is shown to have been intimate with the deceased person Fatma and he is shown within seven days of the discovery of the dead person to have been in possession of a considerable amount of property belonging to the deceased persons which was in their possession upto the time of their death. The attempt to shake the evidence of the persons who identified this property as having been in possession of the deceased is perfectly hopeless.

This is not an ordinary case of stolen property in which a person is suspected and arrested and thereon discloses certain property. But it appears that it was the possession of this property or part of this property which led to the suspicion falling on the accused. The story that we believe is that the accused had gone into a public conveyance running between Tatta and Jungshahi and that at a point about three miles off from Tatta got out of it with a couple of bundles apparently of clothes. The point where he got out is the Makli hill which seems to be a burial place of certain communities in Tatta. He went off to the direction of the tombs. It so happened that in the same conveyance was a Policeman who was not in charge of this case, but had been in Tatta and knew about the murders. At the moment he did not suspect anything in the accused's conduct but after a few minutes thought came to the conclusion that the movement of the accused was suspicious and, therefore, on arrival at Jungshahi instead of going on to Karachi as he had intended, took a *paggy* with him and returned to Makli hill. He directed the *paggy* to trace the foot-prints and he himself went on to Tatta and informed the Investigating Police Officer. On that day the accused was sent for and the accused pointed out this property which is of very considerable amount in value and also showed certain other property which had been in the possession of the deceased persons and which accused had sold or pledged. This certainly is a case in which we might presume that the accused had misappropriated the property of the deceased and might well go on to draw a deduction that the person who misappropriated the property also killed Usman and Fatma and it was, therefore, certainly incumbent on the accused to give some reasonable explanation of his possession. Before the Committing Magistrate he made no statement at all and in Sessions Court he denied possession of the property. This by itself seems to be very strong piece of evidence

against the accused. The case does not, however, stop there because the accused had made certain statement. In the first place, he made a confessional statement to certain *Mashirs*. It is set up by the defence that these confessional statements are inadmissible on the ground that at the time when he made them, he was in the custody of the Police. It is necessary to explain my views as to these statements to *Mashirs* at some length. It is not desirable, in my opinion, absolutely to exclude evidence on general grounds except in cases where the law directs positively that such evidence should be excluded. I am not inclined to extend the meaning of words "in custody of the Police" by implication to cases beyond what is absolutely necessary, *i. e.*, where the man is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the *Mashirs*. It seems to me that would be probably considered to be a case in which any statement to the *Mashirs* is made while he is in Police custody. But where the case is not so and the accused is not arrested or under supervision and he merely being invited to explain certain circumstances, it seems to me to be going further than the section warrants to exclude the statement that he makes, on the ground that he is to be deemed in Police custody. It, however, by no means follows, that because the statement is admissible, therefore, it should not be considered with considerable care to see how far reliance should be placed on such extra judicial confession. The weight to be given to it depends very much on the circumstances of the case, whether suspicion attached to the accused at the time, whether accused was intelligent or ignorant of the possible result of the confession; what the position of the *Mashirs* was and the like. In the present case, there was certain amount of suspicion, but not a very grave suspicion against the accused. It was known that he had been intimate with this woman Fatma and it was also known that he had been carrying property in the early morning and going to an unusual direction. He was being asked to explain his movements, but it does not appear that there was any other suspicion resting on him. He himself is not a rustic. He is a Sayed and was practising as a *Hakim* at the time at Tatta. The *Mashirs* are people of considerable social standing. On the whole in this case I am inclined to give considerable weight to the statement before them. That statement, if believed, is conclusive of his guilt.

Further he was put up before the Magistrate and there he made a very detailed confession. An attempt was made to challenge the admissibility of the confession on the ground that the formalities as to verification at the end of the confession are not complied with. It is obvious that this irregularity is cured by s. 533, Cr. P. C. It is also said that the confession, if admissible, shows clearly symptoms of concoction. But I do not think that this is the case. On the contrary it bears the stamp of genuineness. The Magistrate seems, as was his right and duty, to have asked the accused to explain certain difficulties felt, as the statement was being made. Consequently the confession is very detailed and covers all the points in the case and explains all the difficulties. The accused states that Usman was an old man who had married a fairly young woman who became the mistress of the accused. The accused used to give her presents, but subsequently she entered into relations with one Suleman. This naturally annoyed the accused. The fact that there was this intimacy between the accused and Fatma is shown by other evidence. It appears in consequence of the remonstrances of P. W. No. 10 who was also a *Pir* and Sayed, the accused broke off the connection at the time and went to Multan for two years and returned to Tatta only 10 days before the murders. He found this intimacy with Suleman and remonstrated in vain. The account that he gives of the murders is that he got some *dhatura* and also some dates and made a mixture and administered them to Usman and his wife. The result was that Usman and his wife became unconscious and while asleep he cut the throat of Fatma and subsequently killed Usman fearing that the latter would denounce him. There is a certain amount of difficulty about this statement of the accused, because at first as a general rule the effect of *dhatura* is to produce violent dilirium and it was only after the dilirium has passed over, that unconsciousness sets in. Before the *Mashirs* he stated that after he administered *dhatura*, he went for a walk for a couple of hours and then returned when he found them unconscious. In this case the Doctor is of opinion that it is possible that the effect of *dhatura* might have been to

produce unconsciousness. There is further a difficulty about the wounds which are of very extensive nature and likely to have been caused by a large knife than a razor. It is, however, not impossible that the injuries could be caused by the razor. It is very difficult to see why if it is not true that *dhatura* and a razor was used, the accused was made to refer to the use of *dhatura* and the razor. Why should any one tutor him to say he used *dhatura*? *Dhatura* is not a common stupefying agent. Opium or *bhang* would be the substances which would be more likely to appear in a false confession. So about the razor. The confession was made a long time after the *post mortem*. The Police could easily have ascertained the medical opinion about the cause of the wounds. Why not let the accused say that he used a large knife? Large knives are easy to obtain. I think then that the difficulty really tends to support the voluntariness of the confession. I think, therefore, the confession though retracted is true. Taken along with the possession of the property it makes the case against the accused quite clear.

I think, therefore, under s. 307, Cr. P. C., the accused should be found guilty of the offences under ss. 302 and 404. In view of the circumstantial nature of the evidence and the verdict of the Jury it is not desirable to inflict the extreme penalty. I would, therefore, sentence accused to transportation for life, in respect of the offences under s. 302 and to three years' rigorous imprisonment in respect of that under s. 404. Sentences to be concurrent.

Kemp, A. J. C.—(*February* 28, 1921).—The facts of this Reference have been sufficiently stated in the learned A. J. C.'s heads of charge to the Jury. The offence occurred about 5th April 1920. It was discovered on 10th April 1920 after information had been lodged with the Police on 9th April 1920 at 8 A. M. by the deceased Osman's nephew Ismail. The premises occupied by the deceased persons were opened by the Sub-Inspector, Police, Lutfali Khan at 9 A. M. on 10th April 1920 and various articles and ornaments were found therein. The *Mashirnamas* relating to this inspection are Exs. 5 and 8. Two documents were also found, *viz.*, a Will, dated May 1911 (Ex. 6) and a deed of gift of certain ornaments (Ex. 7).

On 11th April 1920 Inspector Mubarak Ali took up the investigation. Apparently, the accused who was alleged to be on intimate terms with the deceased woman *Musammat* Fatma was with certain other persons under suspicion.

At 3 A. M. on 17th April 1920 accused was a passenger in a conveyance from Tatta to Jungshahi in which there was also Sub-Inspector Pir Mahomed who was going on business to Jungshahi. Accused had two bundles with him and got down at the Makli incline a couple of miles out of Tatta. This excited the Sub-Inspector's suspicion and he returned from Jungshahi and reported the incident to Inspector Mubarak. He went to accused's house and sent for *Mashirs*. Accused was not then in custody nor even under Police restraint. The *Mashirs* took the accused away and told him he had been seen taking property away to Makli and accused thereupon made a confession. He then took the Police and *Mashirs* to an old graveyard near Makli and unearthed certain of the property subsequently identified as in the possession of the deceased persons. On 17th April 1920 he made a confession before the *mukhtayarkar* and on 25th April 1920 he was *challaned*. I do not propose to deal with all the points raised by the defence. My learned brother has discussed them. I think I cannot do better in this supplementary judgment than sum up the evidence against the accused.

It consists in, firstly, his confessions to the *Mashirs*, and the Magistrate. As to the former I agree it is admissible in evidence. When it was made accused was not in Police custody. He was not under arrest nor was he under Police restraint. The fact that he was able to go to Makli with the stolen property shows this. He was merely one of those persons of whom the Police had their suspicions. He was not arrested until after he made his confessions to the *Mashirs*. The Inspector was not even present when the confession was made. The accused was taken to another house by the *Mashirs* at some distance from and out of sight of the Police. The application of ss. 25 and 26 of the Evidence Act depends in every case on the particular circumstances of that case. I am of opinion that the statement made to the *Mashirs* in this case is admissible in evidence against the accused.

I am also of opinion that the confession to the Magistrate is admissible, against the accused. Any defect in the failure to sub-

scribe the proper form of certificate to that confession was cured by calling the Magistrate and by the applicalion of s. 533 of the Cr. P. C.

The next important piece of evidence is the fact that accused pointed out the stolen property at the graveyard at Mukli. This is proved by the witnesses and Sub-Inspector Pir Mahomed who went in the carriage with the accused and saw him leave the conveyance at the Mukli incline and by the Inspector Mubarak and the *Mashirs*, who in consequence of the information obtained from Pir Mahomed and the accused's confession accompanied accused when he unearthed the stolen property. This is much too elaborate a story to have been concocted by the Police. If they had staged the whole story of the accused going to Makli how did they know that the central figure in the play *viz.*, the accused, would confess to the journey to Makli or accompany them to point out the property. No doubt discrepancies exist, they always will, in a genuine case in the accounts of the different witnesses called but the Court has to look at the main story, and the probabilities in deciding whether it be true or false.

I do not believe that all these witnesses would lend themselves to support a false case against a *Pir*. If accused did go to Makli to bury property it is corroborative of the identification of that property as part of the stolen property. Otherwise why did he go to Makli and what was his object in burying the property.

This brings me to the identification of the property. As I have said the accused's disposal of the property in his possession lends strong colour to the inference that it was property, his possession of which he wished to conceal. But the property has been sufficiently identified by witnesses. Some of the ornaments mentioned in the deed of gift have been identified as amongst those produced by accused from the graveyard. The *Mashirnama* of the latter articles is Ex. 16. It is argued that these ornaments are all of the usual kind worn by Muhammadan women of Tatta but I am satisfied from a personal inspection of them that certain of these ornaments are of a sufficiently distinctive character to be capable of recollection and identification. Such for instance are Exs. G and F. One of the gold wristlets, Ex. M, was discovered in consequence of information given by accused, with the witness Mahomed Ismail. They are identified by witness Jivandas as purchased by him for Usman from the goldsmith Ladho. Jivandas's evidence on this point is corroborated by the entry in his book, Ex. 19. I really see no reason why the Court should assume that all the prosecution witnesses who purport to identify these ornaments are parties in concocting a false case against accused. Then there is the motive which the prosecution allege. It is mentioned in the confessions and is borne out by the fact that *all* the ornaments and the cash were not taken from the house where the offence was committed but only such ornaments as the accused had given to Fatma or had been bought by her with money he gave her. I do not attach very much weight to the identification of the accused's clothes. The bloodstains on them are not so pronounced or extensive as to be any strong evidence against accused although it is true he may have washed them after the offence.

Nor do I think it sufficient to rebut all the evidence against accused that the crime was probably done with some other instrument than a razor. This and other points raised on accused's behalf I have given my most careful consideration to and I cannot find that they shake the firm conviction I have that the accused committed the offence with which he is charged.

Under the circumstances I think the verdict of the Jury was perverse and I agree with the learned, A. J. C., that the accused should have been convicted. Nevertheless, the evidence is in the main circumstantial and I, therefore, agree with the conviction and sentences proposed by my learned brother.

Z. K. *Accused convicted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 740 OF 1922.

October 31, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

MIAN KHAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Common intention—Death caused by one of several

accused—Liability of other accused—Confession exculpating maker, whether can be used as against co-accused.

Two accused persons who were charged with having committed murder and having subsequently robbed the deceased, made statements accusing each other of the murder but confessing that each of them had taken part in the robbery:

Held, (1) that the confession made by each accused could not, so far as it related to the murder, be used as against the other, inasmuch as the maker of the confession exculpated himself, and the confessions being mutually contradictory could not be relied upon; [p. 839, col. 1.]

(2) that so far as the confessions related to the robbery, they were valuable evidence both as against the person making the confession and as against the co-accused with regard to the robbery and also as leading to the inference that the robbery and the murder were parts of the same transaction and were committed by the same persons. [*ibid.*]

Where two men with the common intention of murdering a person set upon him and one of them fires a shot which kills him, both of them are guilty of murder under s. 302 of the Penal Code. [p. 839, cols. 1 & 2.]

Agra v. *Emperor*, 27 Ind. Cas. 833; 37 P. R. 1914 Cr.; 16 Cr. L. J. 209: 219 P. L. R. 1915, distinguished.

Appeal from an order of the Sessions Judge, Attock at Campbellpore, dated the 27th July 1922.

Mr. *B. D. Kureshi*, for Malik *Muhammad Hussain*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—A mail runner named Nur Alam was murdered on the morning of the 10th February 1922 by being shot twice with a revolver, the object of the murder being to secure the mail bag which he was carrying and which contained a considerable amount of money and also some insured parcels. When found soon after by Akbar Khan (P. W. No. 3) and Dulla (P. W. No. 4) he was still alive, and his dying declaration was recorded by Nawab Khan *Lambardar*. This was to the effect that two men of the neighbourhood (that is not Pathans) had attacked him, that one was wearing shoes and the other sandals, and that it was the latter who had shot him. Five hours later he died. Suspicion at first attached to one Mehru whose house was searched, and some six days later Mian Khan came to be suspected. This man eventually disclosed the whereabouts of a large quantity of the stolen property, and on the strength of the information given by him and in fact on his pointing out the men himself, the Police was able to discover a large number of witnesses who had seen him and Mehru just before the murder and one witness Saadullah who actually saw the murder committed. A pair of sandals which had fallen to the share of Mehru were traced to the person, to whom he had sold them and with whom he had left the old pair of sandals he had been wearing. The tracks leading from the scene of the crime were found to consist of those of a man wearing sandals and of another wearing shoes, and these led to where the post bag was recovered and later, after both the wearer of the sandals and the wearer of the shoes had discarded them and were walking with bare feet, the tracks led to the discovery of a spear which the murdered man had carried. Mian Khan also produced the revolver which he said had been used by Mehru, and several loaded and empty cartridges, and eventually when both men were sent up for trial and the bulk of the evidence had been recorded, each of them volunteered to make a statement before the Committing Magistrate stating that he had been present when the murder had been committed, though he himself had taken no part, and that his companion had fired the shots, but both implicated themselves in the robbery. Both these confessions were retracted later.

Such is the case against these two men who have both been convicted of murder, and it will be noticed at once that the evidence is not only of different kinds but different qualities and falls under various heads. At page 54 of the judgment the learned Sessions Judge has marshalled the evidence under five heads which are as follows :—

(1) The evidence of Saadullah (P. W. No. 26) who says that he saw the crime and saw the two shots fired by Mehru.

(2) The evidence of the tracker who examined the tracks of the accused at a late stage of the investigation.

(3) The evidence of the various witnesses who saw the two accused about the time of the crime or to whom Mian Khan made payments in currency notes.

(It is very confusing to treat the evidence of all these witnesses under this same head as there is a great difference between them, and it will be better to sub-divide the heading into three sub-heads.

(*i*) The evidence of Akbar, Dulla and Nawab Khan who came up immediately after the murder, and who asked Nur Alam what had happened and who were told by him what he repeated in his dying decla-

ration, with the addition of the fact that the man who had not shot him, that is to say, the man wearing the shoes, had grappled with him and knocked him down. The dying declaration as contained in the *ruqqa* does not mention that Nur Alam had been knocked down before he was shot.

(*ii*) The next class of witnesses is that which for want of a better name may be described as *wajtakkar* witnesses, all of whom were discovered through the instrumentality of Mian Khan as explained by the Sub-Inspector and all of whom identified Mehru as having been his companion. They deposed to having seen them both together shortly before the murder.

(*iii*) The next class is that of the witnesses from whom notes or other articles were recovered.

The next heading covers the confessions by the two accused and finally under the last head the evidence of the recovery of the various stolen articles is collected. There are two serious defects in the record of this case. The first is that the English record is in many cases so meagre as not to reproduce sufficiently what was actually said by the witnesses, a fact which is found by examining the vernacular record; and the second, and the more serious, defect is that the Sessions Judge, while realising that the evidence varies very much in value and in quality, has refrained from stating definitely what evidence he rejects and what evidence he accepts. After stating generally that too much importance must not be attached to the evidence of the eye-witness Saadullah and that the intrinsic value of the evidence under the third head must not be set too high, he does not disclose whether he accepts the evidence of Saadullah and that under the third head or not. No evidence was produced for the defence and we have, therefore, to examine the prosecution evidence under the various heads and see what is the cumulative value of the same.

Now, taking the most important witness, the eye-witness Saadullah. The Sub-Inspector Pir Shujawal Shah has explained that it was at the Gondal fair that Mian Khan pointed out this man Saadullah who makes a living by driving cattle and is a young man of 18 years of age. This man tells us how he saw the shots fired by Mehru, who then fired at him and missed him, and that he told his companions Qazi and Said Ahmad, when they caught him up, and they not unnaturally told him to say nothing about it as they had many head of cattle with them and did not wish to be stopped. The learned Sessions Judge has pointed to the delay in procuring this evidence, but the delay as explained above was perfectly reasonable and natural, and was due to the nature of the occupation of this young man who is quite positive that he identifies both the accused. We believe him to be a truthful and reliable witness.

The second head of evidence is that of the tracker Sultan Muhammad. So far as this is to the effect that the tracks on the spot are those of the two accused we do not accept his evidence, for although he may be a reliable and capable man and may be telling the truth to the best of his ability, we are of opinion that the test was too difficult and that after the time which had elapsed no man could state with certainty that the tracks on the spot corresponded with those of the accused, which he saw later. So far, however, as this man says that the tracks were those of a man wearing sandals and of another wearing shoes and that they led to the place where the post bag was discovered and the place where the spear was found we do accept his evidence.

The three men Akbar, Dulla and Nawab Khan who constitute head (3) are we think reliable and truthful witnesses. Out of these three men, who came up and spoke to Nur Alam before he died and tracked down the mail bag, Akbar knew him before, and the only criticism which Counsel has been able to urge is that Akbar says that he and Dulla were together when they saw Nur Alam while, according to Dulla, Akbar saw him first and told him, Dulla. This is a point of no importance.

The next class, we also accept, being that of those witnesses whom Mian Khan pointed out and all of whom identified Mehru. The *Naib Tahsildar* who conducted the identification has explained how carefully precautions were taken and how the identification parade was conducted. We also accept the evidence of the recoveries, the most convincing and valuable piece of which is that dealing with the Rs. 10 currency note, the number of which had fortunately been taken before the note was posted.

This brings us to the confessions of the

accused and Counsel points out that neither of these confessions can be used against the co-accused inasmuch as both of them exculpate the maker This is true so far as the murder is concerned and the statement of Mian Khan cannot be used against Mehru nor can that of Mehru be used against Mian Khan, and as both the statements are mutually contradictory on this point it would anyhow be impossible to rely on them both.

So far, however, as the confessions relate to the robbery they are valuable against those who made them and against the co-accused. Counsel for Mian Khan has endeavoured to make a point that at the time the bag was seized the accused must have thought that Nur Alam was dead and he urges that, if he was dead, the offence of robbery was not committed. As a matter of fact, however, we know that he was not dead, and even if the offence was not that of robbery it would certainly be criminal misappropriation. We are of opinion that these confessions were voluntarily made and that they constitute valuable evidence against the accused both as regards the robbery and as leading to the inference that the robbery and the murder were parts of the same transaction and were committed by the same persons.

To sum up the case, therefore, the evidence is absolutely overwhelming and conclusive as against both accused. As against Mian Khan it is true that there is more corroboration in the sense that more of the stolen property was recovered from the persons to whom he had given it, and in the case of Mehru the only stolen property recovered was one pair of sandals which is proved beyond all manner of doubt to have been sold by him to Ghulam Haider butcher (P. W. No. 18). Accepting as we do the evidence of Saadullah and that of the other witnesses as we have explained above we find the case clearly established against both. It is quite immaterial who actually fired the fatal shot, for both men with common intent set upon the mail runner and, in pursuance of their common intention to kill him, they did kill him and rob him. Counsel has quoted *Agra* v. *Emperor* (1) and other rulings, which do not apply at all, inasmuch as in this case it is quite clear that the common intention of both the accused was to cause the death of their victim and they are, therefore, both equally guilty of the murder, though as a matter of fact Mehru actually fired the shots.

We accordingly dismiss the appeal and confirm the sentences of death.

Z. K. *Appeal dismissed.*

(1) 27 Ind. Cas. 833; 37 P. R. 1914 Cr.; 16 Cr. L. J. 209; 219 P. L. R. 1915.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 875 OF 1922.

December 12, 1922.

Present:—Mr. Justice Moti Sagar.

PIRAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Burden of proof—Prosecution, duty of.

The mere fact that a person accused of an offence under s. 406 of the Penal Code admits the delivery of the property in dispute to him does not place on him the burden of proving that he received the property in a capacity other than that of a trustee. The prosecution must prove affirmatively that a trust had been created in respect of the property and that the accused had violated that trust. [p. 840, col. 2.]

Criminal appeal from an order of the District Magistrate, Dera Ghazi Khan, dated the 20th June 1922.

Kanwar *Dalip Singh*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This is an appeal from a conviction under s. 406 read with s. 75 of the Indian Penal Code. The appellant who is a previous convict has been found guilty of having committed criminal breach of trust in respect of three cows entrusted to him for grazing, and has been sentenced by the District Magistrate of Dera Ghazi Khan to seven years' rigorous imprisonment. The facts are briefly these :—

One Haji a resident of Rajanpur is said to have owned three cows. It is alleged by the prosecution that he made over these cows to the appellant for the purposes of grazing along with a sum of Rs. 6 in cash some time in October 1921. The appellant lived at a place called Sonwah which is about 15 miles from Rajanpur. Subsequently, neither the appellant nor the cows could be found at that place, and it transpired that the appellant had disposed of them to some unknown person without the consent and the knowledge of the complainant. For some time no trace of these cows could be found anywhere. Shortly

after, one Ilahu gave information that the cows were in the possession of one Musa, a resident of the village Rekh situated at a distance of about 15 miles from Rajanpur. The complainant reported the matter to the Police, and made some attempts to regain possession of the cows, but did not succeed. He then made an application to the Superintendent of Police stating all the facts, which resulted in a case being registered against the appellant under s. 406 of the Indian Penal Code, and the commencement of criminal proceedings against him. The appellant at first made some prevaricating statements but eventually when examined by the District Magistrate admitted that he had received the cows from Haji, the complainant, with a sum of Rs. 6, but denied that the cows had been given to him for the purposes of grazing. The explanation put forward by him was that the complainant's son one Kattu who was an absconder from the Police was living in his (the appellant's) house, that he was in the need of money, that he gave him (the appellant) a letter for his father Haji, that the appellant went with that letter to Haji and got the cows from him for and on behalf of Kattu. It was further alleged that Kattu owed appellant Rs. 100, and that in part payment of that debt he sold him one cow for Rs. 85 promising to pay the balance of Rs. 15 later, and that the appellant in his turn sold the cow so purchased to one Musa for the same amount. Kattu is then said to have been arrested for some offence, and to have left instructions with the appellant not to make over the remaining two cows to any one but the brother of the former, but as there was no grass in the appellant's village, the latter handed over one more cow to Musa on trust on the understanding that it will be returned later when required. As for the third cow it was stated that it was with the appellant's brother Jani, and that it could be produced when necessary. but, as a matter of fact, it was never produced.

The sole question for determination is whether it has been established beyond doubt that the cows had been handed over to the accused for the purposes of grazing as alleged by the prosecution. In my opinion the evidence on the record in support of this allegation is most unsatisfactory, and I am unable to sustain the conviction on the basis of this evidence alone. The evidence clearly shows that at least one of the cows alleged to have been entrusted to the care of the appellant originally belonged to Kattu the son of Haji, that it had been sold by him to his father for a sum of Rs. 80 and that a part of this price had still been unpaid when this case was instituted. It appears, though it is not very clear that Kattu had something to do with these cases, and that the explanation put forward by the accused was not absolutely devoid of foundation. The learned District Magistrate was evidently of opinion that the delivery of the cows having been admitted, it was for the accused to show that he received them in a capacity other than that of a trustee. I do not think this is the right way of looking at the matter. The accused may not have been able to prove satisfactorily that he got the cows from Haji on a letter from Kattu for and on behalf of Kattu, or that he purchased one cow from Kattu for Rs. 85, but this does not relieve the prosecution from proving that a trust had been created in respect of these cows and that the appellant had violated that trust. With the exception of the complainant and his son Budhu, I do not find any evidence on the record worth the name in support of the trust story, and I do not think that this evidence is sufficient to charge the accused with criminal liability. In my opinion the offence has not been clearly established, and I consequently set aside the conviction and acquit the accused.

Z. K. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 326 OF 1924.

July 14, 1924.

Present:—Mr. Justice Venkatasubba Rao.

SARASWATHI AMMAL—PETITIONER

versus

DHANAKOTI AMMAL AND OTHERS —RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 491 — Habeas corpus—*Guardian de jure, application by—Girl over 17 years of age—Considerations applicable—Welfare of minor—Minor's preference.*

On an application for *habeas corpus* in respect of detention of a minor child against the guardian's wishes, the jurisdiction of the Court is essentially a parental one and must be exercised for the benefit and welfare of the child, the word "welfare" being taken in its

widest sense. The moral and religious welfare of the child as well as its physical well-being must be considered, with due regard to its ties of affection. [p. 842, col. 1.]

The order of the Court must be made with reference to the position of the parent, that of the child and its happiness and all the circumstances of the case. [*ibid.*]

If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. There is, however, no hard and fast rule that in the case of a girl over 16 and a boy over 14, the Court has no option in the matter and that the wishes of the infant must be given effect to. Such a rule is too artificial, and even if such a rule obtains in England, there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail. [p. 844, col. 1.]

The mother of a minor girl between 17 and 18 years of age applied for a writ of *habeas corpus* for the production of the girl who was living with her step-sister and had consented to give herself in marriage to a relation to whom the mother objected. The girl's choice of her future husband was a free one and she expressed a decided preference to remain with the step-sister:

Held, that the proper order to make in the case was to free the girl from all restraint and to set her at liberty to go where she chose. [p. 844, col. 2.]

(Case-law referred to.)

Petition praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased (1) to issue a writ in the nature of *habeas corpus* directing the respondents to produce the minor Kripasankari Ammal before the High Court on such date as the High Court may fix to be dealt with according to law, (2) to restrain 1. Dhanakoti Ammal, 2. K. L. Vasudeva Gramani and 3. K. P. Satagoparamanuja Pillai, respondents Nos. 1 to 3 herein by order of injunction from disposing of the said Kripasankari Ammal in marriage to the 4th respondent herein or to any other person, (3) to restrain the 4th respondent herein by an order of injunction from marrying the said Kripasankari Ammal, and (4) to make such other order or orders as the High Court may deem fit to make in the circumstances of the case.

Mr. *R. N. Aingar*, for the Petitioner.

Mr. *A. Krishnaswami Iyer*, for Respondent No. 1.

Mr. *M. Subbaraya Iyer*, for Kripasankari Ammal.

ORDER.—This is an application made under s. 491 of the Cr. P. C. It is in the nature of an application for *habeas corpus*. The applicant is the mother of the girl who is said to be illegally detained. There was some dispute as regards the age of the girl, and there was conflicting medical testimony on the point. But Mr. A. Krishnaswamy Iyer who appeared for the girl as well as for her step-sister (from whose custody the minor girl was produced) agreed to proceed with the application on the footing that the age of the girl was a little over 17 and under 18. The parties belong to a wealthy Gramani family residing at Kodambakkam outside the Municipal limits of Madras. The members of this family have shown themselves extremely litigious and repeated applications have been made before this Court from time to time in regard to disputes that have arisen between them. It is unnecessary to go into these various matters, because the more essential of the facts can be brought within a very small compass. The applicant left the family house or was compelled to leave it about a year or two ago, and the girl has been continuing to live with her step-sister. Arrangements were recently made to give the girl in marriage to her paternal aunt's son who is also a respondent to this motion, and the mother thereupon applied for a writ to Devadoss, J., who was the Vacation Judge and an *interim* order was made for the production of the minor as well as restraining the marriage. I must mention that the step-sister has shown herself to be a person of very strong will and that the mother, on the other hand, is liable to be easily led away. I have examined the minor herself with a view to ascertain her own wishes in the matter. She is a full grown girl and is resolute and self-willed. She expressed her wishes very strongly and stated to me that she would not return to her mother and that she was determined to marry the young man to whom her mother objects. The only relevant allegation made against him is that he is not possessed of any property worth mentioning. He is employed as a Proof Reader in the Government Press and gets a pay about Rs. 25 a month. He looks healthy and strong, and the girl herself, as I have observed, has a decided preference for him.

The short question to be decided is, has a case been made out for the issuing of directions in the nature of *habeas corpus*? It has been repeatedly held in England that the main consideration which ought to weigh with a Court of Chancery is really

the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction, and it is to be exercised for the benefit of the infant. It is also settled law that the word 'welfare' must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being, and due regard must be had to the ties of affection. With reference to all the circumstances of the case the Court makes an order; they relate to the position of the parent, the position of the child and the happiness of the child. There can be no question that this is the law that is administered by a Court of Chancery in England. The Courts in India act on the same principle, and the Guardians and Wards Act, VIII of 1890, recognising that the rules that guide the Court of Chancery are applicable in this country. Section 17 enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, and where the minor is old enough to form an intelligent preference, it is further enacted that the Court may consider that preference.

A question of law has been raised and as I consider it to be of great importance I proceed to deal with it. The basis of *habeas corpus* is illegal restraint. If the person that is alleged to be illegally detained is an adult, the case presents little difficulty because he appears before the Court and says either that he has been wrongfully detained or that there has been no wrongful detention. But in the case of a minor he cannot be said to be capable of giving consent, and detention against the wishes of a lawful guardian is *prima facie* illegal. The consent to which the Court must thus refer is the consent of the guardian and not that of the infant. If, therefore, the *de jure* guardian applies for *habeas corpus* in respect of a child detained against his will, what are the considerations which must guide the Court in determining the rights of the parties? I have said that the question of the interests and the welfare of the infant is the dominant question, and the Court must dispose of the application with reference to it. But it is argued by Mr. A. Krishnaswamy Iyer that in the case of a boy over 14 and in the case of a girl over 16 the Court has no option in the matter and that the wishes of the infant must be given effect to. He puts his argument in this way. The application deals with the liberty of a subject. If the infant is of an age to exercise a choice or use a discretion and the infant declares to the Court that he is not in unlawful custody, the Court is bound to make no further order than merely to declare him at liberty; only where the person is too young to be competent to choose, the Court makes an order giving the custody to the lawful guardian. The next step in his argument is, that the right to such an election depends upon age and age alone and not on mental capacity. In support of his proposition he chiefly relies upon *Queen* v. *Howes* (1), *In re Andrews* (2) and the observation of Brett, M. R. in *In re Agar Ellis, Agar-Ellis* v. *Lascelles* (3).

In *Queen* v. *Howes* (1), Cockburn, C. J., thus observes: "The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by Statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; *and short of which such a child has no discretion to consent to leaving him*".

The *ratio decidendi* would appear to be applicable to cases arising in India, as corresponding to the English Statutes which fix the age, there is the provision of the Indian Penal Code, s. 363, which makes it penal to entice a minor under 14 years of age if a male or under 16 years of age if a female.

In *In re Andrews* (2), Archibald, J., makes the following observations: "The right to such an election, it has now been clearly decided, depends upon age alone, and not mental capacity: see *Queen* v. *Clarke* (4) and it may be taken as settled that

(1) (1860) 3 El. & El. 332; 121 E. R. 467; 30 L. J. M. C. 47; 7 Jur. (N. S.) 22; 8 Cox C. C. 405; 3 L. T. (N. S.) 467; 9 W. R. 99; 122 R. R. 723.

(2) (1873) 8 Q. B. 153 at p. 159; 28 L. T. 353; 21 W. R. 480.

(3) (1883) 24 Ch. D. 317; 53 L. J. Ch. 10; 50 L. T. 161; 32 W. R. 1.

(4) (1857) 7 El. & Bl. 186; 26 L. J. Q. B. 169; 3 Jur. (N. S.) 335; 5 W. R. 222; 119 E. R. 1217; 110 R. R. 551.

no such choice can be made, at all events by a female infant under the age of sixteen; *Queen* v. *Howes* (1) followed by the Court of Probate and Divorce, in the cases of *Cartlidge* v. *Cartlidge* (5) and *Mallinson* v. *Mallinson* (6)." It will be convenient to set out *in extenso* the observations of Brett, M. R. in *In re Agar, Ellis-Agar-Ellis* v. *Lascelles* (3) which have been strongly relied on.

"It is the universal law of England that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus* and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now upto a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages—as to boys the age of fourteen and as to girls the age of sixteen—upto which, as a general rule, the Court will not inquire upon a *habeas corpus* as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away."

With reference to Mr. A. Krishnaswamy Iyer's argument it is necessary to examine whether the passages extracted above express the law of England correctly on the point. In *Reg.* v. *Gyngall* (7) which related to an application for *habeas corpus* in respect of a female infant aged 15, the Court of Appeal refused to give to the mother of the minor custody although she had not been guilty of any misconduct. The child in that case, although she was a female infant under sixteen was examined and the Court inquired into her wishes. Kay, L. J., refers with approval to *Ex parte Hopkins* (8) which related to three girls the eldest of whom was only 13 whom King, Lord Chancellor questioned to ascertain her own wishes. The observations of Brett M. R. in *In re Agar Ellis, Agar Ellis* v. *Lascelles*, (3) to which I referred are set out in the judgment of Kay, L. J., who proceeds thus:

"This language, of course, had reference to the case of *Queen* v. *Clarke*, (4) in which the application being for *habeas corpus* before the Judicature Act and the child in question being a girl and under 16, Lord Campbell, C. J., said that in the Courts of Common Law such a child being deemed incapable of consenting, he would not inquire into the wishes of the child. I have already shown by reference to the case of *Ex parte Hopkins* (8) that there never was any such rule in the Court of Chancery". In the same case Lord Esher, M. R., referring to *Queen* v. *Clarke* (4) says: "It appears to me that that ruling was quite correct. That case is no authority for the present where a different jurisdiction comes into play." Both Lord Esher, M. R., and Kay, L.J., refer to the passing of the Judicature Act and clearly lay down that the decisions prior to that Act are not authorities for cases arising after the passing of that Act. If in the light of these remarks one turns again to *In re Andrews* (2) one cannot fail to notice that the decision rests upon the authority of *Queen* v. *Clarke* (4) which the Court of Appeal refused to follow in *Reg.* v. *Gyngall* (7) on the ground that it was no longer applicable after the passing of the Judicature Act. Kay, L. J., refers in this connection to a child being of a reasonable age and says that the Court would hardly then desire to determine the question without seeing and speaking to the child and ascertaining its wishes on the matter. This expression of opinion is hardly consistent with what Cockburn, C. J., said in regard to intellectual precocity of any particular individual child.

The subject is considered again in *In re Harriet O' Hara*, (9). Fitz Gibbon, L. J., summarises the principle deducible from the judgments of Lord Esher and Kay, L. J., in *Reg.* v. *Gyngall* (7) and repudiates the suggestion that the girl in question there ought not to have been consulted because she was

(5) (1862) 2 Sw. & Tr. 567; 31 L. J. Mat. 85; 8 Jur. (N. S.) 493; 6 L. T. 397; 10 W. R. 672; 164 E. R. 1117.

(6) (1866) 1 P. & D. 221; 35 L. J. Mat. 84; 14 L. T. 636; 14 W. R. 973.

(7) (1893) 2 Q. B. 232; 62 L. J. Q. B. 559; 4 R 448; 69 L. T. 481; 57 J. P. 773.

(8) (1732) 3 P. Wms. 152; 24 E. R. 1009.

(9) (1900) 2 Ir. R. 232; 34 Ir. L. T. R. 17; 5 Ir. L. R. 363.

only 11 years of age. He thus observes ; "I entirely dissent from the contention. From the time of King Chancellor in *Ex parte Hopkins* (8), the Court of Chancery has exercised its discretion in seeing young children, not for the purpose of obtaining their consent, but for the purpose, and as one of the best modes, of determining what is really for their welfare, though the Common Law Courts, as a general rule, would not inquire as between parent and child, as to the child's consent, below the age of 14 for a boy or 16 for a girl".

I think I have made it fairly clear that the hard and fast rule which Mr. Krishnaswami Iyer asks me to accept does not obtain at the present day in England. I have been referred by Mr. Krishnaswami Iyer also to Simpson on Infants, 3rd Edition page 188 and Short and Mellor's Practice of the Crown Office, 2nd Edition, page 313. But the learned authors rely upon cases decided before the passing of the Judicature Act and I cannot, therefore, act upon the passages to which my attention has been drawn.

In each case the Court must decide with reference to the interests and the welfare of the minor. If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. It seems to me that the rule that fixes an inflexible limit in regard to age is too artificial and even if the contention is correct (which, in my opinion, is not) that such a rule obtains in England, I am emphatically of opinion that there is no warrant for the extention of the doctrine to India where different considerations may apply and different conditions do prevail.

In *Pallard* v. *Rouse* (10), Wallis, J., (as he then was) thus observes at page 293*: "Lastly, it is well-established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16 if a girl, to remain in a custody to which he or she objects." It is urged by Mr. Krishnaswami Iyer that Wallis, J., by qualifying his statement by the use of the word "ordinarily" has failed to correctly set forth the effect of the English decisions. It is doubtful whether Wallis, J., brought his mind to bear upon this particular aspect of the question because at page 298* there occurs in his judgment the following passage inconsistent with his earlier observation: "As regards the girls over 16 and boys over 14 it is now conceded in accordance with the principles I have explained that the Court cannot in the present case force them to return to the plaintiff against their will". It seems to me that this case cannot be of much value as an authority upon this particular point.

In *In the matter of Saithri* (11), a minor, Bayley, J., points out in the judgment which refers to various authorities that it is not right to apply the very artificial rule to which reference has been made.

I have, therefore, looked at the question purely from the point of view of the welfare of the minor. I have paid necessarily, as any Court will pay, great attention to the expressed wishes of the infant who will soon reach the age of 18, the age of majority. She is in a position to decide for herself and she expresses a decided preference to remain in the custody from which she has been produced. She is able to form a judgment as to what is in her own interest and for her benefit. She has freely chosen to give her hand in marriage to her paternal aunt's son. It is also not impossible that she has been on terms of friendship and familarity with this young man and it is not desirable to take her away from the surrounding to which she has been accustomed and to place her in the custody, against her will, of her mother who is a woman not of strong will and easily capable of being influenced by the person who at the time happens to be nearest to her ; and it is necessary and important to bear in mind that the mother is not being deprived of the custody of the infant but on the contrary I am aked to take the child away from the custody which she prefers and place her in the custody of the mother to whom she expresses a positive dislike.

The order that I propose to make, therefore, is, that she be freed from all restraint and be at liberty to go where she chooses.

In the circumstances of the case I make no order as to costs.

V. N. V. *Application dismissed.*

Z. K.

(10) 6 Ind. Cas. 754; 33 M. 288; (1910) M. W. N. 187; 8 M. L. T. 47.

(11) 16 B. 307; 8 Ind. Dec. (N. S.) 683.

*Pages of 33 M.—[*Ed.*]

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 907 OF 1922.
December 30, 1922.
Present:—Mr. Justice Zafar Ali.
RAHMAN AND OTHERS—CONVICTS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 304 (ii), 325, 342—Attempt to carry away woman by force—Rescue—Death and grievous hurt caused by rescuers—Wrongful confinement of assailants—Offence committed.

Two years prior to the occurrence, the wife of the complainant had been abducted by one of the accused with whom she was living. On the day of the occurrence complainant organized a raid and arrived with his party at the house of the accused who had abducted his wife and attempted to carry her off by force in the absence of her paramour. She resisted and one of the party of the complainant struck her and proceeded to drag her away. On hearing her cries the accused came up to her rescue and proceeded to attack the party of the complainant with the result that they killed one of them and inflicted grievous hurts on another. They subsequently proceeded to put the members of the complainant's party in wrongful confinement:

Held, (1) that although the accused were justified in attempting to rescue the woman from the party of the complainant, when they proceeded to assault the party of the complainant in a body and caused grievous injuries to them, they constituted an unlawful assembly because their common object was to commit an offence, namely, to cause hurt or grievous hurt; [p. 847, col. 2.]

(2) that the accused were guilty of offences under ss. 304 (*ii*), 325, 342 read with s. 149 of the Penal Code. [*ibid.*]

Appeal from an order of the Sessions Judge, Jhelum, dated the 12th August 1922.

Sheikh *Niaz Ali* and Chawdhri *Rahmat Elahi*, for the Appellants.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The three brothers Rahman, Ahman and Khanun, and their first cousin Maulu, and collateral Hussaina have all been convicted under ss. 304, Part II, 325 and 342, Indian Penal Code, of culpable homicide, grievous hurt and wrongful confinement respectively, and each awarded the following sentences to take effect in succession:—

(1) Under s. 304, Part II, ten years' rigoruos imprisonment.

(2) Under s. 325, two years' rigorous imprisonment.

(3) Under s. 342, six months' rigorous imprisonment.

They have appealed, the first four jointly and the fifth individually. The prosecution version was briefly as below:—

"*Musammat* Rasulan wife of Gaman Gondal of the village Sohawa eloped with Rahman appellant but her husband lodged no complaint nor reported the abduction to the Police. Two years had elapsed since her elopement when Gaman Tarar of the village Phira happened to come across Rahman accused and the latter told him that he did not want to keep *Musammat* Rasulan any longer. Accordingly Gaman Tarar sent Rahman *mirasi* to her husband with the message that he might come over to get her back. On receiving this message he came to Gaman Tarar and in company with him and three other men, *i. e.*, Mirza Gondal, Mirza Chadhar and Muhammada (deceased) proceeded to the village of Rahman appellant, Gaman Tarar on horseback and the rest on foot. On arrival there at about noon, the two Mirzas and Gaman Gondal halted at a threshing-floor while Gaman Tarar and Muhammada went on to the hamlet of Rahman accused which was some 250 *karams* from there. They found *Musammat* Rasulan in the house of Rahman accused but he himself was not there. His brother Ahman and Maulu appellants who were there did not object to their taking her away. Gaman Tarar asked her to go with him but she demurred to it. Thereupon he struck her with a stick or switch and began to drag her away. She raised cries hearing which Rahman, Khanun and Hussaina accused came up. Hussaina was armed with a *kahi* (spade) and Ahman with a hatchet but Hussaina threw down the *kahi* and took up a hatchet. The rest were armed with sticks. All five set upon Gaman Tarar and Muhammada and beat them with their weapons. On hearing their cries the two Mirzas and Gaman Gondal came up. They raised Gaman Tarar from the ground and took him to the threshing floor but Muhammada had been so severely hurt that he could not move and was, therefore, left where he was. But the five accused followed them to the threshing-floor and made them go back to their hamlet and there confined them and Muhammada in their cattle-shed and seated themselves infront of it, saying that they (Gaman and his companions) had come to commit a dacoity. Muhammada succumbed to his injuries and died soon after the attack. At *peshi* time Allah Dad *lambardar* appeared on the scene and hearing the story of the men who were confined in the shed left for the Police Station which was

seven miles from the spot and laid the first information there at 9 P. M."

This version though not without a substratum was not free from exaggeration and embellishment as will be shown later on, but the learned Sessions Judge accepted the whole of it as true for the reason that the defence set up by the accused was palpably false. But obviously the accused found themselves in a dilemma and invented a false story because they were afraid of compromising the position of Rahman accused by admitting that *Musammat* Rasulan was with him and was the cause of the trouble. Therefore they pleaded that Gaman and his companions were beaten by Maulu accused and some strangers who happened to pass by, because they had come to commit a dacoity and wanted to steal buffaloes and that they did not know *Musammat* Rasulan nor was she there. It is now admitted that this was not true and that Gaman and the deceased were beaten because they attempted to carry away *Musammat* Rasulan by force.

In order to apportion responsibility for what took place it is necessary to sift the prosecution evidence to separate true facts from fabrications. In the first place, the medical evidence belied the story that two of the accused used hatchets. There was no incised wound and, therefore, no sharp edged weapons were used. In the first information report also there was no mention made of hatchets.

Secondly, the evidence produced in support of the allegation that Rahman accused wanted to get rid of *Musammat* Rasulan will not bear the test of a close scrutiny. The husband of *Musammat* Rasulan admitted that she had taken away jewelry with her and that he went to the residence of the accused to recover her as well as the jewelry. The fact that he neither lodged a complaint nor reported to the Police and remained inactive for two years, though he was anxious to get back the wife as well as the jewelry, indicates that he could not find a clue to her whereabouts all this time and did not know who had abducted her because his village Sohawa is 18 *kos* from that of the accused. But Gaman Tarar's village is only four *kos* from the latter and, therefore, presumably he made the discovery that *Musammat* Rasulan was with Rahman accused and then sent for her husband and organised a party to bring her away. As their incursion ended in a disaster they had to account for the course perused by them and, therefore, to justify it they concocted the story that Rahman accused had expressed his willingness to part with *Musammat* Rasulan. Gaman Tarar could produce no evidence in support of his statement that Rahman accused met him and told him that he no longer desired to keep *Musammat* Rasulan and that accordingly he sent Rahman *mirasi* to fetch her husband. Rahman *mirasi* was not put in the witness-box and this story finds no place in the First Information Report. In that report it was stated that the party had come "to catch *Musammat* Rasulan." One Hussaina *mirasi* was produced to tell a different tale altogether. He deposed that some 25 days before the event Rahman Gondal of Phira sent him to Rahman accused to say that *Mussammat* Rasulan had come to him (Rahman Gondal) and that he might come and take her away, but that Rahman accused's reply was that she should either return of her own accord or go back to her husband. But Rahman Gondal was not produced at all and there was no evidence to show that *Musammat* Rasulan ever left Rahman accused and found shelter with Rahman Gondal. This new tale was seemingly concocted because no evidence could be produced in support of the original one. Further it follows from what actually happened that neither Rahman accused was anxious to part with *Musammat* Rasulan nor was she prepared to leave him. If he had really received from Rahman the assurance that he was ready to part with her, he would have gone straight to him instead of attempting to carry her off by force in his absence. But even if it be conceded that Rahman accused did tell him that he no longer desired to keep her, the attempt to bring her away by force was quite unjustifiable and unlawful and her friends had the right to rescue her from the hands of the intruders and, therefore, the opinion of the learned Sessions Judge that there were no extenuating circumstances is contrary to the facts and circumstances of the case. Gaman and his party were, undoubtedly, the aggressors but the accused exceeded proper limits in warding off the assault on *Musammat* Rasulan.

Thildly, there is another part of the story which is highly improbable. It was stated:

(1) that three men of Gaman's party halted at the threshing-floor and did not come to the hamlet of the accused before hearing the cries of Gaman and Muhammada, and

(2) that they came back to the threshing-floor after the assault but were taken back to the hamlet by the accused.

It was not explained why three of the party stopped at the threshing-floor when they had come all the way from their village to render assistance in recovering the woman. Further if they had come back to the floor from the hamlet the people at the floor would not have allowed the accused to take them back. Muhammada (P. W. No. 10) stated that there were about 100 men at the threshing-floor. Fazal Din (P. W. No. 12) deposed that there were two factions in the village of the accused, that the accused belonged to one and the men at the floor to the other and that there were 10 or 12 men of Gaman's faction at the floor. If this were true, these men would certainly have interfered and prevented the accused from taking back the four men from the floor by force. The party might have stayed for a while at the floor before proceeding to accused's hamlet but the alleged incidents which were not referred to in the First Information Report were presumably after-thoughts. The report was made by a *lambardar* who repeated what he had heard from Gaman and his companions. Therefore it follows that the latter made no mention of the alleged incidents to the *lambardar* which they would have done if they had really occurred. They were introduced evidently to minimise their responsibility for the consequences resulting from their own initial culpable conduct and to magnify the gravity of accused's offence.

From the facts and circumstances dascribed above the conclusion that can be drawn is that Gaman's party appeared at the hamlet of the accused all of a sudden to seize *Musammat* Rasulan and take her away by force and that when Gaman struck her and proceeded to drag her away the accused came up to her rescue and beat the intruders.

There was the evidence of several witnesses that all the five accused participated in the attack and all five were mentioned in the First Information Report and, therefore, the finding that they all made the attack is unassailable.

The next question is what were the offences committed and in determining this too the learned Sessions Judge's application of the law to the facts was not free from error. As all the five accused made the assault in a body and caused injuries, they constituted an unlawful assembly because their common object was to commit an offence, *i. e.*, hurt or grievous hurt, s. 142 (third). The Committing Magistrate, therefore, framed charges against the accused under ss. 302, 325 and 342 coupled with s. 149, Indian Penal Code, but the learned Sessions Judge amended the charges by striking out s. 149, considering that that there was no evidence to support a charge of rioting. Further he was of opinion that s. 34 too was not applicable at all. But all the same he held all the accused equally responsible for the injuries caused though he found that "it was not known who struck the fatal blow to the deceased or broke the arm of Gaman Tarar." The medical evidence showed that Muhammada's death was due to the fracture of the skull produced by a solitary blow and that the only grievous injury received by Gaman was fracture of the ulna bone. Therefore the blows which caused the fracture of the skull and ulna bone respectively were either both inflicted by one man or by two men, one each. The rest of the accused could not be responsible unless the principles embodied in s. 34 or s. 149 were applicable to their case. The learned Sessions Judge found that the assault was sudden and unpremeditated but in order to hold all the accused equally liable he argued that they made the attack collectively with the intention of causing grievous hurt and knowing that one of them might inflict a *lathi* blow on the head and cause death. Thus he virtually found that the injuries were caused in prosecution of the common object or in furtherance of the common intention of all and it is obvious that the men who caused simple hurts only could not be said to have committed grievous hurt but constructively. Therefore s. 149 ought not to have been struck out from the charges. In awarding sentences the extenuating circumstances were not taken into consideration and even if separate sentences could be awarded, for the grievous hurt and the fatal injury caused, to two men respectively, the sen-

tences should run concurrently as the hurts were caused in the course of the same transaction.

Therefore, I accept the appeal so far as to reduce the sentences and alter the convictions as below.

1. Under ss. 304/149, Indian Penal Code.	Three years' rigorous imprisonment, each.
2. Under ss. 325/149, Indian Penal Code.	One year's rigorous imprisonment, each.
3. Under s. 342, Indian Penal Code.	Three months' rigorous imprisonment, each.

Nos. 1 and 2 shall run concurrently and No. 3 to commence after the expiration of No. 1.

Z. K. *Appeal accepted. Convictions altered.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 634 OF 1924.

December 9, 1924.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

MURLIDHAR—APPLICANT

versus

MAHBOOB KHAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 439, 562 (1-A)—Penal Code (Act XLV of 1860), s. 279, conviction under, by Magistrate of Second Class--Magistrate, jurisdiction of, to release accused after admonition—Revision—High Court, interference by.

The proviso to sub-s. (1) of s. 562 of the Cr. P. C. must be read as a part of the sub-section. It is superseded as regards the effect of sub-s. (1-A) by the words "the Court before whom he is so convicted," in the aforesaid sub-section, and cannot be used so as to control those words. A Magistrate of the Second Class, therefore, has jurisdiction to pass an order of release of an accused person convicted by him under s. 279 of the Penal Code after due admonition, under s. 562 (1-A) of the Cr. P. C. [p. 848, col. 2.]

The High Court will not in revision interfere with an order passed by a Magistrate under s. 562 (1-A) of the Cr. P. C., unless the order is clearly mistaken or injudicious or amounts to a failure of justice. [*ibid.*]

Criminal Reference made by the District Magistrate, Bijnor, dated the 10th October 1924.

JUDGMENT.—One Mahboob Khan was tried by a Magistrate of the Second Class on a charge under s. 279 of the Indian Penal Code, the offence alleged against him being that he rode a bicycle in a manner so rash or negligent as to endanger human life. It appears from the evidence that he actually did collide with and injure a little boy; and the peculiar negligence of his conduct at the time lay in the fact that he was riding a bicycle which had no effective brake. The Magistrate who tried the case, after finding the accused guilty, has recorded his reasons for dealing with him under the provisions of s. 562 (1—A) of the Cr. P. C. He released the accused after due admonition. The matter was brought to the notice of the District Magistrate by a petition presented by the father of the little boy who had been injured. The District Magistrate has referred the matter to the High Court on two distinct grounds. The first, is that the Trying Magistrate, being a Magistrate of the Second Class, had no jurisdiction to pass the order of release after due admonition under the section above referred to. The second, is that the discretion exercised by the Trial Court was in any case injudicious, and that a sentence at least of fine ought in the interests of justice to have been imposed.

On the question of law we are of opinion, after examining the whole of s. 562 of the Cr. P. C. that the proviso to sub-s. (1) of the same Code must be read as a part of the said sub-section. It is superseded, as regards the effect of sub-s. (1—A) by the words 'the Court before whom he is so convicted' in the aforesaid sub-section and cannot be used so as to control those words. We find, therefore, that the Magistrate of the Second Class in the present case had jurisdiction to pass the order which he did.

We have also looked at the matter from the other point of view suggested by the District Magistrate. There is something to be said undoubtedly for the District Magistrate's opinion; but we are not satisfied that the order passed by the Trial Court was so clearly mistaken or injudicious, or amounted to such failure of justice, as to call for our interference in revision. Let the record be returned.

Z. K. *Record returned.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 667 OF 1923.
November 20, 1924.
Present:—Mr. Justice Mukerji.

RAM LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUHAMMAD AMIR MUSTAFA KHAN AND OTHERS—PLAINTIFFS AND *Chaudhri* BADRUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—One co-sharer, whether entitled to build on joint land—Suit for demolition and joint possession, maintainability of.

One co-sharer out of many has no right to build on what is joint land without the consent of the others, and if he does so, the other co-sharers are entitled to sue for the demolition of the building and for joint possession of the site. [p. 849, col. 2.]

Paras Ram v. *Sherjit*, 9 A. 661; A. W. N. (1887) 253; 5 Ind. Dec. (N. S.) 878, dissented from.

Ghasitu v. *Sodhan Singh*, 32 Ind. Cas. 690, *Najju Khan* v. *Imtiaz-ud-din*, 18 A. 115; A. W. N. (1895) 243; 8 Ind. Dec. (N. S.) 782 and *Ram Bahadur Pal* v *Ram Shankar Prasad Pal*, 27 A. 688; 2 A. L. J. 455. A. W. N. (1905) 158, followed.

Second appeal against a decree of the Additional Judge, Aligarh, dated the 2nd of February 1923.

Mr. *Brij Behari Lal*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The parties are co-shares in the village. The suit out of which this appeal has arisen was originally instituted by the respondent No. 1 Muhammad Amir who happens to be a co-sharer to a large extent in the village and also the *lambardar* of it. The main defendants in the case were defendants Nos. 1 and 2. The other defendants were impleaded as being co-sharers in the village who did not join the plaintiff in the institution of the suit. Some of these defendants were later on, it appears, made plaintiffs.

The suit was launched with the allegtion that, on a portion of the village site stood, the house of one Khushla Chamar, a tenant, who died about 20 years ago. Since his death the house was occupied by two other tenants, *viz.*, Rajna and Zaharya. Rajna and Zaharya left the village about two years before the institution of the suit and the defendants Nos. 1 and 2 removed the materials, took possession of the site and started constructing a building of their own. The suit was, therefore, instituted for recovery of joint possession and for recovery of damages.

The Court of first instance decreed the claim for joint possession and for the demolition of the building erected by the defendants Nos. 1 and 2, but dismissed the suit so far as it asked for recovery of damages. This judgment was upheld by the lower Appellate Court.

The finding of the lower Appellate Court is in substance the same as was the plaintiffs' case except as to damages.

Two points have been urged before me. One is that the finding of fact is more or less of a speculative character. It is possible to characterise thus one or two remarks to be found in the judgment of the Court below. But they really deal with the circumstances of the case. It cannot be denied that there was evidence on the record from which the learned Judge could come to the conclusion that Zaharya and Rajna were occupying the house and the site within two years of the suit and the defendants' case, *viz.*, they had been in occupation of the site for 20 years was false. In the circumstances, the defendants Nos. 1 and 2 had no right to take possession of what was the joint property of the parties in the teeth of opposition.

The second question is whether the plaintiffs could, on their own behalf and on behalf of the *pro-forma* defendants, claim the demolition of the building on the site and for joint possession of the latter. The case of *Paras Ram* v. *Sherjit* (1) was cited by the learned Counsel for the appellants. He urged on the basis of that authority that so long as the plaintiffs did not prove special damage they were not entitled to succeed. But this case has not been followed in later years in this High Court. The law as it at present stands is that one co-sharer out of many had no right to build on what is joint land without the consent of the others. The latest case of this High Court is reported as *Ghasitu* v. *Sodhan Singh* (2). It followed an earlier case of *Najju Khan* v. *Imtiaz-ud-din* (3). Indeed, there are good many other cases in which the law as laid down in *Paras Ram* v. *Sherjit* (1) has been dissented from [see for example the case of *Ram Bahadur Pal* v. *Ram Shankar Prasad Pal* (4).]

(1) 9 A. 661; A. W. (1887) 253; 5 Ind. Dec. (N. S.) 878.
(2) 32 Ind. Cas. 690.
(3) 18 A. 115; A. W. N. (1895) 243; 8 Ind. Dec. (N. S.) 782.
(4) 27 A. 688; 2 A. L. J. 455; A. W. N. (1905) 158

As the possession of the defendants Nos. 1 and 2, who are appellants in this Court, was in opposition to and not with the consent of the co-sharers, a decree for joint possession was properly awarded.

The appeal fails and it is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 190 OF 1922.
September 21, 1923.
Present :—Mr. Dalal, J. C.
SULTAN KHAN—PLAINTIFF—APPELLANT
versus
HARDWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Adverse possession—Claim based on grant, failure of—Entry in village record, effect of—Tenant claiming under-proprietary rights—Burden of proof.

Where a person comes forward with a claim on the basis of a grant and fails to prove it, he cannot turn round and say that he has been holding adversely from the date on which he founded his title under the grant. The theory of adversity of title can only come in if no claim is laid to any title whatsoever for the commencement of possession. [p. 851, col. 1.]

An entry in the village record, or even the opinion of a Revenue Court, that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietary nature in the cultivator and will not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he does not do so within six years of the final order [*ibid.*]

Mohammad Mumtaz Ali Khan v. *Mohan Singh*, 74 Ind. Cas. 476; 26 O. C. 231; (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321; 50 I. A. 202 (P. C.), followed.

Durga v. *Ram Padarath*, 65 Ind. Cas. 749; 8 O. L. J. 495, distinguished.

A mere assertion on the part of a lessee, during the currency of his lease, that he is an under-proprietor does not create an under-proprietary right in his favour by adverse possession. [p. 852, col. 1]

Maheshar Parshad v. *Muhammad Ewaz Ali Khan*, 7 O. C. 372 and *Mahesh Misr* v. *Deputy Commissioner, Fyzabad*, 1 Ind. Cas. 325; 12 O. C. 15, relied on.

Where a *zemindar* comes into Court asking for a declaration that the defendants who are cultivating land under him are tenants and not under-proprietors, the burden of proving that they are under-proprietors and not tenants lies on the defendants. [*ibid.*]

Muhammad Mumtaz Ali Khan v. *Harpal Singh*, 32 Ind. Cas. 376; 2 O. L. J. 556, relied on.

Pirthipal Singh v. *Ganesh Din Singh*, 71 Ind. Cas. 611; 25 O. C. 396; (1922) A. I. R. (P. C.) 353; 44 M. L. J. 29; 37 C. L. J. 219; 9 O. L. J. 649; 32 M. L. T. 109; 9 O. & A. L. R. (P. C.) 541; 18 L. W. 41; 50 I. A. 210*n* (P. C.), distinguished.

Second appeal against a decree of the District Judge, Fyzabad, dated the 10th April 1922, in an appeal preferred against that of the Additional Subordinate Judge, Fyzabad, dated the 27th June 1921.

Mr. *M. Wasim*, for the Appellant.

Mr. *A. P. Sen*, for Respondents Nos. 1 and 2.

JUDGMENT.—There is considerable confusion of thought in these proceedings, so the matter at issue before this Court for decision must be clearly defined and kept in mind. The only ground on which the defendants have succeeded in establishing a proprietary right in the land in suit is that of adverse possession only. In the First Court of the Additional Subordinate Judge of Fyzabad, the defence to the plaintiff *zemindar's* suit for a declaration that the defendants are not under-proprietors or *birtdars* of the land in suit was put forward under many heads. They claimed that they were *birtdars* under a grant, that they acquired such title by founding a *purwa*, that their possession as under-proprietors was acknowledged by the *zemindar* and finally that they had acquired right as under-proprietors by adverse possession. Except on the point of adverse possession, every one of the defences was rejected by the Court of first instance. The plaintiff appealed to the Court of the District Judge, but the defendants advanced no argument there in support of their defence on the grounds which were rejected by the First Court. It is true that the defendants were not bound specifically to file cross-objections and were entitled to support the decree of the First Court on any ground open to them but such a position was not taken up by them. It must, therefore, be accepted for the purpose of decision by this Court that the defendants do not hold a grant of any *birt* land, that they did not acquire any such right by founding a *purwa* and that they were not acknowledged as *birt*-holders by the *zemindar*. Bearing the decided facts in view I have to determine whether they have been rightly held by the two Subordinate Courts to have acquired a title by prescription.

I find considerable difficulty in understanding the possession by adversity of title by a person who comes forwards with a claim on the basis of a grant and fails to prove it. A definite origin and source of title are relied upon and then when they have failed, the defendants turn round and say that they have been holding adversely from the date on which they founded their title under a grant. I do not think that such a position can be permitted. The plaintiff *zemindar*, who is admitted owner of the land, avers that he never passed under-proprietary title to the defendants. The defendants reply that they hold a title-deed. The title-deed is either not forthcoming or is not valid. The result must be that the defence of under-proprietary title is false and the defendants in occupation can only be tenants. It cannot be permitted to the defendants under such circumstances to start the theory of adversity of title which can only commence if they did not lay claim to any title whatsoever for the commencement of their possession.

The only fact that has determined the two subordinate Courts to hold in favour of the defendants is the entry in the village record. It is now settled law that such an entry or even the opinion of a Revenue Court that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietor in the cultivator and not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he did not do so within six years of the final order in litigation. In my opinion the present case is covered by the authority of the Privy Council in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1). In that case in 1891 in a revenue litigation arising from the cultivator's objection to a notice of ejectment the Revenue Court held that the cultivator was an under-proprietor. Twelve years after the decision of the Revenue Court the proprietor sued for a declaration that the cultivator was a tenant and not an under-proprietor. Their Lordships observed (page 237* of the report): "The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which admittedly was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor." In the present case the *zemindar* has come to the Civil Court within six years of the Revenue Court decision. The case of the defendants here is similar to that of the defendant in the Privy Council case. What the defendant in effect says: "I asserted title as under-proprietor in 1893 by entry of my name as *birtdar* in the revenue papers. My adverse title started from that date." The answer to this is that such an assertion does not start adverse possession and does not convert a tenant of a land into an under-proprietor. It is not very clear how the entries were made. The entry is not accepted by the lower Courts on the basis of title. The respondents' learned Counsel referred me to a Single Judge decision of this Court reported as *Durga* v. *Ram Padarath* (2), where the learned Judge enunciated the proposition as well-established that in the absence of any evidence to the contrary the entries in the revenue papers prepared under the U. P. Land Revenue Act must be deemed to be correct. If this reasoning be applied here the defendants may be held to be under-proprietors by title and not by adverse possession. Both the subordinate Courts have decided that the defendants have no title, so they did not accept the entry in the village papers as correct. How the entry can start adverse possession it is very difficult to understand. Reference was then made by the respondents' learned Counsel to the partition among the co-sharers of the village. It was said that during partition proceedings this land was treated as under the ownership of under-proprietors. This again is a matter of acknowledgment on which issue the decision was against the defendants and not of adverse possession. The defendants are holding land on payment of rent and the presumption is that they are tenants of the land. It was pointed out that the rent was about one-third of the average tenant's rent of the land. This argument also may be used to support title but not adverse possession. There may also be other reasons why the rent of the defendant was not enhanced.

Another point taken by the learned Coun-

(1) 74 Ind. Cas. 476; 26 O. C. 231; (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321; 50 I. A. 202 (P. C.).

*Page of 26 O. C.—[*Ed.*]

(2) 65 Ind. Cas, 749; 8 O. L. J. 495.

sel for respondents was that as the *zemindar* had come to Court to ask for a declaration it was his duty to prove by definite evidence that the defendants were tenants and not under-proprietors. As I have pointed out more than once this argument also would be the basis of title. Apart from this, in a case like the present the burden of proof lies on the defendants to prove that they are under-proprietors and not *zemindars* [*Muhammad Mumtaz Ali Khan* v. *Harpal Singh* (3).] The Privy Council ruling in the case of *Pirthipal Singh* v. *Ganesh D n Singh* (4) is not in point here. In that case the relations between the parties were regulated upon the footing that the defendants possessed the rights that they claimed to enjoy. As I have pointed out above, the Courts definitely held here that the defendants' claim as under-proprietors was never acknowledged by the plaintiff *zemindar*. It is clear, therefore, that the defendants were never treated by the *zemindar* on the footing of under-proprietors. Even prior to the Privy Council ruling in the case of *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (1), there was no rule in Oudh that a mere assertion of under-proprietary right started possession as against the *zemindar*. The view prevalent up to the date of the Privy Council ruling referred to above was that when an agricultural holder succeeded in avoiding ejectment on the ground of under-proprietary right in the Revenue Court, an adverse title started in his favour from that date and the *zemindar* was put to the necessity of suing in the Civil Court for declaration within six years of the Revenue Court decision. In a Bench case of this Court of 1904 [*Maheshar Parshad* v. *Muhammad Ewaz Ali Khan* (5),] the mere assertion on the part of a lessee during the currency of his lease that he was an under-proprietor was held not to create an under-proprietary right in his favour by adverse possession. A decision of a Single Judge of this Court of 1908 [*Mahesh Misr* v. *Deputy Commissioner, Fayzabad* (6)] also indicates what view on the subject was held by this Court prior to the Privy Council decision in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1). A mere assertion in an ejectment suit that a cultivator was an under-proprietor was not held to be sufficient to set time running against the landlord for a declaratory suit against the tenant where the notice was cancelled on a technical plea that one notice was not sufficient. It is clear, therefore, that a mere assertion of right as under-proprietor was never considered sufficient to give a start to adverse possession unless this assertion was accepted by the Revenue Court. We have seen how this exception has also been swept away by the Privy Council ruling. I hold that the defendants have not acquired under-proprietary right by prescription.

In the result I set aside the decrees of both the lower Courts and decree the plaintiff's suit for a declaration with costs of all the Courts.

Decrees set aside.

Z. K.

(3) 32 Ind. Cas. 376; 2 O L. J. 556.

(4) 71 Ind. Cas. 641; 25 O. C. 396; (1922) A. I. R. (P. C.) 383; 44 M. L. J. 29; 37 C. L J. 219; 9 O. L. J. 649; 32 M. L. T. 109; 9 O. & A. L. R. (P. C.) 541; 18 L. W. 41; 50 I. A. 210*n* (P. C.).

(5) 7 O. C. 372.

(6) 1 Ind. Cas. 325; 12 O. C. 15.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 153 OF 1924.

November 24, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Adami.

Pandit Goswami LALOO LAL SHARMA—APPELLANT

versus

RADHEY LAL GOSWAMI AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 22, O. XXXIX—Proceedings with regard to same subject-matter in Courts subordinate to different High Courts—Procedure—Stay of proceedings—Injunction restraining party from continuing proceedings, when to be issued.

The C. P. C. carefully avoids the chance of any clash in the decisions of two Courts either subordinate to the same High Court or subordinate to different High Courts with respect to the same point at issue arising between the same parties. When the suit or proceedings are in Courts subordinate to the same High Court the matter can be effectively dealt with by that High Court. Where, however, the matters are pending in Courts subordinate to two High Courts, one of such High Courts has no control over the Courts subordinate to another High Court and the matter can be dealt with under s. 10 or s. 22 of the Code. In addition to these provisions there is power vested in the Court to issue injunctions against

persons who are either within the jurisdiction of the Court or have submitted to its jurisdiction, and the provisions contained in ss. 10 or 22 of the Code are supplemented by those contained in O. XXXIX relating to injunctions and those which lie in the inherent power of the Court. [p. 854, col. 1.]

Whereas under s. 10 of the C. P. C. a party must make an application for stay to the Court in which the subsequent suit or proceeding is instituted; under s. 22 the High Court has jurisdiction to make an order that a matter pending before it or before a Court subordinate to it shall proceed, and such order is final, and it is not open to any other Court in India to dispute it and to allow a suit or proceeding to proceed in any other Court than that indicated in such order. [p. 854, col. 2.]

Although a Court will not issue an injunction against a person not within its jurisdiction, it will, in the ends of justice, when a person has submitted to its jurisdiction, restrain such person from doing anything which it considers is improper and will amount to an abuse of the process of the Court. [*ibid.*]

Firm Ram Kumar-Sheo Chand Rai v. *Firm Tula Ram-Nathu Ram*, 56 Ind. Cas. 920; 1 P. L. T. 277 at p. 281; (1920) Pat. 235 and *Amar Kumar Mukherjee* v. *Mr. B. Coventry*, 85 Ind. Cas. 551, referred to.

An application for the grant of Letters of Administration in respect of an estate was made by the petitioner before the District Judge of Patna in the Province of Bihar and Orissa. The respondent was served with notice of the application and he submitted to the jurisdictiou of the Patna Court. Subsequently, however, he made an application for grant of Letters of Administration in respect of the same estate before the District Judge of Mathura in the United Provinces. The application before the District Judge of Patna was eventually dismissed and an appeal was lodged against such dismissal in the Patna High Court and the appellant filed an application in the High Court praying for an injunction restraining the respondent from proceeding with his application before the Mathura Court:

Held, that the respondent having submitted to the jurisdiction of the Patna Court and having entered appearance as respondent in the appeal pending in the Patna High Court, the latter Court had jurisdiction to issue an injunction restraining him from proceeding with his application in the Mathura Court. [p. 854, col. 2; p. 855, col. 1.]

Application to the High Court under s. 10, C. P. C., to stay the proceedings pending in another Court having jurisdiction to grant the relief claimed.

Mr. *T. N. Sahay*, for the Applicant.

Messrs. *K. P. Jayaswal*, *G. N. Mukherjee*, *Fazal Ali* and *B. C. De*, for the Opposite Parties.

JUDGMENT.—This is an application to stay the proceedings instituted pending in the Court of the District Judge of Mathura for the grant of Letters of Administration with respect to the estate of one Mohan Lal. The applicant in that Court is Manu Lal son of Kishori Lal, brother of Mohan Lal. The opposite parties in that case are Laloo Lal son of Mohan Lal, Radhey Lal Goswami and others, sons of the daughter of Mohan Lal. Previous to the institution of the proceedings in the Mathura Court, Laloo Lal had applied to the District Judge of Patna for the grant of Letters of Administration to the estate of his father Mohan Lal. The application was opposed by the aforesaid Goswamis, the sons of Mohan Lal's daughter. Manu Lal was also made a party and entered appearance but afterwards ceased to take any interest in the proceeding. That application was made on the 17th September 1923 and terminated in the final order of the District Judge passed on the 14th June 1924, by which the application of Laloo Lal was refused. Against that order Laloo Lal has appealed to this Court, and has now applied for an *ad interim* stay of proceedings in the Court at Mathura in the United Provinces, pending the disposal of the appeal here.

On the 7th of August 1924 an order of *ad interim* stay of the proceedings before the District Judge of Mathura was made by this Court pending the disposal of the present application. Now the application has come up before us for determination as to whether the *ad interim* injunction should continue pending the disposal of the appeal or it should be withdrawn.

The Goswamis, that is, the daughter's sons of Mohan Lal, have appeared through Mr. Jayaswal. He supports the application of Laloo Lal. Manu Lal, who is the applicant in the Mathura Court for the grant of Letters of Administration to him, however, opposes this application. He contends that the application should be made in the Court of the District Judge of Mathura for stay of proceedings under s. 10 of the C. P. C. and that no injunction should be issued against him restraining him from proceeding with his application in the Mathura Court. It is admitted on all hands that the points at issue both in the appeal pending before us and in the proceedings in the Mathura Court are one and the same. The proceeding out of which the appeal to this Court has arisen was started long before the application made by Manu Lal in the Mathura Court. Upon these admitted facts the suit at Mathura cannot proceed and the trial of that suit is barred by s. 10 of the C. P. C. It is true that an application for stay of proceedings under s. 10 of the Code should have been made in the Mathura Court. Upon the facts stated by

the parties an application for the grant of Letters of Administration could be instituted either at Patna or at Mathura, and, as a matter of fact, the proceedings have been taken in both the Courts. This circumstance brings the case within s. 22 of the Code read with s. 23, and the Court can determine in which of the two Courts the proceedings shall proceed. Manu Lal was made a party in the proceedings before the District Judge of Patna and he entered appearance. No objection was, however, made by him as regards the proceedings instituted in the Patna Court or that those proceedings should have been stayed. He quietly went to Mathura and instituted a fresh proceeding and allowed the proceedings at Patna to continue and to be dealt with and determined by the District Judge of Patna. He, therefore, submitted to the jurisdiction of the Patna Court. Having thus submitted to the jurisdiction of the Patna Court he cannot frustrate the appeal in this Court by simultaneously going on with his proceedings in the Mathura Court. It is, therefore, to my mind, obvious that the proceedings at Mathura should not go on until the disposal of the litigation here The Code has carefully avoided the chance of any clash in the decision of two Courts either in the same High Court or in different High Courts with respect to the same point at issue arising between the same parties. When the suits and proceedings are in the Courts subordinate to the same High Court, the matter does not present any difficulty and can be effectively dealt with by that High Court. Difficulty, however, is felt in dealing with such matters when they are pending in Courts subordinate to two High Courts, for one High Court has no control over the Courts subordinate to another High Court. To meet these difficulties the Code has made provision in two sections, *viz.*, ss. 10 and 22. These express provisions are further fortified by the power vested in the Court for issuing injunction against persons who are either within the jurisdiction of the Court or have submitted to its jurisdiction. Therefore the provisions contained in ss. 10 and 22 are supplemented by those contained in O. XXXIX relating to injunctions and to those which lie in the inherent power of the Court. It is certain that in the circumstances of the case the proceedings in the Mathura Court should not go on and be stayed.

The question of procedure then, to my mind, will not at all stand in dealing with the matter. Whereas under s. 10 the party should apply to the Court in which the subsequent suit or proceeding is instituted, under s. 22 this Court has jurisdiction to make an order that the appeal in this Court shall proceed. This order under s. 22 has the effect of stopping the proceedings in the Mathura Court. This has been the view arrived at by me in the case of *Firm Ram Kumar-Sheo Chand Rai* v. *Firm Tula Ram-Nathu Ram* (1) and although this Court will not issue any injunction to Courts subordinate to another High Court yet the order passed by this Court under s. 22 is final; and it will not be open to any other Court in India to dispute it and to allow suits and proceedings to proceed in any other Court than that in which this Court directs. Again, although the Court will not issue any injunction against a person not within its jurisdiction, yet when that person has submitted to the jurisdiction, the Court will in the ends of justice restrain that party from doing anything which it considers is improper and will amount to an abuse of the process of the Court. The reason why an injunction should not issue against a person residing outside the jurisdiction of the Court is that an injunction on a person if disobeyed cannot, in that circumstance, be enforced, but a party to a proceeding pending in this Court or in Courts Subordinate to this Court is amenable to this Court. Manu Lal was a party in the Court below and entered appearance and did not object to the jurisdiction of that Court and therefore he made himself liable *in personam* to this Court: *Vide Amar Kumar Mukherjee* v. *Mr. B. Coventry* (2). Again, he is a respondent in this Court and has entered appearance. Therefore an injunction can issue against him restraining him from proceeding with the suit in the Mathura Court.

It has, however, been contended that an injunction against Manu Lal will not at all interfere with the Mathura Court and that Court in spite of such an injunction can continue the proceedings in that Court. That contingency may not be apprehended. So long as Manu Lal is personally responsible to this Court an injunction against

(1) 56 Ind. Cas. 920; 1 P. L. T. 277 at p. 281; (1920) Pat. 235.

(2) 85 Ind. Cas. 551.

him restraining him from doing any act is a sufficient check upon any proceeding being adopted by him in the Mathura Court.

The case we are told, is not a complicated one, nor is it a heavy case. Most of the papers are in English and will not be requirad to be translated. The appellant is ready to deposit the printing cost which has now been estimated by the office for printing the paper-book. Therefore the preparation of the paper-book can be expedited and so also the hearing of the appeal. The *ad interim* order passed by this Court on the 7th of August 1924 should, therefore, continue until the disposal of the appeal, the hearing of which is directed to be expedited. On behalf of Manu Lal an undertaking has been given that he will not proceed with the proceenings in the Mathura Court if the hearing in this Court is expedited. In the circumstances there will be no order as to costs.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 73 OF 1921.

February 29, 1924.

Present:—Mr. Justice Spencer and Justice Sir Kumaraswami Sastri, KT.

MOLLAYA PADAYACHI AND ANOTHER—DEFENDANTS Nos. 4 AND 5—APPELLANTS

versus

KRISHNASWAMI AIYAR AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1-3 AND 8-10—RESPONDENTS.

Benami *transaction—Purchase-money, source of—Advancement, presumption of—Attestation by real owner—Decree against* benamidar *and real owner—Execution sale—Payment by reversionary heir asserting hostile title—Charge on property—Contract Act (IX of 1872), ss. 69, 70—Transfer of Property Act (IV of 1882), s. 91.*

In cases of alleged *benami* purchases, the source of the purchase-money is a very important criterion for determining the real ownership. [p. 861, col. 1.]

Gopeekristo Gosain v. *Gangapersaud Gosain*, 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20 (P. C.), followed.

There is no presumption of advancement where a husband purchases almost all the property in the name of the wife, more so where there is a second wife and her children left unprovided for. [p 861 col. 2.]

Kerwick v. *Kerwick*, 57 Ind. Cas. 834; 48 C. 269 at p. 274; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 191; 47 I. A. 275; 32 C. L. J. 490; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 10 L. B R. 335 (P. C.), followed.

Per *Kumaraswami Sastri, J.*—Where a purchase is *benami* and monies have to be raised, the person who lends money would require a recital as to ownership, and it is the invariable practice in such cases to get the attestation of the real owner. But attestation does not by itself import consent to, or knowledge of, the contents of a document, and the real owner is not bound by such a recital on account of his attestation. [p. 860, col. 2; p. 861, col. 1.]

Where a person makes a payment in assertion of a hostile title and for the protection of his own interests, in order to save property which he claims to be his from passing out of his hands, the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be re-imbursed [p. 864, col. 2.]

The interest contemplated by s. 69 of the Contract Act is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself. [*ibid.*]

Veeraraghava Aiyar v. *Lakshmana Aiyar*, 18 Ind. Cas. 247; 25 M. L. J. 312; 13 M. L. T. 345, referred to.

Section 70 of the Contract Act has no application where the person making the payment makes it for himself and not for the person against whom the claim for re-imbursement is made. [*ibid.*]

Section 101 of the Transfer of Property Act does not create a security where there was no security before. [*ibid.*]

A person purchased from his own self-acquisitions properties *benami* in the name of his wife. A suit was brought on a pro-note executed by the husband and the wife and a decree was obtained against both of them personally and against their son to the extent of the family properties. In execution of the decree, the properties purchased *benami* were sold. The son, who claimed that the mother, since deceased, was the real owner of the properties and had bequeathed the same to him, executed a mortgage of the properties to the plaintiff who was aware of the *benami* nature of the purchases. With the help of the money advanced by the plaintiff he next applied under O. XXI, r. 89, C. P. C., to set aside the Court sale. This was accordingly done. The father had subsequently also sold portions of the same properties to third persons, for the purpose of discharging other similar joint debts incurred by himself and his deceased wife. In a suit to enforce the mortgage executed by the son, impleading the son, the father and the purchasers from him as parties:

Held, per *Kumaraswami Sastri, J.*—(1) that the son having made a payment in assertion of a hostile title and for the protection of his own interests in order to save property, which he

claimed to be his, from passing out of his hands, the mere fact that the father was benefited would not, if it was found that the son had no title, entitle him to be re-imbursed; [*ibid.*]

(2) that since, however, title to property sold in Court auction vested in the auction-purchaser from the moment of sale even prior to confirmation and, therefore, in the present case title passed out of the real owner and the *benamidar* at the Court sale, the setting aside of that sale must be treated as a re-purchase by the son, and the mortgage to the plaintiff, in so far as the consideration went to set aside the sale, must be treated as money borrowed to re-purchase the properties; [p. 866, col. 1.]

(3) that where property is sold in execution of a decree against the real owner and the *benamidar* re-purchases the property or raises money for the purpose of setting aside the sale, it would be contrary to all principles of equity and justice to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligations to re-pay the money borrowed by the *benamidar* for the purpose of setting aside the sale; [p. 866, col. 2.]

(4) that, therefore, the plaintiff was entitled to a charge on the properties to the extent to which the mortgage-money went to set aside the Court sale; [p. 858, col. 1.]

Per *Spencer, J.*—that the son as reversionary heir of the father was sufficiently interested in the preservation of the property to be entitled to redeem it under s. 91 of the Transfer of Property Act, or to apply to have a Court sale set aside under O. XXI, r. 89, C. P. C., that he was entitled to an equitable lien for the amount of the money so utilised, that he acted neither speculatively nor officiously in paying money that the father as well as himself were bound to pay, and that the plaintiff having obtained an assignment of the son's rights through the suit mortgage-deed, was entitled to recover the amount by way of charge on the redeemed properties [p. 867, col. 2.]

Bhagwan Singh v. *Muhammad Mazhar Ali Khan*, 23 Ind. Cas. 339; 36 A. 272 at p. 276; 12 A. L. J. 395, *Rajah of Pittapur* v. *Secretary of State*, 25 Ind. Cas. 783; 16 M. L. T. 375 at p. 380 and *Narayana Kutti Goundan* v. *Pechiammal*, 15 Ind. Cas. 203; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M. L. J. 364, followed.

Appeal against a decree of the Court of the Subordinate Judge, Cuddalore, in O. S. No. 21 of 1918, dated the 17th November 1920.

Messrs. *C. S. Venkatachariar* and *V. N. Venkata Varadachariar*, for the Appellants.

Messrs. *K. Bhashyam Iyengar*, *P. J. Kuppanna Rao* and *A. Srirangachariar*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—The 4th and 5th defendants are the appellants. The plaintiff sued to recover Rs. 6,669-1-0 with costs and further interest due on a deed of mortgage, dated the 27th of January 1916 executed by the 1st defendant in his favour for Rs. 5,500 with interest at 9 per cent. per annum. It is alleged that the amount was re-payable within the 27th of January 1917 and that, in default of payment, interest at 12 per cent. was chargeable from the date of the bond and was to be added to the principal with annual rests.

The 1st defendant is the son of the 2nd defendant. The case for the plaintiff is that the mortgaged properties belonged to Murugayi, the mother of the 1st defendant and wife of the 2nd defendant, that Murugayi who died on the 7th of January 1916 executed a Will, dated the 2nd of April 1914, whereby she bequeathed the properties to the 1st defendant, that the 1st defendant became the exclusive owner of the properties, that in execution of the decree in O. S. No. 55 of 1914 on the file of the Tanjore Additional Sub-Court which was passed against the 1st and 2nd defendants and the deceased Murugayee in favour of Dandapani Vaithiyan, the properties were brought to sale and purchased by the decree-holder on the 20th of January 1916, that with a view to set aside the sale, the 1st defendant who was the owner of the properties which were sold, executed the plaint mortgage-deed, that the amount advanced by the plaintiff was deposited in Court by the 1st defendant towards the amount due under the decree and the Court sale was set aside on the 1st of February 1916 and that the money advanced on the suit mortgage thus satisfied the decree of Court against the 2nd defendant also and went to set aside the Court sale. The plaintiff states that the 2nd defendant has no interest in the mortgaged properties, that in case the 2nd defendant claims the mortgaged properties as joint properties, the mortgage is binding on him as the 1st defendant was acting as the manager of the family and borrowed the money for preserving the estate and for satisfying the decree against the 2nd defendant, that in any event the 2nd defendant was bound in law to re-imburse the plaintiff to the extent to which he, the 2nd defendent, was benefited by the amount advadnced for the mortgage and that he is liable to pay the plaintiff half the amount deposited in O.

S. No, 55 of 1914 as the decree was personally against the 2nd defendant and his wife Murugayi and against the family properties of the 1st defendant.

The 3rd defendant was made a party as he is a subsequent purchaser from the 1st defendant. Defendants Nos. 4 to 8 were made parties as mortgagees and purchasers from the 2nd defendant. Defendants Nos. 9 and 10 were made parties as they are the sisters of the 1st defendant and live in the first item of the mortgaged properties with the plaintiff's permission.

The 1st defendant filed a written statement admitting the plaintiff's claim and the allegations in the plaint.

The 2nd defendant filed a written statement denying that the properties belonged to his wife, Murugayi, and denying her right to dispose of the properties by Will. He states that she had no funds to purchase the properties, that he went to the Transval, stayed there for several years, earned money and remitted money by post and brought money with him whenever he came to India, that the properties were purchased with his own funds *benami* in the name of his wife and were his exclusive properties and that the plaintiff was well aware that the properties stood in Murugay's name only *benami* and that he was the real owner. He admits that a decree was passed in O. S. No. 55 of 1914 on the file of the Additional Sub-Court, Tanjore, against himself, his wife Murugayi and his son, the 1st defendant, and the suit properties were brought to sale and that a sum of Rs. 4,203-1-4 was paid for setting aside the sale. He states that in any event there was no consideration for the suit-mortgage to the extent of Rs. 1,500. He denies that the properties are the joint properties of himself and his son and states that he is the exclusive owner of the properties and has been managing the same. He denies that he is bound by the mortgage as the 1st defendant was only a volunteer and paid the money to set aside the sale, alleging title hostile to the real owner. He states that he sold item Nos. 2 to 18 for a proper consideration to the 6th defendant, that the 4th defendant purchased those items from the 6th defendant and that the first item was mortgaged by him to the 6th defendant who assigned the mortgage to the 5th defendant. He attacks the sale of the suit properties to the 3rd defendant by the 1st defendant as fraudulent.

The 3rd defendant filed a written statement pleading that as he is not in possession of the suit properties he has not paid the amount due on the mortgage to the plaintiff and that he should not be made liable for costs.

Defendants Nos. 4 and 5 adopt the written statement of the 2nd defendant.

The 6th defendant died pending suit and the 11th and 12th defendants were added as his legal representatives. The 11th defendant filed a written statement stating that he is an unnecessary party to the suit, that he is not the legal representative of the 6th defendant and is not in possession of any assets, that Lakshmanan Chetti the 12th defendant is the legal representative of the 6th defendant, that the 6th defendant died even before the suit and that the suit is not maintainable against him.

The Subordinate Judge while disbelieving the case that the deceased Murugayi had funds of her own and that the suit properties were purchased out of such funds, held that the 2nd defendant, her husband, purchased the properties with his own funds but for the benefit of his wife, Murugayi, and not *benami* in her name, that there was nothing to show that the plaintiff was aware that Murugayi was a *benamidar* and that the 2nd defendant was estopped from setting up the rights of a real owner against the plaintiff. He also held that apart from any question of the purchase being *benami* or of estoppel the mortgage was enforceable against the 2nd defendant on the principle of salvage lien and passed the usual mortgage-decree in favour of the plaintiff as prayed.

Against this decree the 4th and 5th defendants appeal. Their contention is that the evidence shows clearly that the properties were purchased by the 2nd defendant in the name of his wife Murugayi, that the plaintiff was fully aware of the *benami* nature of the purchase, that the 1st defendant executed the mortgage alleging title hostile to the 2nd defendant, his father, and claiming the properties mortgaged as his absolute properties vested in him as legatee under the will of his mother, Murugayi, who was the absolute owner and that

even though a portion of the mortgage-money went to set aside the Court sale, the mortgage would not bind the 2nd defendant or his transferees, the 4th and 5th defendants, as the suit-mortgage was executed by the 1st defendant alleging title hostile to the 2nd defendant and without his consent.

The main questions for determination are whether the purchase of the suit properties by the 2nd defendant was *benami* in the name of his wife Murugayi, whether the plaintiff had notice of the *benami* nature of the transaction, whether the mortgage is binding on the 2nd and the 4th and 5th defendants to the extent to which the mortgage amount went to discharge the amount of the decree in execution of which the properties were sold and whether if the mortgage is not binding, the plaintiff is entitled to a charge to that extent.

It is admitted that the 2nd defendant was not possessed of any ancestral properties. The evidence shows that he was a barber by caste and went to South Africa at least on three occasions. He made money there and either brought money when he visited India or sent money from South Africa to India. The properties purchased by bim consisted of 13¾ *cawnies*; excepting three-fourths of a *cawny* which he purchased in the names of himself and another wife of his, Meenakshi, the remaining lands were purchased in the name of Murugayi.

The case for the plaintiff and the 1st defendant is that Murugayi got monies from her mother; but the evidence which is unreliable has been rightly discredited by the Subordinate Judge. He finds, and I think, rightly on the evidence that the consideration for all the purchases came from the 2nd defendant and that the monies were both brought and sent by him from the Transvaal.

Exhibit M is a sale-deed dated the 18th of September 1891. It is for 10 *cawnies* and the price was Rs. 2,205. The plaintiff's fourth witness, Subbaraya Pandithan, in his cross-examination states that the 2nd defendant returned from Transvaal in Chithrai (April May) of the year *Khara* (1891), and that he was present when the lands were purchased under Ex. M. The 2nd defendant states that he went to Natal stayed there for 12 years, that he opened a barber's shop and then started a Railway hotel and purchased and sold articles on commission, that he returned to India in Chitrai of *Khara* year, that he was earning 50 to 60 sovereigns a month, that on his return to India he brought with him 500 or 600 sovereigns, jewels and a draft for £ 130, that he purchased 10 *cawnies* for Rs. 2,000, odd, that a prior mortgage in favour of one Chakravarthi Ayyangar was discharged out of the purchase-money and that, as he had the intention to go back to Natal, he took the sale-deed in his wife's name so that she may pay the *kist* and manage the lands in his absence. He states that after he returned to India in the years *Khara* he stayed here for about six years and during that period he purchased all these lands to the extent of 13¾ *cawnies*, that after six years he went to South Africa and stayed there for five years and came back to India afterwards, that he remained in India for three years and went back again, that he stayed at the diamond fields of Kimberlay for four years and finally returned to India, that when he returned to India for the first time in *Khara* he was accompanied by his second wife Meenakshi, and six sons and one daughter by her, that she and his wife Murugayi stayed in the same house with him during his stay in India and that with the exception of the three-fourths of a *cawny* purchased in the joint names of himself and Meenakshi all the other properties were purchased in the name of Murugayi. Defendant's second witness Subramania Aiyar who was a Vakil's clerk states that his master Chakravarthy Aiyengar had a mortgage of the land purchased under Ex. M, that the 2nd defendant was present and negotiated the purchase of the land, that he brought the money and gave it into Murugayi's hands to be paid over to the vendors at the time of the registration and that the mortgage (Ex. 23) in favour of his master was redeemed. He states in cross-examination that the 2nd defendant told him that he brought money from Natal and wanted to purchase lands and that, as he was going to Africa, the sale deed was to be taken in his wife's name to enable her to manage the lands. Defendant's third witness Pavadai Padayachi who is one of the vendors under Ex. 17 states that the 2nd defendant concluded the bargain, that he produced a sum of Rs. 2,205 which was paid to the vendors at the Registrar's Office and that with that sum Ex. 23 in favour of Chakravarthy

Aiyengar was redeemed and the mortgage-bond was handed over. There can be little doubt from the evidence that the whole of the consideration for Ex. M was paid by the 2nd defendant with monies which he brought from Natal.

The next document is Ex. O, a mortgage dated the 16th of March 1892 for Rs. 700 executed by Murugayi. The document states that the money was borrowed to purchase lands and make jewels for the daughter of her co-wife, Meenakshi who had been given in marriage to her brother Subbaraya Pariyari. This document is attested by her husband the 2nd defendant. The endorsement on this document shows that the money was received on the 13th and the 14th of February 1893 through one Narayana Nattan who, according to the evidence of D. W. No. 1 is the person to whom the 2nd defendant was remitting monies.

Exhibit 21 is a sale-deed, dated the 21st of April 1892 in favour of the 2nd defendant and his wife Meenakshi for Rs. 212-8-0 and comprises items Nos. 2, 3 and 4 of the plaint schedule.

Exhibit B, dated the 3rd of August 1892 is a lease in favour of Murugayi of the lands purchased under Exs. M and 21, and the fact that the lands purchased both under Exs. M and 21, were covered by the lease supports the evidence of the plaintiff that the lands purchased under Ex. M were purchased by the 2nd defendant *benami* in the name of his wife because he wanted to go away to South Africa and wanted the lands to be managed by his wife.

The evidence shows that Meenakshi, the second wife was the wife who was going with the 2nd defendant to South Africa while Murugayi was the wife who was permanently residing in India and hence the necessity for Exs. M and 21 being taken in the name of Murugayi.

Exhibit J dated the 17th of July 1893 is a sale-deed in the name of Murugayi of a portion of item No. 1 which is the house in which Murugayi, her husband, the 2nd defendant, her co-wife and her son and others were living. The sale is in respect of house, ground and *thottam* for Rs. 650.

Exhibit L, dated the 8th of March 1900 is a sale-deed in favour of Murugayi in respect of house and ground for Rs. 200.

Item No. 1 in the plaint schedule consisted of the two portions purchased under Exs. J. and L. Evidently after the purchase, these items were improved and added to and were converted into one dwelling house in which admittedly all the parties had been living. Plaintiff's 7th witness Subbarama Ayyar states that the house which was built 20 years ago at a cost of Rs. 3,000 will now be worth Rs. 4,000 or Rs. 5,000.

Exhibit C, dated the 21st of July 1896 is a mortgage for Rs. 100 executed by Murugayi. The money is alleged to have been borrowed for her family expenses. The first attesting witness is her husband, the 2nd defendant. This was discharged on the 14th of May 1898.

Exhibit N, dated the 22nd of July 1896 is a sale-deed in favour of Murugayi for Rs. 1,500. The 2nd defendant in his evidence states that he and his wife raised the purchase-money by mortgaging the property to the vendor himself. He states that he borrowed money at Natal from his brother-in-law Sabhapathi Panditham and sent it to Narayana Nattar and the mortgage was discharged. Plaintiff's fourth witness Subbaraya Panditham corroborates the 2nd defendant when he states that the 2nd defendant borrowed monies from Sabapathi Panditham and that Sabapathi Panditham got a decree against the 2nd defendant though he states that he does not know for what purpose the money was borrowed by the 2nd defendant.

Exhibit K-1 is a deed of mortgage, dated the 21st of March 1900 for Rs. 2,500 executed by Murugayi in favour of Narayana Nattar. It recites that a sum of Rs. 2,500 was then due to the mortgagee and that the properties which were mentioned in the mortgage-deed and which the mortgagor says were purchased by her from Krishnaswami Padayachi and others were mortgaged. This deed is attested by Murugayi's husband, the 2nd defendant.

It appears from the mortgage Ex. 12 dated the 7th of September 1912 executed by the 2nd defendant and his wife Murugayi in favour of one Sundarappa Ayyar that a sum of Rs. 4,000 was borrowed to discharge the principal and interest due under the mortgage-deed Ex. K, as appears from the endorsement on Ex. K-1.

Exhibit D is a deed of hypothecation dated the 19th of July 1900 for Rs. 300 executed by Murugayi. It recites that the money was borrowed for the purpose of building a house. This is again attested by her

husband the 2nd defendant and it appears from the endorsement thereon dated the 30th of December 1905 that the principal and interest due on the bond were received from Narayana Nattan to whom the money was sent by the 2nd defendant so that it is clear that this deed was discharged by the 2nd defendant.

Exhibit R-1 is a mortgage-deed dated the 6th of March 1901 for Rs. 2,890 executed by Murugayi to one Thangasami Dikshadar. It recites that out of the consideration a sum of Rs. 1,840 was paid in discharge of a decree passed by the District Munsif's Court of Chidambaram in respect of a temporary loan borrowed by her husband for purchasing some lands, that a sum of Rs. 530 was utilised for paying off a debt on pledge of jewels and that a sum of Rs. 500 was given to a temple for the purpose of lighting a lamp and for charity. The deed also recites that there was a debt of Rs. 2,500 due to Narayana Nattan and two sums of Rs. 200 and Rs. 300 due to others. It winds up by saying that Murugayi and her husband have solemnly assured the mortgagee about the above debts and that she executed the deed and got her husband to attest it. It is attested by 2nd defendant.

Exhibit F, dated the 21st of October 1902 is a sale-certificate in respect of a house site and house which were purchased for Rs. 109 in a Court sale on the 20th of November 1899. The property is a very small one and is said to be 12 feet by 48 feet. Subsequently the house in which the parties were living was built on the site. Exhibits J, L and F refer to the site on which the house was built.

Exhibit G, dated the 18th of December 1902 is a rental agreement in respect of the property so purchased.

Exhibit E, dated the 1st of September 1908 is a usufructutary mortgage for Rs. 100 executed by Murugayi to one Doraiswami Pandithan. It recites that the amount was borrowed for domestic purposes and is attested by the 2nd defendant. The endorsement on the deed shows that it was discharged on the 28th of February 1911.

Exhibit R, dated the 25th of July 1912 is a release deed in favour of Murugayi by the sons of Tangasami Dikshadar the mortgagee under Ex. R-1. It refers to Ex. R-1 and states that the mortgagee under Ex. R-1 had received Rs. 3,990 through Narayana Natta and the payment was endorsed on the deed and that the debt was discharged.

Exhibit 12, dated the 7th of September 1912 is a deed of hypothecation for Rs. 4,000 executed by the 2nd defendant and Murugayi to one Sundarappier. It refers to the mortgage Ex. K-1 in favour of Narayana Nattan and states that the amount was borrowed for discharging the amount due under that deed, and another promissory-note for Rs. 500 and for paying off certain miscellaneous debts to the extent of Rs. 500. It is thus clear that Narayana Nattan's mortgage was discharged by Ex. 12.

Exhibit 13, dated the 27th of January 1913 is a sale of some item of property by the 2nd defendant and Murugayi for Rs. 2,389-4-0. The amount is said to have been required for the purpose of meeting the family expenses, for the marriage of their son, for performing a vow at Thirupathi, for improving and re-building a house and for redeeming jewels.

Exhibit 14 is another sale-deed dated the 27th of January 1913 for Rs. 4,870 executed by the 2nd defendant and Murugayi. It says that the object of the sale was to discharge the debt due to Sundarappier under Ex. 12 and other debts. The recital is that the property was formerly purchased in the name of Murugayi, that it belongs to her and her husband and that it is in their enjoyment.

These are all the documents connected with the plaint properties, and it is clear that almost all the documents are executed by Murugayi and attested by her husband the 2nd defendant or executed by both the 2nd defendant and Murugayi. It is also clear from the evidence that the money for the purchase of the properties was supplied by the 2nd defendant and that where they had to borrow money either for purchasing properties or for family expenses, it was the 2nd defendant that discharged the debts. There is no evidence worth the name to show that Murugayi was ever in a position either to purchase properties or to pay the loans which were raised upon the properties.

Stress was laid down on the fact that the documents recite that the properties belong to Murugayi; but where the purchase is *benami* and monies have to be raised, the person who lends money would require a recital as to ownership and it is the invariable practice in such cases to get the attestation of the real owner, so that if

any question shoud arise subsequently, he may be bound by the attestation. It is the common belief that attestation by the husband or near relation of the executant is evidence of his consent and will bind him; and parties hardly realise the effect of the recent decision of the Privy Council that attestation does not by itself import consent to or knowledge of, the contents of the document.

It is clear that the source of purchase-money is a very important criterion for determining the real ownership. In *Gopeekristo Gosain* v. *Gangapersaud Gosain* (1), it was held by their Lordships of the Privy Council that the test is as to who advanced the purchase-money and that there is no presumption of advancement where property is purchased by a father in the name of his son. In *Moulvie Sayyud Uzhur Ali* v. *Bebee Ultaf Fatima* (2), it was held that the principle of *benami* laid down in *Gopeekrist Gosain* v. *Ganapersaud Gosain* (1) applies equally to Muhammadans and that there is no presumption of advancement by the name of the son being used as purchaser. Their Lordships at page 247* observe: "That the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*, and that, from the purchase by a father, whether Muhammadan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English Law would draw, of an advancement in favour of that son. Again, the mere fact that this property was purchased, not in the sole name of the son, but in the name of the wife as well as of the son affords a strong argument in favour of the hypothesis that it was a *benami* purchase, for there was no such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property; and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in this country."

There being no presumption of advancement, the onus lies on the respondents to show that in purchasing the properties in the name of Murugayi, the 2nd defendant intended that it should be for her benefit. As I have already pointed out, out of the 13¾ *cawnies*, only three-fourths of a *cawny* was purchased by the 2nd defendant in the name of himself and his second wife Meenakshi and the balance of 13 *cawnies* were purchased in the name of his first wife Murugayi. He was thus practically without any property, and this circumstance, I think, strongly militates against the view that the purchase was for her benefit. It is hardly likely that a man in the position of the 2nd defendant would have denuded himself of all his properties with the idea of benefitting his first wife at the expense of himself, his second wife his first wife's son and his second wife's children. I may in this connection refer to the observations of their Lordships of the Privy Council in *Kerwick* v. *Kerwick* (3). After noting the fact that all the properties were in the name of the wife, their Lordships observe:

"If he had been possessed of an uncontrollable passion to bestow upon his wife beneficially every fragment of property he could acquire, to leave himself with nothing to live upon but his salary, and at the same time be burdened with debt and his children being absolutely unprovided for, he could not have gratified that passion more fully than he apparently did, if his wife's case be true."

Their Lordships think that it is impossible to draw a presumption of advancement where almost all the property was purchased in the name of the wife. This is the view taken in cases between Englishmen where the presumption of advancement prevails and it applies *a fortiori* to cases of Hindus where there is no such presumption.

I find it difficult to agree with the Subordinate Judge when he states that the suit properties were purchased by the 2nd defendant for the benefit of his wife and I have no hesitation in coming to the conclusion that the properties were purchased by the 2nd defendant *benami* in the name of his wife and that she had no interest in them.

(1) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20 (P. C.).

(2) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538 (P. C.).

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(3) 57 Ind. Cas. 834; 48 C. 269 at p. 274; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 47 I. A. 275; 32 C. L. J. 490; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 10 L. B. R. 335 (P. C.).

On the 13th of March 1913, the 2nd defendant and his wife Murugayi executed a promissory-note (Ex. 8) for Rs. 600 in favour of Sundarappa Iyer. The consideration is said to have been received for the purpose of paying the amount of the absolute sale-deed obtained on the 12th of March 1913 from one Velayudha Mudali in favour of Murugayi and for domestic purposes. Another promissory-note Ex. 8 (*a*) dated the 7th of April 1913 was executed by the 2nd defendant and his wife for Rs. 1,000 in favour of Sundaram Aiyar. The object is said to be for paying the amount of the sale-deed got on the 3rd of April 1913 from one Kandasami Mudaliar in favour of Murugayi and for the purpose of meeting certain repairing charges.

The 3rd defendant in this suit is the son of Sundarappa Iyer and he was appointed by the plaintiff's father as guardian of plaintiff and executor of his Will. The 3rd defendant's father Sundarappa Iyer filed O. S. No. 184 of 1914 on the file of the District Munsif's Court of Chidambaram on Exs. 8 and 8 (*a*) praying for a personal decree against the 2nd defendant, Murugayi and against the 1st defendant to the extent of the family properties; and he got an attachment before judgment of the properties now in dispute.

The 2nd defendant and his wife Murugayi executed a promissory-note for Rs. 3,434 on the 7th of October 1911 in favour of one Dandapani Vaidiar who filed O. S. No. 48 of 1914 on the file of the Court of the Subordinate Judge of Mayavaram which was transferred to the file of the Temporary Subordinate Judge of Tanjore and numbered there as O. S. No. 55 of 1914 to recover Rs. 4,439-9-0 the principal and interest due under the promissory note. He prayed for a personal decree against Murugayi and her husband, the 2nd defendant herein and the 1st defendant, their son was made a party in order to bind the joint family properties. He applied for attachment before judgment. A decree (Ex. P) was passed on the 22nd of February 1915 for Rs. 4,271-2-0 with costs and further interest against the 2nd defendant herein and Murugayi personally and against the 1st defendant to the extent of the joint family properties. Execution was applied for by Dandapani Vaidiar and the sale of the properties was fixed for the 20th of January 1916. The 2nd defendant herein who was the 1st defendant in that suit filed an application (Ex. Z) under O. XXI, r. 83, C.P.C. praying for a postponement of the sale for six months and for leave to effect a private sale or to mortgage the properties. It was alleged in the affidavit (Ex. Z) that his wife was dead, that the properties were purchased by him *benami* in her name, that there were misunderstandings between himself and his wife and that he was, therefore, not able to raise money to discharge the debts. On the 20th of January 1916 the petition was dismissed as it was not pressed. The properties were brought to sale and sold. The 1st defendant in this suit applied under O. XXI, r. 89, C.P.C. to set aside the sale and paid into Court a sum of Rs. 4,256-15-4 being the balance of the amount due under the decree and the five per cent. of the purchase-money payable to the purchaser. The application is Ex. AA. The affidavit in support of the application is Ex. AA-1. It was filed by the 1st defendant herein who was the 3rd defendant in that suit, and he stated that his mother the 2nd defendant in that suit died, that the properties which belonged to him and his mother were sold in Court auction on the 20th of January 1916 and the plaintiff himself purchased the moveable and immoveable properties and that he had paid the balance due and the five per cent. of the purchase-money and wanted the sale to be set aside. The 2nd defendant herein, after his application (Ex. Z) was dismissed, did nothing. The amount paid into Court to set aside the sale under O. XXI, r. 89, was borrowed from the plaintiff in this suit under Ex. A executed by the 1st defendant herein. The mortgage-deed recites that the properties belonged to his mother Murugayi who purchased and enjoyed them, that he is now in possession and enjoyment of the same and that he has borrowed Rs. 5,500 for the purpose of getting back the properties which had been sold in execution of Dandapani Pandithan's decree. The Subordinate Judge finds that out of the mortgage-money borrowed from the plaintiff a sum of Rs. 4,629-11-4 was paid into Court to get back the properties as appears from Ex. AA-3, and states that the properties which were worth Rs 12,000 were sold in execution of Dandapani's decree and were purchased by Dandapani himself for less than one-fourth of their market-value.

Sundarappa Iyer applied to execute his decree and to bring the properties to sale

which had already been sold in execution of Dandapani's decree. The 1st defendant herein filed Ex. 9 objecting to the sale in execution and stated that the immoveable properties under attachment belonged to his mother, that he got them from her by a Will, that the 2nd defendant herein who was the 1st defendant in that suit had no right to those properties, that they had been sold in execution of the decree in O. S. No. 55 of 1914, that he borrowed Rs. 5,500 and executed a mortgage of the properties on the 27th of January 1916, that out of the sum borrowed, Rs. 4,629-11-4 was paid into Court to set aside that sale and that the properties should be sold subject to that mortgage. Exhibit 3 is the sale proclamation in O. S. No. 184 of 1914, and it states that there was a mortgage over the properties dated the 27th of January 1916 for Rs. 5, 500 in favour of Krishnaswami Aiyar but that it was subsequent to the attachment before judgment It appears from Ex. IV that on the 16th of September 1916 items Nos. 1 to 17 of the sale proclamation were sold to the plaintiff's Vakil in that suit for Rs. 1,012. It appears from Ex. V that the 2nd defendant herein applied to adjourn the sale on the ground that he had arranged to raise money elsewhere but that the 3rd defendant therein who is the present 1st defendant was unwilling to join in the petition and the petition was dismissed and the properties were brought to sale.

On the 12th of October 1916 the present 2nd defendant agreed to sell the properties to Sevagan Chetti the deceased 6th defendant herein. Exhibit I (*a*) dated the 12th of October 1916 recites that the properties were purchased by him *benami* in the name of his wife Murugayi, that the properties were sold in execution of the decree in O. S. No. 184 of 1914 and that he received Rs. 2,400 for the purpose of setting aside the sale. It appears from Ex. II that a sum of Rs. 2,348-0-2 was paid into Court and that the sale was set aside on the 17th of October 1916.

The question, therefore, arises as to how far on these facts the mortgage in favour of the plaintiff is binding on the 5th and 6th defendants and the first question I have to consider is whether the plaintiff Krishnaswami Iyer is a *bona fide* mortgagee from the 1st defendant without notice of the fact that the 1st defendant's mother was only a *benamidar*. The Subordinate Judge finds that the Will, Ex. Y, dated the 2nd of April 1914 executed by the 1st defendant's mother was genuine and valid; so that if the properties belonged to Murugayi or if the plaintiff had advanced the money *bona fide* without knowledge that Murugayi was only a *benamidar*, he would be protected under s. 41 of the Transfer of Property Act. I have already given my reasons for holding that Murugayi was only a *benamidar*.

The next question is whether the plaintiff is a *bona fide* lender without notice. I do not think that the plaintiff is protected under s. 41 of the Transfer of Property Act. I think the evidence shows that the plaintiff must have been aware of the fact that Murugayi could not be the real owner of the properties. Murugayi, her husband, and their children were all living in the house which is one of the items mortgaged to him. The plaintiff in his evidence admits that he knows the 1st and 2nd defendants and that the 1st defendant is the son of the 2nd defendant, and that the 2nd defendant had money dealings with him. He admits that in 1914 he got a transfer of the decree in O. S. No. 98 of 1910 on the file of the Shiyali District Munif's Court in 2nd defendant's favour which had been attached by Dandapani in O. S. No. 55 of 1914. Though he says that he does not remember it, it is clear from Ex XXII (*a*) that he filed a claim and that it was dismissed. He says that when he took Ex. A, though he knew of the existence of the 2nd defendant he did not make any enquiries of him. He also states that he knew that the 3rd defendant's father had attached the properties at the time of his mortgage Ex. A and that he saw all the deeds of sale and mortgage in respect of the properties at the time of the mortgage Ex. A. It is, therefore, clear that the fact that some of the deeds were jointly executed by Murugayi and her husband the 2nd defendant and that her husband attested almost all the documents must have put the plaintiff on notice; and the absence of any enquiry by him from the 2nd defendant who was living in one of the houses mortgaged shows that the plaintiff had constructive notice, because if he had pursued the matter further and made enquiries from the 2nd defendant he would have been told all the facts. It is also clear that he had notice both of Dandapani's suit and of Sundarappa Iyer's suit. He says that he paid the money under Ex. A to set aside the Court sale. If he had made enquiries,

he would have known that there were disputes between the father and the son as regards the title to the properties. It is clear from the evidence of the plaintiff's 7th witness Subbarama Iyer who admittedly negotiated the mortgage Ex. A that he must have known that the 2nd defendant was asserting that he was the real owner. He admits that he was the writer of Ex. XV, dated the 27th of January 1914, where it is distinctly stated that the properties mortgaged were purchased by the 2nd defendant *benami* in the name of his wife Murugayi. Plaintiff's 8th witness Ramachandra Iyer (3rd defendant) admits that he was an executor appointed under the plaintiff's father's Will and that he knew the 2nd defendant from 1912. He states that he did not know Murugayi before Ex. XII and how she acquired the properties. I find it difficult on the evidence to hold that the plaintiff when he lent the money for the purpose of paying it into Court to set aside the sale in execution of Dandapani's decree was ignorant of all that had happened before and lent the money *bona fide* believing that Murugayi was the real owner and that her husband the 2nd defendant had or claimed no interest in the properties.

The question remains as to the relief, if any, to which the plaintiff is entitled on these facts. There can be little doubt on the evidence that the properties mortgaged were sold in execution of a decree to which the 1st and 2nd defendants were parties and that but for the act of the 1st defendant in raising money from the plaintiff and setting aside the Court sale under O. XXI, r. 89, C. P. C., the properties would have been lost to the 2nd defendant who on the evidence is the real owner of the properties. The 2nd defendant wanted an order postponing the sale and permission to raise monies to pay off the decree amount but his application was dismissed as the 1st defendant did not concur. He then did nothing and the 1st defendant claiming to be the real owner of the properties applied to set aside the sale under O. XXI, r. 89, C. P. C., and paid the amount due under the decree into Court. The result has been that not only has the liability of the 2nd defendant under the decree been satisfied but the 2nd defendant and the transferees from him are now in a position to put forward their claim to the properties on the ground that Murugayi the mother of the 1st defendant was only a *benamidar*.

Reliance was placed by the respondent's Vakil on ss. 69 and 70 of the Contract Act but these sections would not apply. It is clear that the payment into Court under O. XXI, r. 89 by the 1st defendant was not made for the 2nd defendant but was made in the assertion of a hostile title and for the protection of the interests of the person making the payment. The mere fact that the 2nd defendant was benefited will not be sufficient.

In *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (4), their Lordships of the Privy Council observe: "The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied to re-pay. It is well-settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debt. Still less will the action lie when the money has been paid, against the will of the party for whose use it is supposed to have been paid."

It is thus clear that where a person makes a payment in the assertion of a hostile title and for the protection of his own interests in order to save property which he claims to be his from passing out of his hands the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be re-imbursed. In *Veeraraghava Aiyar* v. *Lakshmana Aiyar* (5), it was held that the interest contemplated by s. 69 of the Indian Contract Act is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself, that s. 70 of the Indian Contract Act has no application where the person making the payment makes it for himself and not for the person against whom the claim for re-imbursement is made, and that s. 101 of the Transfer of Property Act does not create a security where there was no security before. In *Sri Sri Sri Gajapathi Kristna Chendra Deo Garu* v. *Srinivasa Charlu* (6), it was held that the test to bring the case under s. 70 of the Indian Contract Act is that a person should have in fact enjoyed

(4) 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208; 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 136 (P. C.).

(5) 18 Ind. Cas. 247; 25 M. L. J. 312; 13 M. L. T. 345.

(6) 20 Ind. Cas. 445; 38 M. 235; 14 M. L. T. 20; 25 M. L. J. 433; (1914) M. W. N. 99.

the benefit by accepting or adopting without objecting to it and that it is not necessary that before the act is done by the other party an option must have been given to the person sought to be made liable of accepting or declining the benefit before the benefit is given. All the authorities on the subject have been reviewed by the learned Judges. The scope of s. 70 was also considered in *Gopalasamy Iyenyar* v. *Nummachi Reddiar* (7). In that case the plaintiff sued to recover monies paid by him for discharging encumbrances on certain properties purchased by him. The sale to the plaintiff was held not to be binding and was set aside against the defendants in the previous proceedings. Spencer, J., after a review of the authorities held that the plaintiff was entitled to recover under ss 69 and 70 of the Indian Contract Act monies paid by him for discharging encumbrances but that he was not entitled to a charge for the same. Devadoss, J., held that the plaintiff was not entitled to recover as he was a mere speculating volunteer and as he was aware that the sale to him conveyed no title. I agree with the view taken by Spencer, J., but it will not help the plaintiff in the present case. Unless there is a charge in his favour he would have no relief against the 5th and 6th defendants who are purchasers from the 2nd defendant.

The 1st defendant may have a claim for contribution as the decree was a joint decree but this again will give him no charge.

If ss. 69 and 70 do not apply, the mere fact that a person setting up a hostile title discharges encumbrances which the other party was liable to discharge would of itself give no right. In *Ammani Ammal* v. *Ramaswami Naidu* (8), it was held that where the guardian of a minor purports to sell the minor's property as the guardian's own property the mere fact that part of the consideration for the sale went to discharge debts binding on the minor would not cast on him an obligation of re-paying the debts found to be binding on him and discharged out of the purchase-money. In *Balwant Singh* v. *Rockwell Clancy* (9), it was held that where a person who was the manager of an undivided family mortgaged property as if he was the full owner denying the right of the junior members of the family, the alienee cannot claim to be paid back the portion of the mortgage money which went to discharge the debts binding on the junior members of the family.

Reference has been made by Mr. Bhashyam Aiyangar for the respondents to *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (10), where their Lordships of the Privy Council held that where a person lent money to the nominal purchaser of a property who was the agent of the real purchaser in order to purchase the property, there was a charge on the purchase-money so advanced. This decision was considered in *Royzuddi Sheik* v. *Kali Nath Mookerjee* (11) and it was held that where a person who held a tenure *benami* for another executed a bond in favour of the landlord who knew that the person executing the bond was only a *benamidar* for arrears of rent it would not affect the tenure and that the landlord suing on the bond was not entitled to claim a charge on the land under the Bengal Tenancy Act. The learned Judges distinguished this case on the ground that there were no such equitable considerations in this case as those that arose in *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (10).

The facts of the present case, however, can be distinguished from the cases I have referred to and, in my opinion, entitle the plaintiff to a charge for the sum which went to set aside the sale under O. XXI, r. 89. The decree was a joint decree against the 1st and 2nd defendants and the deceased Murugayi. It was on a promissory-note executed by the 2nd defendant, the real owner and Murugayi the *benamidar*. The sale was a sale that will bind both the real owner and the *benamidar*, and if the sale was not set aside the title of the real owner would have been extinguished because the judgment-debtors were the *benamidar* and the real owner and whether the properties belonged to him or to Murugayi the purchaser would have got an absolutely good title.

It is clear that under the C. P. C. of 1908 title vests in the auction-purchaser from the moment of sale and that no confirmation is necessary. I need only

(7) 74 Ind. Cas. 416; 17 L. W. 254; (1923) A. I. R. (M.) 392.

(8) 51 Ind. Cas. 57; 37 M. L. J. 113; 10 L. W. 75; (1919) M. W. N. 866.

(9) 14 Ind. Cas. 629; 34 A. 296; (1919) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).

(10) 15 A. 304; 20 I. A. 108; 6 Sar. P. C. J. 7; 17 Ind. Jur. 320; 7 Ind. Dec. (N. S.) 911 (P. C.).

(11) 33 C. 985; 4 C. L. J. 219.

refer to the decision of their Lordships of the Privy Council in *Bhawani Kumar* v. *Mathura Prasad Singh* (12), where it was held that a sale in execution took effect from the actual date of the sale and not from the date of confirmation. A similar view was taken by a Full Bench of this Court in *Annavajhula Venkatachellamayya Garu* v. *Ramagirjee Neelakanta Girjee* (13).

As, therefore, title passed out of the real owner and the *benamidar* at the Court sale, the setting aside of that Court sale by the 1st defendant by payment of money into Court must be treated as a re-purchase by the 1st defendant and the mortgage to the plaintiff in so far as the consideration went to set aside the sale must be treated as money borrowed to re-purchase the properties. In *Malireddi Ayyareddi* v. *Adusumilli Gopalakrishnayya* (14) their Lordships of the Privy Council treated money paid by a puisne encumbracer to discharge a mortgage and to stave off proceedings being taken to bring the mortgaged properties to sale as purchase-money. It is also clear, that a *benamidar* is an agent or trustee for the real owner. In *Gur Narayan* v. *Sheo Lal Singh* (15), it was held that a *benamidar* represents the real owner and so far as their relative legal position is concerned, is in the position of a mere trustee for him. Their Lordships of the Privy Council observe: "As already observed, the *benamidar* has no beneficial interest in the property or business that stands in his name, he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him."

In the present case the properties were sold in execution of the decree against the real owner and the *benamidar* and there was no misconduct or default by the *benamidar* which led to the sale.

It seems to me that where a person in the position of an agent or trustee repudiates his character and re-purchases properties in his own name it is open to the real owner to treat such repudiation as a nullity and to claim that the properties are held by the *benamidar* in trust for him and the *benamidar* cannot treat the re-purchase as for his own benefit. But at the same time I can find no authority for holding that the real owner can get the properties free from the obligation to pay the money that was the consideration for the re-purchase. Section 62 of the Trusts Act which deals with wrongful purchase by a trustee states that the beneficiary if he wants to have the property so purchased declared subject to the trust or re-transferred by the trustee should re-pay the purchase-money paid by the trustee with interest. Section 90 which deals with advantages gained by a qualified owner similarly makes the holding of the advantage to be for the benefit of the other party but subject to re-payment of expenses properly incurred. It is obvious that but for the raising of the money on the mortgage to the plaintiff the properties would have been legally and effectively lost to the real owner. Applying, therefore, the law as regards purchase by agents or trustees of property which the principal or *cestui que trust* can claim the advantage of, no case has been referred to us which decides that because the re-purchase was made by the agent or trustee in his own name it passed free of any obligation created on the property for the purpose of meeting the purchase-money in cases where the original sale was not brought about by any default of the agent or trustee and would be binding on the *castui que trust*.

Where property is sold in execution of a decree against the real owner and the *benamidar* re-purchases the property or raises money for the purpose of setting aside the sale it seems to me to be contrary to all principles of equity and justice to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligations to re-pay the money borrowed by the *benamidar* for the purpose of setting aside the sale. In the present case it is clear that the sale proclamation in the decree to pay off which the 2nd defendant alienated the properties to the 5th and 6th defendants distinctly states that the Court sale was subject to the mortgage in favour of the plaintiff and any enquiry which

(12) 16 Ind. Cas. 210; 40 C. 82; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

(13) 43 Ind. Cas. 685; 41 M. 474; 23 M. L. T. 9; 34 M. L. J. 156; 7 L. W. 179; (1918) M. W. N. 121.

(14) 79 Ind. Cas. 592; 46 M. L. J. 164; 22 A. L. J. 45; (1924) A. I. R. (P. C.) 36; 19 L. W. 215; 26 Bom. L. R. 201; 34 M. L. T. 1; 2 P. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C L. J. 204; 47 M. 190; 28 C. W. N. 1025 (P. C.).

(15) 49 Ind. Cas. 1; 36 M. L. J. 68; 17 A. L. J. 66; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566 (P. C.).

the 5th and 6th defendants ought to have made would have shown that the mortgage to the plaintiff was to set aside the sale under O. XXI, r. 89 in the other suit. But even if they had no notice it is clear from *Srinivasa Raghava Iyengar* v. *Ranganatha Iyengar* (16) that where there is a charge on immoveable property a purchaser of the immoveable property although without notice of the charge takes it only subject to the charge. I think that the plaintiff in the present case is entitled to a charge for Rs. 4,629-11-4. If he is entitled to a charge it is clear that that charge would bind the alienee from the 2nd defendant. I think the plaintiff is entitled to a mortgage-decree for Rs. 4,629-11-4 with costs and interest at six per cent. from the date of plaint to date of payment. I would modify the decree of the Subordinate Judge accordingly. The parties will pay and receive proportionate costs throughout. Time for redemption three months from this date.

Spencer, J.—I agree with my learned brother that on the evidence the 2nd defendant was the real owner of the properties which were purchased with his money *benami* in the name of his wife Murugayi and of items Nos. 2, 3 and 4 which were purchased in the name of himself and his wife Meenakshi; and I think that the fact that the purchases in Murugayi's name were not of one or two items but of the greater part of 2nd defendant's acquisitions negatives the theory of advancement: [*Cf. Kerwick* v. *Kerwick* (3)].

I do not find any justification for the learned Subordinate Judge's opinion that the 2nd defendant grossly exaggerated his earnings in South Africa when he spoke of them as amounting to £ 50 or £ 60 a month. He ran a shaving saloon and opened a Railway Hotel during the height of the gold boom in Natal and the Rand and may easily have found those ventures very remunerative.

The circumstance that he mortgaged some of the lands that he had purchased for the occasion of his daughter's marriage does not in the least disprove his story of the manner in which he earned the capital that he invested in land.

As regards the plea of estoppel, there is evidence that the 2nd defendant transferred a decree to plaintiff (Ex. XXII) and the plaintiff preferred a claim petition when the decree was attached before judgment upon Dandapani Vaithiyan's suit and it was dismissed (*Vide* Ex. XXII (*a*)). The plaintiff must have been aware of the circumstances of 2nd defendant's family, as it appears from his admissions in the witness-box, and there can be no estoppel in favour of a party who knows the truth.

The mortgage-suit must, therefore, fail except in respect of a sum of Rs. 4,629-11-4 which went to pay off the sale of the properties in favour of Dandapani. The 1st defendant, as reversionary heir of 2nd defendant, was sufficiently interested in the preservation of the property to be entitled to redeem it under s. 91 of the Transfer of Property Act, or to apply to have a Court sale set aside under O. XXI, r. 89, C. P. C. He was entitled to an equitable lien for the amount of the money so utilised [see observations in *Bhagwan Singh* v. *Muhammad Mazhar Ali Khan* (17) and *Rajah of Pittapur* v. *Secretary of State* (18) and s. 32 of the Indian Trusts Act.] He acted neither speculatively nor officiously in paying money that 2nd defendant was bound as well as himself to pay. The plaintiff, having obtained an assignment of 1st defendant's rights through the suit mortgage-deed (Ex. A) is entitled to recover the amount by way of charge on the redeemed properties [*vide Narayana Kutti Goundan* v. *Pechiammal* (19)]. There is no bar of limitation here, as there was in *Gopalasamy Iyengar* v. *Nummachi Reddiar* (7), as the present suit has been instituted on 19th April 1918 and the sale was set aside on 31st January 1916. I agree with the modification of the lower Court's decree proposed by my learned brother.

V. N. V.

N. H. *Decree modified.*

(16) 51 Ind. Cas 963; 36 M. L. J. 618; 25 M. L. T. 347.

(17) 23 Ind. Cas. 339; 36 A. 272 at p. 276; 12 A. L. J. 394.

(18) 25 Ind. Cas. 783; 16 M. L. T. 375 at p. 380.

(19) 15 Ind. Cas. 206; 36 M. 420; 11 M. L. T. 174; (1912) M. W. N. N. 353; 22 M. L. J. 364.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1118 OF 1924.
July 31, 1924.
Present:—Mr. Justice Sulaiman.
AMBIKA PRASAD—PLAINTIFF—APPELLANT
versus
MADHO PRASAD—DEFENDANT—RESPONDENT.

Hindu Law—Female owner, alienation by—Payment of secured debts.

Under the Hindu Law a female owner who represents the whole estate for the time being is bound to manage it to the best of her ability. She must be allowed reasonable latitude in the exercise of her powers provided she does not act unfairly towards the reversioners. So long as there are outstanding debts which are a charge on the estate and which bind the estate and which cannot be got rid of by the reversioners without payment, it is her discretion to decide whether she should pay them off or not. It is not incumbent on a transferee from her to establish that some dire consequences would have ensued if these debts had not been discharged. [p. 868, col. 2.]

Bandhu Ram v. *Ram Kishun Sonar*, 73 Ind. Cas. 1010; 21 A. L. J. 354; (1923) A. I. R. (A.) 535, distinguished.

Second appeal against a decree of the Subordinate Judge, Mirzapur, dated the 11th April 1924.

Mr. *Shambhu Nath Chaube*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit brought by a grandson to set aside a sale-deed executed by his deceased mother who held the property as the only daughter. The only question before the Courts below was whether there was legal necessity and justification for the sale-deed. Both the Courts have found that this was so and accordingly dismissed it. On the findings of the lower Appellate Court the plaintiff's mother executed the sale-deed in order to pay off a debt which had been raised on the property by her own father, who was the last male owner of the estate, and to pay off certain debts previously raised by her for the purpose of maintaining and supporting the present plaintiff himself and for the purchase of seeds, etc., for needs which have been found to constitute legal necessity. In my opinion the findings of the lower Appellate Court really dispose of the appeal completely.

It is, however, urged on behalf of the appellant that the findings are insufficient inasmuch as there is no finding that there was *pressing necessity*. It is urged that the previous debts were debts on mortgages with possession and there is no finding that the mortgagee was demanding payment or that there was any urgency about their discharge.

Reliance has been placed on the case of *Bandhu Ram* v. *Ram Kishun Sonar* (1). It is to be noted that in that case it was the father (who did not represent the whole estate for the time being) who had executed certain sale-deeds in lieu of a consideration, the bulk of which formed a mortgage-debt which was not to fall due till long after the sale-deed. The payment was thus premature. On the other hand in the present case it was the Hindu daughter, who represented the entire estate for the time being, who thought it necessary to discharge these old debts which were due. The payments were in no sense premature. It seems to me that a female owner as she represents the whole estate for the time being is bound to manage it to the best of her ability. She must, therefore, be allowed reasonable latitude in the exercise of her powers, provided she does not act unfairly towards the reversioners. So long as there are outstanding debts which are a charge on the estate and which bind the estate and which cannot be got rid of by the reversioners without payment, it is her discretion to decide whether she should pay them off or not. I do not think that it is further incumbent on the transferee to establish that some dire consequences would have ensued if those debts had not been discharged.

I accordingly dismiss this appeal under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

(1) 73 Ind. Cas. 1010; 21 A. L. J. 354; (1923) A. I. R. (A.) 535.

MADRAS HIGH COURT.

CIVIL APPEAL No. 212 OF 1922.
July 9, 1924.
Present:—Mr. Justice Ramesam and Mr. Justice Reilly.
PARIGI VENKOBACHARLU—DEFENDANT No. 1—APPELLANT
versus
SAMJI RADHABAYAMMA AND OTHERS—DEFENDANTS NOS. 2 AND 3 AND PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96—Findings neither implied nor embodied in decree—Appeal by successful party, whether lies.

Findings which are neither necessarily implied nor embodied in the decree have no operative force and do not constitute *res judicata* between the parties and a successful party cannot appeal merely against such findings. [p. 869, col. 1.]

Where a suit for partition was dismissed but findings were recorded on certain issues raised between the defendants *inter se*:

Held, that an appeal by one of the defendants against such findings was incompetent. [p. 870, col. 1.]

Midnapur Zamindary Co., Ltd. v. *Kumar Naresh Narayan Roy*, 80 Ind. Cas. 827; 47 M. L. J. 23; (1924) A. I. R. (P. C.) 144; 26 Bom. L. R. 651; 51 C. 631; 35 M. L. J. 169; (1924) M. W. N. 723; 29 C. W. N 34; 20 L. W. 770; 51 I. A. 293; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76 (P. C.), *Midnapur Zemindari Co., Ltd.* v. *Naresh Narayan Roy*, 64 Ind. Cas. 231; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241; 48 I. A. 49 (P. C.), relied on.

Ranganatham Chetty v. *Lakshmu Ammal*, 21 Ind. Cas. 15; 25 M. L. J 379; 14 M. L. T. 189; (1913) M. W. N. 690, *Rama Krishna Naidu* v. *Krishnasami Naidu*, 52 Ind. Cas. 34; 9 L. W. 180; (1919) M. W. N. 7; 25 M. L. T. 88; 36 M. L. J. 641 and *Muthu Pillai* v. *Veda Vysa Chariar*, 60 Ind. Cas. 397; 12 L. W. 277, distinguished.

Appeal against a decree of the Court of the Subordinate Judge, Anantapur, in O. S. No. 6 of 1920 (O. S. No. 51 of 1918 on the file of the District Court of Bellary).

Messrs. *L. A. Govindaraghava Iyer* and *P. S. Ramachandra Iyer*, for the Appellant.

The Advocate-General and Mr. *K. S. Sankara Iyer*, for the Respondents.

JUDGMENT.—The 1st defendant is the appellant in this appeal. The appeal relates to findings on certain issues which were raised as between 1st defendant on the one hand and 2nd and 3rd defendants on the other. The plaintiff sued for partition and the suit was dismissed. The Advocate-General appearing for defendants Nos. 2 and 3 raises a preliminary objection that no appeal lies. He argues that the findings now complained against by the appellant are not necessarily implied in the decree nor are they embodied in the decree. They have no operative force. He argues that they will not be *res judicata* and the appellant has no right to appeal against such findings when the decree is a decree dismissing the suit.

The learned Vakil for the appellant refers to the cases in *Ranganatham Chetty* v. *Lakshmu Ammal* (1) *Rama Krishna Naidu* v. *Krishnasami Naidu* (2) and *Muthu Pillai* v. *Veda Vysa Chariar* (3). In the first of these cases, the decision in the first suit on a point arising between the defendants was necessary for the dismissal of the plaintiff's suit. The matter was, therefore, *res judicata* in the later suit and the defendant (in the first suit) against whom the Court decided ought to have appealed. This decision does not help the appellent except to this extent, that, for an appeal to lie, it is not necessary that the finding should be actually embodied in the decree. In the present case, the Issue No. 7 could well have been left undecided, by the Sub-Judge, if he so chose, and he could have dismissed the plaintiff's suit. The decision on the genuineness of the Will is not necessary for the dismissal of the plaintiff's claim. The fact that the Sub-Judge refused to expunge the issues has really no bearing on the matter. At the time he decided to retain it, it was impossible to say how the suit would have ended. We think the Sub-Judge disallowed the costs of the 1st defendant, because he thought he instigated the suit and not because of the findings on the issues. The case in *Rama Krishna Naidu* v. *Krishnasami Naidu* (2) contains observations about the application of *Run Bahadur Singh* v. *Lucho Koer* (4) which are opposed to the view of this High Court in other cases, *e. g.*, *Kelu Nambiar* v. *Chathu Nambiar* (5). Whatever difficulties there may be in reconciling *Rama Krishna Naidu* v. *Krishnasami Naidu* (2), with the latter case in which it was held that where, the decision is one based on a finding not necessary for the decision of the suit, the finding is not *res judicata*, and in applying it to a case between plaintiff and defendant, those difficulties do not present themselves in this case which is a case of co-defendants. It may be that the case in *Run Bahadur Singh* v. *Lucho Koer* (4) and *Krishna Behari Roy* v. *Banwari Lall Roy* (6) can be reconciled not on the ground suggested by Sadasiva Iyer, J., in *Rama Krishna Naidu* v. *Krishnasami Naidu* (2) in that *Run Bahadur Singh* v. *Lucho Koer* (4) should be confined to a case where the finding is contradictory to the final decree

(1) 21 Ind. Cas. 15; 25 M. L. J. 379; 14 M. L. T. 189; (1913) M. W. N. 690.

(2) 52 Ind. Cas. 34; 9 L. W. 180; (1919) M. W. N. 7; 25 M. L. T. 88; 36 M. L. J. 641.

(3) 60 Ind. Cas. 397; 12 L. W. 277.

(4) 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. s.) 960 (P. C.).

(5) 52 Ind. Cas. 258; 9 L. W. 84; 25 M. L. T. 66; (1919) M. W. N. 34.

(6) 1 C. 144; 25 W. R. 1; 2 I. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. s.) 93 (P. C.).

in the case, but on the ground that in *Krishna Behari Roy* v. *Banwari Lall Roy*, (6), an appeal and a second appeal were preferred against the finding, argued without any objection and the appellant having chosen to insist on a decision is bound by it. This view is supported by *Midnapur Zamindary Co., Ltd.* v. *Kumar Naresh Narayan Roy*, (7) and *Midnapur Zemindari Co., Ltd.* v. *Naresh Narayan Roy* (8), where the Privy Council observe that the findings in the earlier suit would not be *res judicata*. In the present case, the matter is stronger for the appellant as the finding is between co-defendants. In *Muthu Pillai* v. *Veda Vysa Chariar* (3), Sadasiva Iyer, J., held that the matter was *res judicata* because there was an appeal against the finding in the first case. It was not between co-defendants.

We are, therefore, of opinion that there is no decree against the 1st defendant—either express or implied—against which it is his duty to appeal and the appeal is, therefore, incompetent. On this ground we dismiss the appeal with costs on the one-fourth scale as no notice of objection was given by the respondent subject to the minimum rule.

V. N. V.
Z. K. *Appeal dismissed.*

(7) 80 Ind. Cas. 827; 47 M. L. J. 23; (1924) A. I. R. (P. C.) 144; 26 Bom. L. R. 651; 51 C. 631; 35 M. L. J. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; 51 I. A. 293; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76 (P. C.).

(8) 64 Ind. Cas. 231; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241; 48 I. A. 49 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 345 OF 1924.
July 2, 1924.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

RAJANI KANTA BAG—PLAINTIFF—PETITIONER
versus
RAJA BALA DASI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Court Fees Act (VII of 1870), Sch. II, Art. 17 (6)—Suits Valuation Act (VII of 1887), s. 8—Partition suit—Jurisdiction, value for purposes of, how determined—Interlocutory order—Revision—High Court, interference by.

Ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not merely the subject-matter of the share which is to be partitioned. It is the entire value of the property which determines jurisdiction and not the value of the share which the plaintiff claims in the property. The mere fact that in a suit for partition a question as to the title of the plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to the suit being one for partition. In such a suit the plaintiff may be liable to pay *ad valorem* Court-fees upon the value of the share that he claims, but the suit will still be one for partition and the jurisdiction of the Court would be determined by the value of the entire property which is sought to be partitioned. [p. 871, cols. 1 & 2; p. 872, col. 1.]

In exceptional cases the High Court has jurisdiction to interfere in revision with interlocutory orders. [p. 872, col. 2.]

A Judge cannot assume as a matter of law that which in fact has no existence in law and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of a Statute deprive himself of the jurisdiction which properly belongs to him and if he refuses jurisdiction in such a case the High Court may interfere in revision and set the matter right. [*ibid.*]

Case-law referred to.

Rule against an order of the Court of the Additional District Judge, Howrah, dated the 3rd March 1924, in Miscellaneous Appeal No. 6 of 1924, affirming that of the Subordinate Judge, Howrah, dated the 5th January 1924, in Title Suit No. 66 of 1923.

Babus *Mohendra Nath Roy* and *Apurba Charan Mukerji*, for the Petitioner.

Babu *Baranashi Basi Mukherji*, for the Opposite Party.

JUDGMENT.

Chakravarti, J.—This Rule was obtained by the plaintiff calling on the defendants to show cause why an order of the Subordinate Judge of Howrah, dated the 5th of January 1924, affirmed in appeal by the District Judge on the 3rd March 1924 should not be set aside or any other order should not be passed by this Court as to this Court may seem fit. The facts out of which this application arises are these.

The plaintiff in the plaint filed by him alleged that he was entitled to a 4-annas share of the family properties along with some of the defendants. The plaintiff further alleged that he was in possession but that a cloud had been thrown upon his title on account of a certain suit previously instituted and also on account of an erroneous record in the Record of Rights. The plaintiff on establishment of his title prayed for partition of the family properties which he valued at Rs. 2,500. The plaintiff paid a Court-fee of Rs. 20 for partition and also paid *ad valorem* Court-fee upon

the 4-annas share of the property under partition. It appears that the defendants objected to the trial of the suit by a Subordinate Judge on the ground that the value of the suit both for jurisdiction and for Court-fees was, under s. 8 of the Suits Valuation Act, triable by a Munsif and not by a Subordinate Judge. The learned Subordinate Judge gave effect to that contention of the defendants and directed that the plaint be returned to be filed in the proper Court. There was an appeal by the plaintiff but on appeal the order of the Subordinate Judge was upheld. Then the plaintiff moved this Court for revision of the order. It was contended by the learned Vakil for the petitioner that as this was a suit for partition the jurisdiction of the Court should be determined by the value of the entire property and not by the value of the share claimed in the suit. It is quite clear that ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not the subject-matter of the share which is to be partitioned. It is not necessary to quote many cases on this point. The case of *Bidhata Rai* v. *Ram Chariter Rai* (1), the case of *Kirty Churn Mitter* v. *Aunath Nath Deb* (2) and the case of *Lala Bhagwat Sahai* v. *Rai Pashupati Nath Bose* (3) are authorities which show that it is the entire value of the property which determines jurisdiction and not of the share which the plaintiff claims in the property. Now if it were a simple suit for partition there could be no question that the suit is triable in the present case by the Subordinate Judge and more specially so, as the plaint as it was presented by the plaintiff contained a clear statement that the plaintiff was in possession of the property. But it appears in the present case, on the objection of the defendants a question was raised as to whether it was a simple suit for partition or whether it was a suit really for a declaration of the plaintiff's title and also his rights to joint possession and then a suit for partition when such title and possession are established. The mere fact that in a suit for partition a question as to the title of the plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to its being a partition suit. In the case of *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (4), it was held, to quote the words of their Lordships: "It may be that to decide the question, what property is in the possession of one member as a member of a joint family, other questions will have to be tried; but if the plaintiff is entitled to have the property partitioned upon a ten-rupee stamp, the fact that the enquiry will be a long and difficult one does not affect the question of the stamp that will have to be paid for it". But it seems to us that in the present case, the plaintiff had to establish his title and had to establish his right to joint possession, which was denied before he could seek partition of the property in suit. In that case the position would be as was laid down by their Lordships in the case of *Kirty Churn Mitter* v. *Aunath Nath Deb* (2) that the plaintiff would be bound to pay *ad valorem* Court-fee upon the value of the share that he claimed. Sir Richard Garth, C. J., in delivering the judgment of the Court said as follows: "If the plaintiff's suit had been to recover possession of, or establish his title to, the share which he claims in the property, he must have paid an *ad valorem* stamp-fee upon the value of that share. But, as I understand, he is already in possession of his share, and all that he wants is, to obtain a partition, which is merely, as explained by the learned Judges in the case of *Rajendro Lall Gossami* v. *Shama Churn Lahori* (5) to 'change the form of his enjoyment' of the property, or, in other words to obtain a divided instead of an undivided share." Here as I have already stated the suit as originally framed was one in which the plaintiff asserted that he was in possession of the property. Therefore the plaint as framed, was clearly one for partition and was unquestionably triable by the Subordinate Judge. It was on the defendant's plea that the plaintiff was not in possession and that it was really an attempt to establish title and then to obtain possession by partition, that the plaintiff has paid Court-fee *ad valorem* on the value of his share. Therefore it seems to us that so far as the Court-fees are concerned all that could possibly be demanded has been paid by the plaintiff. Then a

(1) 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33.
(2) 8 C. 757; 11 C. L. R. 95; 4 Ind. Dec. (N. S.) 488.
(3) 10 C. W. N. 564; 3 C. L. J. 257.
(4) 20 C. 762 at p. 765; 10 Ind. Dec. (N. S.) 514.
(5) 4 C. L. R. 417; 5 C. 188; 4 Ind. Jur. 573; 2 Shome L. R. 209; 2 Ind. Dec. (N. S.) 730.

question arises whether the case is to be tried by the Subordinate Judge or by the Munsif. In our opinion, the Munsif would have no jurisdiction to entertain the suit so far as the claim for partition is concerned. It has never been doubted that a plaintiff can, in a partition suit, if necessary, establish his title and his right to joint possession and then if his title is good, demand in the same suit possession, not joint possession but possession by partition. If this is so, the jurisdiction of the Court would be determined by the value of the entire property which is sought to be partitioned. It was contended by the learned Vakil showing cause as has also been held by the Courts below that where an *ad valorem* Court-fee is paid under Sch. II, Art. 17, cl. 6 of the Court Fees Act, the jurisdiction of the Court according to the Civil Suits Valuation Act, s. 8, would be the same as the valuation for the Court-fees. That, undoubtedly, would be so, where the suit is of a simple character and of the character contemplated by that Article of the Court Fees Act. But where the suit is not a simple suit contemplated by that Article but is a suit for partition then the Article applicable would be Art. 17, cl. (6). Therefore, in a case like this, in our opinion, s. 8 of the Suits Valuation Act has no application. We think, therefore, that the learned Subordinate Judge erroneously refused jurisdiction to try the suit. The learned Vakil for the opposite party argued that assuming that the Subordinate Judge and the District Judge were wrong it is not a case in which we should interfere in our revisional jurisdiction. We think that it is a fit case in which the Court not only ought to but should interfere in revision. It may be conceded that ordinarily this Court does not interfere with interlocutory orders in a suit. But the cases show that in a fit case this Court would interfere. In the case of *Yatindra Nath Chowdhary* v. *Hari Charan Chowdhary* (6), Mr. Justice Mukerji in dealing with an objection similar to the one now raised by the learned Vakil said as follows: "We may add that it was faintly suggested on behalf of the opposite party that this Court is not competent to grant relief, even if satisfied that the order of the Subordinate Judge is erroneous and unjust. We are not prepared to take such a restricted view of the jurisdiction of this Court to grant relief, in the exercise either of our revisional powers or the power of superintendence vested in this Court by the Indian High Courts Act, 1861. Instances are by no means rare where, in very exceptional cases, this Court has interfered and set matters right by the reversal of interlocutory orders" and their Lordships referred to a number of cases in support of that view. But in the present case there is a further distinction in favour of our interference in these proceedings. It appears that the result of the decision of the learned Subordinate Judge resulted in his refusal to entertain and try the suit and although a preliminary question as to whether the Court has jurisdiction or not was a question which had to be determined by interpreting certain sections of the Court Fees Act and of the Civil Courts Jurisdiction Act still the result of that decision is either exercise or refusal of jurisdiction. In this view, I am supported by clear authority in the case of *Sheo Prasad Bungshidur* v. *Ram Chunder Hari Bux* (7), where Mr. Justice Woodroffe in the course of his judgment at page 341* said as follows: "Reference has also been made on this point to a decision: *Maharaja of Burdwan* v. *Apurba Krishna Roy* (8). This was also a case of refusal to exercise jurisdiction and all that the Court held was that it was immaterial that such refusal was made upon a mis-apprehension of the true effect of the statutory provision on the subject. This appears to me to be obvious. The decision rests on the well-known principle that a Judge cannot assume as a matter of law that which in fact had no existence in law, and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the Statute deprive himself of the jurisdiction which properly belongs to him, and if he refuses jurisdiction in such a case, the High Court may interfere, whether the question has been rightly or wrongly decided by him." This is exactly the case here. The Courts below, as I have already stated, upon an erroneous interpretation of the provision of the Court Fees Act and also Civil Courts Jurisdiction Act came to a wrong conclusion that the

(6) 26 Ind. Cas. 954; 20 C. L. J. 426 at p. 433.

(7) 23 Ind. Cas. 977; 41 C. 323.

(8) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.

*Page of 41 C.—[*Ed.*]

suit was not triable by the Subordinate Judge. We think, therefore, that this is a case in which this Court should interfere and accordingly, we make this Rule absolute with costs, set aside the orders of the Subordinate Judge as affirmed by the District Judge and direct that the case be tried by the Subordinate Judge in accordance with law.

We assess the hearing-fee in this Rule at two gold *mohurs*.

Greaves, J.—I agree.

Z K. *Rule made absolute.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 140 OF 1923.

August 21, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

KATTAMANCHI KRISHNA REDDI—DEFENDANT No. 2—APPELLANT

versus

THOLA RAMAKRISHNAYYA SETTY *alias* RAMAKRISHNAN, BY HIS AGENT GANGOJAMMA—PLAINTIFF—RESPONDENT.

Madras Revenue Recovery Act (II of 1864), s. 63—Madras Sale of Minor's Estates Regulation (X of 1831), s. 2—"Regular course of inheritance," whether includes survivorship—Minor owner, unregistered, whether protected.

The Madras Sale of Minor's Estates Regulation, 1831, applies to all minor owners of property whether registered or not. [p. 874, col. 1.]

The expression "by the regular course of inheritance" in the Madras Sale of Minor's Estates Regulation, 1831, includes property taken by way of survivorship. [*ibid.*]

The effect of s. 63 of the Madras Revenue Recovery Act is to leave the rights conferred on minors by the Madras Sale of Minor's Estates Regulation, 1831, whether they are technically land-holders or not, unaffected by the Act. [p. 874, col. 2.]

Appeal against a decree of the District Court, Cuddapah, in O. S. No. 30 of 1922.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Mr. *S. T. Srinivasa Gopalachary*, for the Respondent.

JUDGMENT.

Ramesam, J.—In this appeal, the 2nd defendant is the appellant and the plaintiff, the respondent. The suit was filed to declare the sale of the *shrotriem* village of Vasudevapuram in May 1911, for arrears of revenue, void on the ground that it was made during plaintiff's minority and, therefore, opposed to Regulation X of 1831.

The plaintiff alleged that the village originally belonged to the plaintiff's family as joint family property and that it fell to plaintiff's father's share in a partition. When the father died in 1905, the plaintiff became sole owner. The 2nd defendant admitted that the village belonged to the joint family consisting of plaintiff's father and others but denied the partition and that the plaintiff became the sole owner in 1905. The first issue was framed with reference to this plea.

In appeal, he wishes to argue that the property did not belong exclusively to plaintiff's family. According to his present suggestion, the plaintiff's family owned only 3/14 share in the village and the appellant filed new documents to substantiate his plea. Having regard to his admission in the written statement, we do not think this plea should be allowed to be raised at this stage. We say nothing on the merits of this plea.

The partition must be found to be true as plaintiff's first witness whom we see no reason to disbelieve proves it.

The next point argued is that the sale is not void. The argument consists of two parts, (1) that Regulation X of 1831 does not apply, (2) the operation of the Regulation is partly cut down by s. 63 of Act II of 1864.

Taking up the first point, the appellant's contention is that s. 2 of the Regulation applies only to cases where the minor owner obtained the property "by regular course of inheritance" and this does not include cases of survivorship in a joint family. In the present case the village was not plaintiff's father's self-acquisition.

I think s. 2 itself throws some light on the words 'regular course of inheritance.' The word 'accession' occurring at the end of the section seems to have been used in the same sense as 'inheritance.' This is not an unnatural use of the word [*vide* 'inherit', inheritance and inheritor in Stroud's Judicial Dictionary and my judgment in *Sivarama Aiyar* v. *Gopala Krishna Chettiar* (1) referring to *Watkins* v. *Frederick* (2)].

The word 'inheritance' occurs in Regulation IV of 1882 (preamble), Regulation

(1) 82 Ind. Cas. 1044; 47 M. L. J. 337; (1925) A. I. R. (M.) 88.

(2) (1865) 11 H. L. C. 358; 145 R. R. 237; 11 E. R. 1371.

V of 1884, (s. 3) and Regulation III of 1802 (s. 16) and it is difficult to hold in these instances that 'inheritance' does not include the taking of property by survivorship; I think it is a fair inference that in s. 2 of Regulation X of 1831, the word is used in the same general sense.

It is next contended that s. 63 of Act II of 1864 saves the operation of Regulation X of 1831 only in respect of minor land-holders. In the present case, the village was not registered in the name of the plaintiff's father or plaintiff and the plaintiff is not a minor land-holder. But the words in the sentence are "Minors and other disqualified land-holders." The 'minor' includes registered and unregistered owners and this may be the reason why the word 'other' is used with reference to disqualified land-holders. No doubt the results would have been the same even if the word 'other' is omitted, but the two parts of the phrase would have been overlapping. We have not got 'minor and other' but 'minors' and we do not see any reason to cut down the natural meaning of the words as they stand. It seems to me that the object of the words beginning with 'in respect of' was to compendiously refer to the subject-matter of Regulation V of 1804 and X of 1831 so far as it was pertinent.

In *Saminatha Aiyar* v. *Govindasami Padayachi* (3), the Regulation was applied to a minor whose name was not registered. It is true that the ground of the decision was that the Government ought to find out the correct heir of the deceased person and the responsible officer should enter his name in the proper register. Whatever the ground may be, it must be conceded that the decree is inconsistent with the appellant's contention based on s. 63 of the Revenue Recovery Act. In *Sanagapally Lakshmayya* v. *Intoory Bolla Reddy* (4), it is not clear whether the 1st defendant's name was registered or not.

I am, therefore, of opinion that Regulation X of 1831 applies to all minor owners of property whether registered or not.

The appeal fails and is dismissed with costs.

Reilly, J.—I agree that the appeal must be dismissed. Plaintiff succeeded before the District Judge on the ground that the sale was held while he was a minor for arrears which accrued after his accession to the property and was, therefore, in contravention of Regulation X of 1831. For defendant No. 2, the transferee of the auction-purchaser, it is contended that after the enactment of the Madras Revenue Recovery Act, 1864, the special protection given to minors by Regulation X of 1831 was preserved only by s. 63 of the Act and that in that section the word 'minors' includes only minor land-holders and plaintiff is not a land-holder within the meaning of the Act, never having been registered as such. I agree with Mr. Srinivasagopalachari who appears for the plaintiff, that 'minors' in the phrase "Minors and other disqualified land-holders" in s. 63 cannot be treated as equivalent to "minors and other disqualified land-holders" so as to make the word 'minors' mean "minor land-holders." The effect of s. 63 in my opinion is to leave the special rights conferred on minors by Regulation X of 1831, whether they are technically land-holders or not, unaffected by the Act.

We have, therefore, to see whether plaintiff comes within the protection of Regulation X of 1863. It is admitted that his right to the property in question is that of the last surviving member of the joint family of his father and himself. Can it be said within the words of the Regulation that the property "descended to him by the regular course of inheritance?" Strictly those words are far from appropriate to property taken by survivorship, which has not really descended to plaintiff and to which he is not heir. But I agree with my learned brother that it is probable that in 1831, when the true incidents of survivorship were less clearly recognised than now, those who enacted Regulation X of 1831 intended the words quoted to include property taken by survivorship by a minor who was the last surviving member of a joint family. The property of such a minor would need protection no less than that of a minor who took as heir. Moreover the use of the word 'accession' at the end of the sentence points to something not confined strictly to inheritance by an heir being intended. I agree that the sale was in contravention of the Regulation and that the appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(3) 45 Ind. Cas. 595; 41 M. 733; (1918) M. W. N. 409; 8 L. W. 37; 34 M. L. J. 536 (F. B.).

(4) 26 M. 385.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2053 OF 1922 AND 12 OF 1923.

July 21, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

IN No. 2053 OF 1922.

PRAMATHA NATH MUKHERJEE AND OTHERS—DEFENDANTS Nos. 1, 2 and 3—APPELLANTS

versus

ANUKUL CHANDRA BANERJEE—PLAINTIFF AND JOGESH CHANDRA MUKHERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 12 OF 1923.

AMAR CHANDRA BANNERJEE—DEFENDANT No. 23—APPELLANT

versus

PRAMATHA NATH MUKHERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Endowment—Will, construction of—*Shebaitship, *devolution of—Gift to unborn persons, validity of—Devolution of* shebaitship, *variation in—Directions as to management, whether cease to be operative.*

A Hindu testator by his Will, made a gift of certain properties to an idol and appointed his wife and his three brothers *shebaits* and as to future *shebaits* made the following provision: "When you all have ceased to be, he who shall be of the Hindu pursuation and senior in age, amongst your legal heirs shall have the management of the property:"

Held, (1) that the *shebaitship* was a hereditary office; [p. 877, col. 2.]

(2) that the provision as to the appointment of future *shebaits* being in the nature of a gift to unborn persons failed and the *shebaitship* reverted to the heirs of the founder, on the death of the heirs of the *shebaits* mentioned in the Will who were in existence at the time of the death of the testator. [p. 879, col. 2.]

Gopal Chunder Bose v. *Kartick Chunder Dey*, 29 C. 716 (P. C.), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandam*, 27 I. A. 69; 23 M. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29; 7Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 501 (P. C.), *Kunjamani Dasi* v. *Nikunja Behary Das*, 32 Ind. Cas. 823; 20 C. W. N. 314; 22 C. L. J. 404, followed.

Bisseswar Prasanna Sen v. *Bhagabati Prasanna Sen*, 3 C. L. J. 606, *Mathura Nath* v. *Lakhi Narain Ganguly*, 75 Ind. Cas. 435; 50 C. 426; (1924) A. I. R. (C.) 68, *Rambrahma Chatterjee* v. *Kedar Nath Banerjee*, 72 Ind. Cas. 1026; 36 C. L. J. 478; (1923) A. I. R. (C.) 60, *Jatindra Mohan Mondal* v. *Ghanesyam Chaudhury*, 72 Ind. Cas. 1019; 50 C. 266; 36 C. L. J. 423; (1923) A. I. R. (C.) 27, *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar*, 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; 26 C. W. N. 537; 41 M. L. J. 346; (1921) M. W. N. 449; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 215; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A I. R. (P. C.) 123 (P. C.), distinguished.

The directions as to management of an endowment do not cease to be operative simply because the original provision as to devolution of *shebaitship* ceases to be operative, owing to its being varied. [p. 881, col. 1]

(Case law discussed.)

Appeals against the decrees of the Second Additional District Judge, 24-Parganas, dated the 14th of July 1922, affirming those of the Subordinate Judge, Fourth Court of that District, dated the 29th of July 1921.

IN S. A. No. 2053 OF 1922.

Mr. *B. Chakravarti*, Babus *Mohendra Nath Roy*, *Baranashibashi Mukherjee* and *Krishna Lal Banerjee*, for the Appellants.

Babus *Ram Chandra Majumdar*, *Khitis Chandra Chakerbutty*, *Rishindra Nath Sarkar*, *Ramaprosad Mukherjee*, *Someswar Mukherjee* and *Gopendra Krishna Banerjee*, for the Respondents.

IN S. A. No. 12 OF 1923.

Babus *Brojo Lal Chakerbutty*, *Rupendra Kumar Mitter*, *Bijan Kumar Mukherji* and *Dharmadas Set*, for the Appellant.

Babus *Baranashibashi Mukherjee*, *Krishna Lal Banerjee*, *Khitis Chandra Chakravarti* and *Rama Prosad Mukherjee*, for the Respondents.

IN S. A. No. 2053 OF 1922.

JUDGMENT.—This appeal has been argued at great length and with great ability and earnestness on both sides, but we do not regret the time occupied as the arguments at the Bar have been of great assistance to us.

The facts which have given rise to the present case and several previous cases are that plaintiff's mother's father, Ram Kamal Mukherjee, who died on the 1st August 1845, shortly before his death, *viz.*, on the 4th February 1845 executed a Will by which, after providing for various annuities and legacies, he made a gift of certain valuable properties to an idol Sri Sri Gopal Jiu and appointed his wife Barada Sundari Devi and his three brothers Ram Kumar, Madhusudan and Chandra Mohan Mukherjee *shebaits* of the endowment. As to future *shebaits*, he made the following provision:—"When you all have ceased to be, he who shall be of the Hindu pursuation and senior in age amongst your legal heirs shall have the management conferred upon him." We do not refer here to other provisions of the Will which will have to be considered in their proper places. This Will has been a fruitful source of litigation and after the death of each *shebait* the assistance of the Courts has been sought for the construction of the Will. It appears that of the four *shebaits* appointed under

the Will Madhusudhan was the last to hold the *shebaitship*. In 1863 when Madhusudhan was acting as *shebait* three of his sons Ashutosh, Mritunjoy and Aghore instituted a suit against him and certain transferees from him and impleaded in the suit all the heirs of the original *shebaits*—Jogeswar, son of Ram Kumár, Kamini, daughter of the testator and Barada Sundari, and Damayanti, widow of Chandra Mohan. The suit was for construction of the Will, for declaration of trusts created thereunder and for having the unauthorised alienations of the trust property declared inoperative. Kamini, the daughter of the testator and mother of the present plaintiff, denied the genuineness of the Will and further urged that it did not create any valid endowment. The Principal Sudder Amin who tried the suit decreed it in full, holding that the Will was genuine, that it created a valid religious endowment and that the transfers were null and void. On appeal by Kamini and one of the purchasers, this decree was affirmed by the High Court on the 15th May 1865. There was no further dispute till 1879 when Madhusudhan died. Then Kamini, the mother of the plaintiff, instituted a suit in the First Court of the Subordinate Judge at Alipore for the construction of the Will, for the determination of the nature and extent of the interest of the idol Gopal Jiu in the estate of the testator, for the appointment of a proper person as *shebait* and for other reliefs. All the then existing heirs of the original *shebaits* were made parties to the suit. The Subordinate Judge passed a decree in the suit by which he dismissed Kamini's claim for possession of the properties by right of inheritance. He declared that the entire property of Ram Kamal had vested absolutely in the idol and appointed Ashutosh the eldest son of Madhusudhan as *shebait*, Damayanti widow of Chandra Mohan and the senior member in age having waived her right to act as *shebait*. Kamini preferred an appeal from the decree of the Subordinate Judge to the High Court which allowed the appeal and held that there was no valid endowment, that the Will created a religious charge on the properties and that there was a devise of the surplus proceeds for the benefit of the heirs of the testator and his brothers. The matter was taken in appeal to the Privy Council and in 1888 their Lordships of the Judicial Committee reversed the decision of the High Court holding that the question relating to the construction of the Will and the nature of the dedication were *res judicata* by virtue of the decision in the suit of 1863. They further held that Asutosh had a preferential right to *shebaitship*. The decision of the Judicial Committee is reported *sub namine* [*Kamini Debi* v. *Asutosh Mukerji* (1)]. Soon after the decision of the Privy Council Asutosh died on the 23rd August, 1888. Damayanti who had previously waived her right to *shebaitship* in favour of Asutosh now laid claim to the office and as Kamini resisted her claim, she commenced an action in 1888, for construction of the Will and for the appointment of herself as *shebait* or of any other suitable person if her claim was disallowed. All the heirs of the original *shebaits* then living were made parties to the suit. Kamini and Aghore Nath one of the sons of Madhusudhan disputed her right and each claimed the office. The Court of first instance held that Damayanti was disqualified as she had once waived her right and appointed Kamini to the *shebaitship*. On appeal, the First Appellate Court agreed in dismissing the claim of Damayanti but held that Aghore Nath had the preferential title to the *shebaitship*. Damayanti appealed to the High Court which held that she being the senior in age among the heirs of the original *shebaits* was entitled to the *shebaitship* despite her previous waiver. Damayanti accordingly held the office till her death in 1905, when both Kamini and Aghore came forward to claim succession to the *shebaitship*. Kamini brought a suit in 1906 for declaration of her preferential right to *shebaitship* against Aghore and the present appellant who are Aghore's brothers and succeeded in her claim up to the High Court. There were several litigations between her and Aghore and his brothers but Kamini held the *shebaitship* till her death in 1916. She was succeeded in the office by Aghore who acted as *shebait* till his death in 1918. Upon Aghore's death the present controversy arose. On Aghore's death no one among the heirs of the testator and his brothers was left who was alive at the time of the testator's death, all the parties to this suit having been born after that event. Plaintiff, thereupon, instituted the present suit for declaration of his right and that of his

(1) 15 I. A. 159; 16 C. 103; 12 Ind. Jur. 410; 5 Sar. P. C. J. 246; 8 Ind. Dec. (N. S.) 68 (P. C.).

brother (defendant No. 23) to the *shebaitship* of the idol on the ground that on the death of all the persons living at the time of the death of the testator the office of the management of the endowed property reverted to the heirs of the testator. He further prayed that if the above contention was overruled he should be appointed as *shebait*, being senior in age among the heirs of the original *shebaits*. This latter claim has been dismissed as it has been found that the plaintiff is not senior in age to defendant No. 1 and we need not consider it any further. As regards the plaintiff's first contention both the Courts below have given effect to it and decreed the suit.

The defendants Nos. 1 to 3 have appealed and it is contended on their behalf that the view of the law taken by the Courts below is erroneous. Some other points have been raised which we will consider later, but the main question on which the decision of this appeal hinges is whether the principle of law enunciated in the case of *Jotendromohun Tagore* v. *Gnendromohun Tagore* (2) and extended to an hereditary office and endowment by *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) and now firmly established, that the gift to an unborn person is invalid and contrary to Hindu Law, is applicable to the office of *shebaitship*.

It is first argued that this question is affected by the principles of *res judicata* in view of the previous litigations to which the plaintiff's mother Kamini was a party. It is said that the Will of Ram Kamal has been construed on several occasions specially by their Lordships of the Judicial Committee in *Kamini Debi* v. *Asutosh Mukerji* (1) who at page 116* of the report observe that it was decided in the suit of 1863 that "the Will was wholly valid and passed the entire estate to the idol." It is argued that the words "wholly valid" must be taken to mean that all its provisions are valid including the devolution of the *shebaitship* in persons unborn at the time of the testator's death. The questions, raised in the suit of 1863 by Kamini, were that the dedication was illegal and invalid and that at the most it created a religious charge on the secular properties of the testator and their Lordships say that in that suit it was decided that the Will bequeathing the properties to the idol was valid to the whole extent of the bequest and that the idol took the entire estate. The present question was not under consideration either in the suit of 1863 or of 1880, there was no issue on this point and there was no decision express or implied of this question. In fact the present controversy had not then arisen and there was no occasion or necessity for considering it. The dispute for the first time arose in 1918 after Aghore's death. We may note that the Will does not expressly say that the *shebaitship* will also devolve on the heirs of the original *shebaits* not in existence then. It contains a general provision that the office shall devolve on the heirs of the *shebaits* appointed under the Will. Plaintiff claims that this provision has now been exhausted and the *shebaitship* will henceforth follow the estate of inheritance.

It is next contended to distinguish the decision of the Judicial Committee of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) that the office of *shebait* in the present case is not hereditary inasmuch as the condition of appointment is that the succession to the office depends on seniority of age and not on heirship to any particular person. The argument is ingenious but not sound. The *shebait* succeeds to the office because he is heir to one of the four original trustees. The appellants for instance claim to be appointed *shebaits* because they are the sons of Madhusudhan. The testator laid down two qualifications for the *shebaitship*—heirship to one of the original trustees and seniority in age. The Will expressly says that the *shebaitship* shall devolve on the *heirs* of the first *shebaits*. It is possible that immediately on the death of a *shebait* his son may not succeed to the office not being senior in age, but it is equally possible that he may happen to be senior in age and succeed his father on the latter's death. In our judgment it cannot be said that the *shebaitship* in the present case is not a hereditary office.

The next point raised is that as no emolument or interest in property is attached to the office in this case it is not within the rule of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3). The facts of that case properly scrutinised will show that the office there did not carry with it any pecuniary interest. In

(2) I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

(3) 27 I. A. 69; 23 M. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

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fact the Government had taken charge of the temple and the endowment and subsequently released them in favour of Velu Pandaram grandfather of the plaintiff in that case. That Velu executed an agreement by which he undertook to do the *puja*, keep the temple in repairs and pay the Government Revenue. There is no mention of the manager making any profit out of the management. In their judgment the Judicial Committee have nowhere referred to the peculiar character of the hereditary office there which attracted the operation of the rule in *Jotendramohun Tagore* v. *Ganendromohun Tagore* (2). They hold that Art. 124, Limitation Act, applied to the case and then observe that the rule in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) applies equally to an hereditary office as to a gift. Article 124 of the Limitation Act prescribes the period of limitation applicable to a suit for the recovery of an hereditary office without making any distinction between an office carrying personal benefit and one which has no gain attached to it and which the learned Counsel for the appellants calls "bare trusteeship." We have not been referred to any authority either in the texts of the Hindu Law or in decided cases that there exists in law any difference between a so called "bare" trusteeship and a trusteeship carrying emoluments. It is, however, argued that there are three kinds of endowment; (1) where the whole property and its income are devoted to the idol; (2) where properties are dedicated to the idol but a portion of the usufruct is given to beneficiaries including the *shebait*; and (3) where secular property is charged with expenses of the worship of the idol. It is submitted that the endowment in the present case belongs to the first class, and, as held by the Judicial Committee in the case of *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (4), a *shebait* is a mere manager and has no right or estate in the endowed property and, therefore, the law of gift to an unborn person should not be applied in the case of *shebait*. This argument virtually invites us to revise the correctness of the decisions of the Judicial Committee in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) as also in the case of *Gopal Chunder Bose* v. *Kartick Chunder Dey* (5), which we are incompetent to do. The case of *Gopal Chunder Bose* v. *Kartick Chunder Dey* (5) affords a valuable guide for the determination of the present controversy as the facts of that case are to a great extent similar to those of the present case. There a Hindu testator created an endowment and directed that *shebaitship* should be held by his wife, after her death by his son and after his death by the testator's daughter and her husband and their male children. It was held that on the death of the last surviving son of his daughter, the succession to *shebaitship* failed and the *shebaitship* reverted to the heirs of the testator. The arguments pressed in this case were also advanced in *Gopal Chander Bose* v. *Kartick Chunder Dey* (5). The Division Bench of this Court, whose decision was approved and upheld by the Judicial Committee, observed as follows: "It was contended before us for the respondent that we are not dealing with an actual bequest or gift of immoveable property, but only with the appointment of persons to superintend and manage the pagoda. It would appear, however, from the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) that the rule in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) is applicable to a hereditary office and endowment as well as to immoveable property." This, in our judgment, supplies a conclusive answer to the appellant's contention.

This being the view we take of the decisions of the Privy Council and the law laid down by it, it is not necessary to refer to the several cases of this Court to which the learned Counsel for the appellants has drawn our attention in support of his argument. But we propose to refer briefly to a few of them which apparently favour the appellant's contention. The first case is *Bisseswar Prasanna Sen* v. *Bhagabati Prasanna Sen* (6). In that case a Hindu Will provided that the senior in age among the lineal descendants and heirs of the testator was to take charge as *shebait* of the trust property dedicated to the worship of an idol. It was contended that possible and not actual events must be taken into account and that following the rule in

(4) 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; 26 C. W. N. 537; 41 M. L. J. 346; (1921) M. W. N. 449; 3 U. P. L. R (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

(5) 29 C. 716 (P. C.).

(6) 3 C. L. J. 606.

Jotendromohun Tagore v. *Ganendromohun Tagore* (2) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3), the gift was bad *ab initio* as the senior in age amongst the lineal descendants might not be in existence at the death of the testator. It was in short argued that as the bequest would fail at a future time the whole of it is bad in law including the bequest in favour of persons living at the testator's death. The learned Judges held that it is not so and that such directions are common enough in Hindu Wills and they did not think that there was anything contrary to Hindu Law in the provision. The parties in that case were all alive at the time of the testator's death and the judgment of the Court so far as it related to the validity of the bequest between the parties to the suit is quite correct. But if the learned Judges intended to hold that the bequest in favour of unborn persons was also good they went beyond the scope of the suit and their observation must be regarded as *obiter dictum* and in conflict with the law as laid down by the Privy Council. But as one of the Judges who decided this case Maclean, C. J., was a party to the case of *Gopal Chunder Bose* v. *Kartick Chunder Dey* (5), it may be fairly presumed that the learned Judges meant to hold that the bequest as between the parties to the suit was valid and binding, and it was not bad because at some future time it might fail for illegality.

The next case on which reliance is placed is *Mathura Nath* v. *Lakhi Narain Ganguly* (7). There the testator had empowered her widow to appoint a *shebait* in succession to her. She appointed a person who was not in existence during testator's lifetime. The contention was that according to the rule in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2), the bequest authorising the widow to appoint a *shebait* who possibly might no be in existence at the time of the testator's death is illegal. The learned Judges held that that rule did not apply in that case. Richardson, J., at page 436 in giving his reasons why *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) did not apply observes that the testator might have empowered the Civil Court, instead of the widow to appoint a *shebait* and the choice in that case need not have been restricted to persons living at the time of the testor's death. The *ratio* of that decision is that where appointment to *shebaitship* is to be made by nomination the rule of law governing directions in a Will for appointment of an unborn person designated or of a designated class will not apply.

In *Rambrahma Chatterjee* v. *Kedar Nath Banerjee* (8), the question was whether daughter's sons of the founder who were not in existence at his death were entitled to share in the *bhog* or offering to the idol. It was held that share in the *bhog* not being interest in property is not subject to the rule in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2).

In *Jatindra Mohan Mondal* v. *Ghanesyam Chaudhury* (9), an annuity was given by the testator to his daughter and absolutely to her son who was not then born. The learned Judges held that an annuity may be given to an unborn person under the Hindu Law.

We are of opinion that none of the cases cited by the learned Counsel for the appellants has any bearing on the present question. The learned Judge of the Court of Appeal below remarks that the office of *shebaitship* in this case carries with it the right to hold and manage properties belonging to the idol and so the appointment as *shebait* may be said to create an interest in immoveable property. This view is not without justification. It is suggested by the respondent that a sufficient profit is left to the *shebait* of the idol. This is possible considering the frequent scramble for the office since the death of the testator. But we express no opinion on this point.

After a careful examination of the authorities we have arrived at the conclusion that after the death of Aghore the bequest, so far as it provides that the person senior in age among the heirs of the first *shebait* should be appointed *shebait*, fails and we hold on the authority of *Gopal Chunder Bose* v. *Kartick Chunder Dey* (5) and *Kunjamani Dasi* v. *Nikunja Behary Das* (10) and other cases that the *shebaitship* reverts to the heirs of the founder Ram Kamal Mukherjee. It is not disputed that the plaintiff and the defendant No. 23 are the

(7) 75 Ind. Cas. 435; 50 C. 426; (1924) A. I. R. (C.) 98.

(8) 72 Ind. Cas. 1026; 36 C. L. J. 478; (1923) A. I. R. (C.) 60.

(9) 72 Ind. Cas. 1019; 50 C. 266; 36 C. L. J. 428; (1923) A. I. R. (C.) 27.

(10) 32 Ind. Cas. 823; 20 C. W. N. 314; 22 C. L. J. 404.

heirs of Ram Kamal.

Lastly it is contended that, as the idol was established by the mother of Ram Kamal who founded the present endowment for the worship of that idol, according to Hindu Law, the succession to the *shebaitship* of the idol which would include the management of the properties endowed by Ram Kamal, should descend to the heirs of Ram Kamal's mother and reliance is placed for this view on the case of *Ananda Chandra Chakravarti* v. *Broja Lal Singh* (11). Hence the defendants Nos. 1 to 3 being the heirs of Ram Kamal's mother are entitled to the *shebaitship* in preference to the plainliff. This point was not taken in either of the Courts below nor does it appear to have been mentioned in the pleadings. As determination of this question depends upon questions of facts we do not think we will be justified in allowing the appellants to take it at this stage and as Court of Second Appeal we are not in a position to consider it. We may mention one fact to show that we are not competent to deal with this matter. There is no evidence that the idol was consecrated by Ram Kamal's mother. In the translation of the Will which is to be found in the report of the case of *Kamini Debi* v. *Asutosh Mukerji* (1) certain vernacular words have been translated as "Thakur Gopal Jiu consecrated by my mother." We have looked into the Bengali document and we do not find that there is any word there meaning 'mother' but there is the sign 'Ishwar' which may indicate God or a dead person. The appellants say that Ram Kamal's mother was dead at the time of the Will; the respondent denies it and there is nothing in the Will to show that she was dead at that time. In these circumstances we are unable to allow the appellants to raise this point in second appeal.

In the view we have expressed this appeal fails and is dismissed with costs to the plaintiffs.

A cross-appeal is filed by the plaintiff against the order in the decree of the First Court confirmed by the decree of the Additional District Judge whereby his and his brother's possession of the *shebaitship* and property is declared to be subject to the rights of the defendants and members of the family of the original *shebait* to reside in the Kidderpore house to repair it if necessary, to get maintenance out of the offerings to the idol and to enjoy certain other rights.

Appeal No. 12 of 1923 is filed by the *pro forma* defendant No. 23 the brother of the plaintiff against this declaration.

In cross-appeal it is urged on behalf of the plaintiff on the principle of *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) that these provisions have lapsed since 1880 and anyhow cannot enure to the benefit of the younger members, not in existence at the time the testator died.

It is urged both by the appellants (defendants Nos. 1-3 in the lower Court) and by some of the *pro forma* respondents (defendants Nos. 12-15 and 16-22) that this matter was already decided by the Privy Council in restoring the order of the Subordinate Judge in the case between the predecessors of the parties reported as *Kamini Debi* v. *Asutosh Mukerji* (1) as in that matter the Subordinate Judge had held that these provisions in the Will were valid. The property is that of the idol and the *shebaits* get no property for their exclusive use by virtue of their office. The property is with the idol and the direction in the Will as to how the income shall be spent is not bad. In deciding this point in the suit of 1880 the learned Subordinate Judge said:

"It is contended for the plaintiff that those persons only who were born at the time of the testator's death, are entitled to maintenance from the estate, and not those who were born afterwards. This contention is based on the principle laid down in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) *viz.*, that no gift to an unborn person is valid. The Will virtually made no gift to any unborn person, the entire gift was to the idol, who was to have his daily *bhog* which ordinarily is distributed to the poor and needy or to Brahmins without any inquiry whether they were born during the testator's lifetime or not. That is the immemorial custom of the Hiudus in charge of the endowed property. The testator alive to the proverb, that charity must begin at home, preferred his blood relations including their future descendants as recipients of the *prosad* than outdoor beggars or Brahmins.

"The five brothers and their descendants who by the Hindu Law are entitled to maintenance from them, are all entitled to

(11) 74 Ind. Cas. 793; 50 C. 292; 36 C. L. J. 356; (1923) A. I. R. (C.) 142.

the *prosad* of the idol as well as to reside in the Kidderpore house; they are also entitled to their *poita* and marriage expenses as well as the charges of the performance of their parents' *sradhs* to the extent of their ceremonial part. The income of the estate being totally inadequate to meet all the necessary expenditures, all secular charges like marriage portion, dower, or in the shape of ornaments or the like should not be made from the *debutter* funds".

The Subordinate Judge's order though not approved by this Court was restored by the Privy Council and so the matter cannot be re-opened. Learned Counsel also relied on the principles laid down in the case of *Rambrahma Chatterjee* v. *Kedar Nath Banerjee* (8), where it was laid down that "A founder who is competent to provide for the Government and administration of a trust, can give a direction for its management which is not inconsistent with its character as a religious and charitable trust. The test in each case is whether the direction given by the founder is inconsistent with the nature of the endowment as a religious and charitable trust and is a colourable device for the evasion of the law of perpetuities." The learned Subordinate Judge in 1880 found that the directions were not inconsistent with the character of a religious trust recognised by Hindus and with this opinion we agree. The directions as to management will not cease to be operative simply because the original provisions as to the devolution of the *shebaitships* cease to be operative owing to succession to the *shebaitship* being varied.

The cross-objection is, therefore, dismissed with costs to each set of respondents appearing three in all.

Appeal No. 12 of 1923 really raises the same point in a different form. The appellant is *pro forma* defendant No. 23 in the First Court, brother of the plaintiff. He raised certain issues in that Court which were decided against him, it being held that his claim which as we have said above is similar to the claim in the cross-objection is barred by *res judicata* a finding upheld by the learned Additional District Judge.

The arguments in his appeal are, however different. Without going into the merits of the claim that the directions to the use of the income accruing to the idol are good and valid his arguments at the Bar are—

(*i*). That he is an heir of Kamini, whose interest in the estate arose by virtue of the terms of the Will: he now claims by inheritance from the original testator through his mother Kamini and Kamini in the previous suit did not claim as he does now by inheritance. Hence the ruling in *Katama Natchiar* v. *Raja of Sivaganga* (12) which lays down that a reversioner would be bound by a decree fairly and properly obtained against a widow has no application in his case. Kamini's position in the previous litigations was that of a legatee under the Will with a chance of becoming a *shebait*, he is an heir of the testator through Kamini and is not bound by any decision to which Kamini was a party in another capacity.

(*ii*). There was no decision in the case of 1863 on the question now in issue; that suit was confined to the genuineness of the Will and the right of Asutosh to see that its provisions as to the *corpus* of the property were carried out. The Privy Council decision of 1888 only declared that the decision on these points were *res judicata*. It did not decide anything more.

The second point may be considered first, and appears to us to be based on a misunderstanding of what the Privy Council decided in the case. The advice which the Judicial Committee gave to Her Majesty was that the appeal of the plaintiff in that suit wholly fails and the cross-appeal wholly succeeds. The High Court *ought to have dismissed the appeal to them with costs.* Her Majesty in Council decreed accordingly. The decree of the Subordinate Judge restored by the order is in these words:—

ORDERED.

" That the plaintiff's claim to get the estate of her deceased father Ram Kamal Mukherjee by right of inheritance be dismissed, as well as her claim to be the sole preferential *shebait* of Gopal Jiu Thakur. It is hereby further ordered, that the entire property of Ram Kamal, deceased having absolutely passed to and been vested in the said Thakur, plaintiff's claim to a partition of that estate be also dismissed. It is further declared that the heirs and descendants of the five brothers, namely, Ram Kamal Mukherjee and of his four brothers, Ram Kumar Mookerjee, Madhu Sudhan Mukherjee, Chunder Mohan Mukherjee and Dina Nath Mukherjee who are by Hindu Law entitled to maintenance from the said five persons shall be entitled to

(12) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

participate in the daily *prosad* of Gopal Jiu Thakur as well as to reside in the Kidderpore dwelling-house. It is further declared, that the expenses of the religious portion only of the ceremonies of *sradh* of the parents of the aforesaid persons, of the marriages of their sons and daughters, and of the Jagnapobita ceremonies, shall be defrayed out of the income of the *debutter* estate but on no account shall the said income be used in feasting Brahmins, etc., and other secular offices in connection with these ceremonies. It is hereby also declared, that the said dwelling-house, along with the other properties of the testator, shall be under the control and management of the *shebaits* for the time being who shall look to the necessary repairs of the buildings as next importance to the daily worship of Gopal Jiu Thakur and distribution of *prosad* to the members of the family. The *shebait* for the time being shall strictly carry out the other provisions of the Will concerning *Durga Puja*, the celebration of the *dole jatra*, *ras hindola* and *nandotsub*. If sufficient funds should not be forth-coming from the estate for their due celebration then the religious portion of the ceremonies, *viz.*, the *pujas*, etc., shall alone be performed. The defendant No. 8 Damayanti Debi, who has the preferential right to be *shebait*, having declined to accept the duties of *shebait*, the defendant No. 1 Asutosh Mookerji, as the next senior member of the family, shall conduct all the duties in terms of the Will. The plaintiff shall pay to the defendants Nos. 1, 2 and 3 one set of costs according to the schedule. The plaintiff and the remaining defendants shall bear their own respective costs. The costs incurred by the defendant No. 1, Rs. 10 and those incurred by the defendants Nos. 2 and 3, Rs. 2-8-0 and the one set of Vakil's fees payable by the defendents Nos. 1, 2 and 3 in proportion to the claim amounting to Rs. 899-14-0 and interest thereon, *i. e.*, on the entire amount aforesaid from this day to the date of realization, shall be paid by the plaintiff at the rate of 8-annas per cent. per month."

This is the decree which Her Majesty in Council adopted. It is over forty years old and no one has ever suggested before that it was not justified by the judgment of the Judicial Committee and it certainly cannot be challenged before us.

The first point needs little argument. The whole of the then existing beneficiaries were before the Court in 1863 and in 1880 (in the latter year including the present appellant) and the appellant cannot under any principles urge that he is not bound by the decree of the Privy Council of 1888. But apart from any thing else we have only to add that in considering the appeal and cross-appeal we have come to a decision that the property does not belong either to the plaintiff or the appellant. It belongs to the idol and this appellant is only a *shebait*, not an owner—a trustee for the idol bound to carry out the trust which we hold the testator had full power to make.

This appeal is, therefore, dismissed with costs. One set divided between the three sets of respondents.

Z. K.

Appeals and cross-objections dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 282 AND 461 OF 1922.

February 8, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Justice Sir Kumaraswami Sastri, KT.

IN A. S. No. 282 OF 1922.

KRISHNAMURTHY AIYAR, MINOR BY K. SUBRAMANIA AYYAR—DEFENDANT No. 3—APPELLANT

versus

KRISHNAMURTHI AIYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN A. S. No. 461 OF 1922.

S. SUBRAMANIA AIYAR—DEFENDANT No. 2—APPELLANT

versus

KRISHNAMURTHI AIYAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Adoption—Ante-adoption agreement between natural and adoptive father—Contemporaneous Will—Bequest of properties to third persons, binding nature of—Matters for consideration—Benefit to adopted boy—Execution and registration of document—Plea of ante-dating—Burden of proof.

Per *Spencer, Offg. C. J.*—If an adoption and a disposition of his property by the adoptive father form part of one transaction, the adopted son never acquires any interest in the property disposed of and no question can arise as to his guardian's competency to deal with it. [p. 883, col. 2.]

Per *Kumaraswami Sastri, J.*—Where an adoption is made by a Hindu who at the time of adoption has absolute power of disposal over his property, a

simultaneous agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *intervivos* or by a Will binds the adopted son in all cases where it is for his benefit. [p. 893, col. 1.]

Case-law on ante-adoption ageeements reviewed.

In regard to ante-adoption agreements, the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted. But the rights of the boy to be adopted should not be tested with reference to what his position in the family would be *after adoption* and by seeing whether the adoptive father could *after the adoption* have made the alienations which are disputed, since the right of a Hindu father to give his son in adoption is not governed by any questions of benefit to the adopted boy. [*ibid.*]

If the adopting father would not make the adoption but for the conditions agreed to by the natural father and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. [p. 893, cols. 1 & 2.]

The onus of showing that a document duly executed and registered was ante-dated is on the person who sets up such a case. [p. 887, col. 1.]

Mina Kumari Bibi v. *Bijoy Singh Dudhuria*, 40 Ind. Cas. 242; 44 C. 662 at p. 671; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P. C.), relied on.

Appeals against the decree of the Court of the Subordinate Judge, Mayavaram, in O. S. No. 24 of 1918, dated the 31st July 1922.

Messrs. *A. Krishnaswamy Iyer* and *C. A. Seshagiri Sastriar*, for the Appellants.

Messrs. *S. Srinivasa Iyengar* and *N. S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.

Spencer, Offg. C. J.—The plaintiffs are legatees under the Will of one Ramakrishna Aiyar who died on the April 2nd, 1911. The suit is brought to recover possession of properties bequeathed to the plaintiffs under the said Will. The deceased owned about 135 acres of land, of which he bequeathed 17 acres 90 cents to be taken by the plaintiffs, who were his wife's relations, immediately on his death. They were also to get 19 acres 30 cents upon the death of his widow Sivagami Ammal to whom the Will allotted 45 acres 65 cents. On the same date (23rd March 1910) that the Will was executed, Ramakrishna Aiyar adopted the 3rd defendant and under the Will he bequeathed 26 acres 35 cents to the adopted son. He also gave 12 acres and odd to charity, and 9 acres 33 cents to his two nieces, 6 acres 34 cents to his nephew and grand-nephew and 37 acres to a *gnati* named Sami Aiyar. Out of the 45 acres given to his wife, the adopted son was to get 26 acres 35 cents upon the widow's death. After the bequest in favour of the plaintiffs had become vested in them upon Ramakrishna Aiyar's death, their father sold the properties bequeathed to them under the Will, to the 1st defendant who in turn sold them to the 2nd defendant, who is alleged to be the *benamidar* of the adopted son, the 3rd defendant. The plaintiffs obtained a decree in the lower Court for possession of the property sued for with mesne profits and costs. The adopted son (the 3rd defendant) now appeals. The 2nd defendant has also appealed against the order directing payment of costs by him.

The Will (Ex. A) was presented for registration on the 25th March 1910. At the same time a document (Ex. B.) was executed by the natural father of the 3rd defendant agreeing to the alienations by Will being made by the adoptive father. This document was not registered till the 9th April and the defence to the suit is that it was ante-dated. The lower Court has decided against the theory of the agreement being ante-dated. The learned Subordinate Judge states that he is certainly of opinion that the Will was carefully thought out before the adoption actually took place, that Natesa Aiyar, father of the adopted son, was fully informed of the intentions of the testator and had given his free and voluntary consent to such dispositions and that the consent document was executed and completed before the adoption actually took place. The law on the subject of an adoptive father making a Will disposing of his property has been clearly established in *Lakshmi* v. *Subramanya* (1). Shephard, J., observes that if an adoption and a disposition of his property by the adoptive father form part of one transaction, the adopted son never acquires any interest in the property disposed of and no question can arise as to his guardian's competency to deal with it. In that case it appeared that the defendant's natural father, when he gave his son in adoption, tacitly submitted to the arrangement contained in a Will settling certain property on the testator's wife. This decision has been followed and approved by the Full Bench in *Visalakshi Ammal* v. *Sivaramien* (2), a case of an adoption by a widow in pursuance of her husband's

(1) 12 M. 490; 4 Ind. Dec. (N. S.) 691.
(2) 27 M. 577; 14 M. L. J. 310 F. B.).

authority, the natural father agreeing prior to the adoption to a disposition of half the property for the widow to enjoy during her life. It is clear that, from the moment that an adoption takes place, the natural father of the adopted boy loses his authority on behalf of the boy to give his consent to any disposition of property and at the same moment the adopted son becomes a co-parcener in the family of his adoptive father and thereupon the latter has no power to dispose of ancestral property at his own sweet will and pleasure, but can only make alienations for necessary purposes. In *Visalakshi Ammal* v. *Sivaramien* (2) it is assumed that the natural father would not have agreed to an adoption coupled with a disposition of property unless it was for the benefit of his son, and it is further assumed that the adoptive father would not have taken the son in adoption except on the condition agreed to. In such circumstances, Benson, J. observed the adoption cannot be set aside and the condition with which the adoption was coupled could not be set aside except on strong grounds of legal necessity or public policy. The references in this judgment of Benson, J., to the test of fairness and reasonableness of the dispositions were not really necessary for the disposal of that case. They were based on the remarks in favour of Farran, J., in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3) who was considering, in the light of Mayne's Hindu Law, the powers of a guardian to bind his ward by giving his consent to acts done on his behalf during his minority. There is a point of difference between that case and the present, which is, that the adoption there was made by a widow in pursuance of an authority from her deceased husband but here the adoption is made by a full owner. The test of reasonableness has been imported into the case dealt with in *Balkrishna Motiram Gujar* v. *Shri Uttar Narayandev* (4), although in that case a document was executed by the natural father of the adopted boy agreeing to a grant in favour of certain charities and the adoptive father was alive at the time of adoption. The learned Judges were of opinion that the authority of *Lakshmi* v. *Subramanya* (1) had been weakened by the subsequent decisions in *Jagannadha* v. *Papamma* (5) and *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6) which were cases of adoption by widows whose power of alienation was inferior to that of their deceased husbands. With due respect I consider that if the father of the boy consented to the adoptive father endowing certain charities and gave his consent at or before the time of adoption to such dispositions, a presumption would arise that the grant was valid.

The 3rd defendant in the present suit having set up the case that the consent was given after the adoption, the onus lay on him to prove that Ex. B was ante-dated: see *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (7). The circumstances that the two documents, the Will and the consent agreement, were not registered at the same time is explainable by the fact that the Registrar came to the village to register Ramakrishna Aiyar's Will because he was ill. The adoption agreement could not be registered in the village under s. 31 of the Registration Act, as it was executed by Natesa Aiyar who was capable of attending at the Registration Office. The Easter Holidays intervened from the 24th to 28th March and the document was, therefore, registered later, but the stamp was bought on the same date as the Will was dated as is proved by the stamp vendor's endorsement. I see no reason to differ from the lower Court which has found that the execution of the Will and the adoption deed were parts of the same transaction and that the documents were more or less simultaneous.

As for the witnesses whose evidence is relied upon for the purpose of showing that the agreement by the natural father was after the adoption had taken place, the 1st defence witness states that when the Will was first shown to him he was told by the 2nd defendant's agent that Ramakrishna Aiyar had made the adoption and that the agent was then covered with sandal as if he had been through some ceremony. This witness's brother is the vendee under Ex. I

(3) 11 B. 381; 6 Ind. Dec. (N. S.) 250.

(4) 50 Ind. Cas. 912; 43 B. 542; 21 Bom. L. R. 225.

(5) 16 M. 400; 3 M. L. J. 193; 5 Ind. Dec. (N. S.) 985.

(6) 16 C. 556; 16 I. A. 53; 5 Sar. P. C. J. 505; Rafique & Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).

(7) 40 Ind. Cas. 242; 44 C. 662 at p. 671; 1 P. L. W 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344 (1917) A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 4 (1917) M. W. N. 473; 44 I. A. 72 (P. C.).

and he paid money of his own for the sale deed. His evidence is not disinterested. The 16th defence witness who says that he attested the agreement on March the 27th, two days after the Will was presented for registration, is the 3rd defendant's agent. He wrote the Will, but his statement that it was dictated to him in 10 or 15 minutes is incredible as the Will with its schedules is a lengthy document of 16 pages and was evidently written with much deliberation. The 18th defence witness who says that, when he executed the consent document, he learnt that the Will had already been executed is the natural father of the adopted son and thus interested. He admits that he would have signed anything that he was asked to sign by Ramakrishna Aiyar. He contradicts the 16th defence witness as to whether the details of the Will were given out to him by that witness on the date of its execution. His statement that he signed the agreement without reading it and without asking anyone what was written in it is incredible. He is obliged to make this false statement because if it were true that he had not agreed to its terms, he would be unable to explain why he did not object to signing. The testator was conducting the charities in favour of which he made certain bequests and it is unlikely, therefore, that he would have made an adoption and restricted his own power of providing for the charities without some previous understanding being come to with the father of the boy whom he intended to adopt. Before the suit Will was executed, there was another Will (Ex. D) which disposed of a large portion of the testator's property and authorised his widow to adopt the 2nd plaintiff. If he had not adopted the 3rd defendant and made another Will, this other Will would have taken effect. He must, therefore, have intended to benefit the legatees under the Will of 23rd March 1910 before he arranged to adopt the 3rd defendant. The 3rd defendant's attempt to split the transaction into several parts has failed. The lower Court's finding on the third issue will, therefore, be confirmed and the appeal dismissed with costs of respondents Nos. 1 and 2. The decree, however, will be amended by allowing mesne profits only from 15th January 1912 according to the prayer in the plaint, and not from April 1911.

The 2nd defendant's appeal in the matter of costs will be dismissed on the ground that his conduct in the lower Court and previous to the suit was not straightforward, He gave up some of his contentions at the trial. He assisted the 3rd defendant in the conduct of his defence and he got a medical certificate for him and he set up a title in himself which has failed. There is no reason why he should not be made responsible for the plaintiff's costs. Appeal No. 461 of 1922 is, therefore, dismissed with costs.

Kumaraswami Sastri, J.—The 3rd defendant is the appellant. This appeal arises out of a suit for possession of the immoveable properties specified in the plaint and mesne profits filed by the plaintiffs who claim as legatees under a Will dated the 23rd March 1910 executed by the adoptive father of the appellant who died on the 2nd April 1911. His widow died on the 11th June 1911.

The case for the plaintiffs is that prior to the adoption there was an arrangement between the adoptive father and the natural father of the appellant whereby the adoption was made on condition that the adoptive father was to have the liberty of making the dispositions which he made by his Will which according to the plaintiff's case was executed before the adoption. It is also alleged by the plaintiffs that before the adoption another document filed as Ex. B-1 in the case was executed by Natesa Aiyar the natural father of the appellant in favour of Ramakrishna Aiyar, the adoptive father wherein it is stated that the adoption was subject to the condition that the boy to be adopted should only take such of the properties as were given to him by will of the testator. The case for the plaintiffs is that the adoption was conditional, and that the ante-adoption agreement between the natural father and the adoptive father is valid and binding on the adopted son and that plaintiffs are entitled to the properties claimed. It is alleged by the plaintiff that their father conveyed the properties which fell to them under the Will to the 1st defendant under Ex. I, dated the 3rd January 1912, and that the 1st defendant in turn sold the properties under Ex. 1-B on the 15th of January 1912 to the 2nd defendant and that these sales are not binding on the plaintiffs.

The case for the appellant is that there was no agreement before the adoption and that the Will Ex. A executed by the adop-

tive father and the agreement (Ex. B-1) executed by the natural father in favour of the adoptive father were, as a matter of fact, executed after the adoption ceremony was over. His case also is that the arrangement, even if made before the adoption, would not bind him.

The Subordinate Judge held that the ante-adoption agreement is true and valid and binding on all the parties and that the sale by the plaintiff's father to the 1st defendant is not binding on the plaintiffs as it was made without necessity and for a grossly inadequate consideration. Although one would have expected that the 1st and 2nd defendants would support the ante-adoption arrangement, they have not chosen to do so and there can be little doubt that they are siding the 3rd defendant. The suggestion is that the 2nd defendant is only a *benamidar* for the 3rd defendant.

The only question, therefore, for consideration is whether there was an arrangement as set out in the plaint. It is admitted that the properties left by the testator under his Will Ex. A are ancestral properties, and that unless the arrangement between the natural father and the adoptive father of the appellant was entered into before the adoption and the arrangement is otherwise binding in law on the appellant, the Will would not operate on the properties devised. The Subordinate Judge in a careful and exhaustive judgment held that the arrangement was entered into before the adoption was made and that it was beneficial to the appellant and is binding on him. I have no hesitation in agreeing with the Subordinate Judge.

The natural father Natesa Aiyar was a man of very little means. He had a large family and it was conceded before us in argument that, but for the adoption, the appellant would be a poor man. At the date of the adoption Ramakrishna Aiyar the adoptive father was a rich man who owned extensive landed properties. He was childless and the evidence shows that he had great affection for his sister's children and for the plaintiffs who are related to him distantly and to his wife more proximately He had executed a Will on the 30th of May 1903 marked as Ex. D in the case making various bequests to his wife and other relations, giving his sister's sons 12 acres of land and directing the 2nd plaintiff who was then two years old to be adopted by his wife. It is unnecessary to go further into the details of this Will. I refer to it only as showing that the plaintiffs were the objects of his bounty and were provided for in the Will Ex. D executed before the adoption. The deceased fell ill some days before the adoption and he got worse. The evidence is that a few days before the adoption he asked the natural father of the appellant to give the appellant in adoption to him and, as one would expect, the natural father readily consented to give his son, who was in poor circumstances, to a person who was rich.

We find that the Will is dated the 23rd of March 1910, the ante-adoption agreement executed by the natural father is also dated the 23rd of March 1910 and the adoption also was on that date. So far as the ante-adoption agreement (Ex. B-1) is concerned the stamp vendor's endorsement shows that the stamp paper was purchased on the 23rd of March 1910 in the name of the natural father of the appellant; so that it is clear that on 23rd a stamp paper was purchased with the object of executing the document in connection with the adoption. No other purpose is suggested. We also find that the document was executed and was duly registered. We also find that Ramakrishna Ayyar lived for nearly a year afterwards and died on the 2nd of April 1911 and that there was no objection taken by anybody either to the ante-adoption arrangement (Ex. B-1) or to the dispositions contained in the Will, during the testator's lifetime. It is not disputed that the natural father of the boy was aware of the terms of the Will. He did not question the validity of the arrangement during the testator's lifetime though he now wants to make out that the agreement executed by him was made after the adoption and ante-dated and is therefore, invalid because the adoption conferred on the boy the status of an undivided son and the adoptive father could not dispose of by Will property which was ancestral.

The evidence let in by the appellant is to the effect that there was no talk of any disposal of property before the adoption, that the Will was executed after the adoption and that the arrangement (Ex. B-1) was executed after the adoption and ante-dated by the natural father. I do not think that the appellant has made out this case. The probabilities, and the evidence for the plaintiffs which the Subordi-

nate Judge has believed, are all against it. In the first place there was no motive for the natural father, after the adoption was completed and after the son had obtained full right to execute the document Ex. B-1 and ante-date it especially where such conduct would have deprived the natural son of a large portion of the property which but for this arrangement would go to him. The onus of showing that a document, duly executed and registered and dated the 23rd of March, 1910, was antedated is on the appellant. I need only refer to the decision of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (7).

So far as the agreement Ex. B-1 executed by the natural father in favour of the adoptive father is concerned, it is attested by all the witnesses who attested the Will. It is argued that, as Ex. B-1 was not registered along with the Will, the probabilities are that it was executed after the Will and ante-dated. It is clear from the evidence and it is not disputed before us that the Sub-Registrar's Office was closed for the Easter recess on the date when the Will was registered and that the Sub-Registrar came to the house of the testator to register the Will. Exhibit B-1 was executed not by the testator but by the natural father in his favour. Under the rules framed under the Registration Act, Ex. B-1 would not be registered at the residence of the executant (the natural father) unless there was some reason, *e. g*, illness, etc., in order to have the document registered during vacation and at the residence of the executant. There is no suggestion that the natural father of the appellant was ill or that there was any reason which would have justified the Registrar in going to the executant's house. The document was presented for registration after the office re-opened. I see no reason to disbelieve the evidence that the document Ex. B-1 was shown to the Registrar on the 25th and that the Registrar said that it would be registered after the office re-opened.

Great stress was laid on the evidence of Krishnaswami Iyengar, a Pleader, who was examined as defendants' first witness. According to his evidence, when the Will Ex. A was shown to him by Kalyanasundram Iyer, the father of the plaintiffs he questioned him if an agreement had been taken from Natesa Iyer the natural father of the appellant expressing his willingness in adoption subject to the conditions in the Will and told him that the Will would be valid only if such an agreement was taken and that Kalyanasundram Iyer replied that he would take such an agreement. If the evidence of this witness is true, the agreement Ex. B-1 must have been taken after the Will was executed. As he says that the parties came to him at night, the stamp paper for Ex. B-1 must have been purchased the next day from the stamp vendor and the document executed subsequently. The Subordinate Judge does not accept the evidence of this witness and I have no hesitation in coming to the conclusion that his evidence cannot be believed. He admits that the property in dispute was sold to his brother under Ex. 1 on the 3rd of January, 1912 by the plaintiff's father and that he (witness) paid the purchase-money. It appears from the endorsement on Ex. 1 that the stamp paper was purchased in his name. The sale is for Rs. 6,000. It states that on the 3rd of December, 1911, an advance of Rs. 500 was received and that the balance of Rs. 5,500 was paid in cash that day. The witness began by saying that he knew nothing of this sale-deed before the date when he paid the sum of Rs. 5,500 and that he was consulted only on the day of the execution when it was approaching completion. But he was forced to admit that he paid the advance of Rs. 500 and that when he paid the advance on the 3rd December (*i. e.*, one month before the sale-deed) he knew that the lands were going to be purchased by his brother. There is a great deal of force in the contention of the respondents that this property was really purchased by Krishnaswamy Iyengar for himself in the name of his brother. He says that he paid the purchase-money; the stamp paper is purchased in his name; he admits that although his brother was divided from him he took no document to evidence the loan; and he further admits that, though he keeps accounts, this transaction will not appear in the accounts as a loan to his brother. But even assuming that the transaction was one where the brother was the purchaser and the witness only advanced moneys, it is hardly likely that he would have, with the knowledge that there was no arrangement between the natural father and the adoptive father as to the adoptive father's power of disposition before the

adoption took place, advised his brother or advanced moneys to purchase property the title to which depended upon the binding nature of the Will upon the adopted son. He says that he was not consulted before the completion of the sale and that as the sale had already been settled, he did not advise his brother not to complete it. As a lawyer he must have known that there would absolutely be no title if, as a matter of fact, the adoption had been unconditional and the testator after the adoption executed a Will dealing with ancestral properties, and the mere fact that there was an agreement to sell would not render the purchaser liable to purchase the property to which the vendor had no title. His statement that he was not consulted before the completion of the sale cannot be believed. Within 12 days of the sale under Ex. 1 the property was again transferred to the 2nd defendant under Ex. 1-B. Krishnaswami Iyengar says that his brother sold the property to the 2nd defendant, got money and paid him off. The 2nd defendant was appointed by the Will as a trustee of the charities which the Will directs to be performed and it is alleged that the 2nd defendant was only a *benamidar* for the 3rd defendant. It is admitted that though the 2nd defendant purchased the property under Ex. 1-A on the 3rd January 1912 possession remained all along with the 3rd defendant and that he took no steps to get possession. It is not explained why if he was the real purchaser he did not take steps to get possession or to get back the purchase-money if there was no Will. The fact that the 2nd defendant directly supports the case of the 3rd defendant as regards the invalidity of the Will and the absence of any ante-adoption agreement, while if he was a *bona fide* purchaser his interest would be otherwise, supports the view that he was only a *benamidar*. So far as the other evidence is concerned, I agree with the Subordinate Judge that no reliance can be placed upon the evidence on the defendant's side to show that there was no arrangement before the adoption. I think the probabilities all point to there having been an arrangement before the adoption.

As I have already said, the testator wanted to make provision for his wife and relations and executed a Will some years before his death. It is not shown that between that date and the date of the adoption the feelings between the testator and the persons whom he wanted to benefit were strained or that the relations had altered. It is hardly likely that the testator who wanted to provide for his wife and relations would have left his wife at the mercy of the adopted son by making an unconditional adoption. It is extremely unlikely that he would have made an adoption without providing for them and would immediately after the adoption have changed his mind and executed a Will providing for his wife, his sister's sons and the plaintiffs. The case of the appellant that there was no arrangement before the adoption was made, that immediately after the adoption the testator was asked to make provision and he readily consented to do so and that this Will was written after the adoption and before the evening of that day is, I think, improbable. As pointed out by the Subordinate Judge the Will is a carefully considered document and the probabilities all point to the testator having thought matters before the adoption and to having made the adoption after informing the natural father and getting his consent to the dispositions which he wanted to make. So far as the natural father is concerned the property which the adopted son gets under the Will was a wind-fall. He was poor, he had a growing family and the only property he had was a small item of landed property. Under these circumstances there is nothing improbable in his having readily consented to give his son in adoption on condition that the testator should be at liberty to dispose of his properties as under his Will. It is also unlikely that, if a complete title had been conferred on the adopted son by the adoption without any arrangement, the natural father would have agreed to execute an ante-dated document materially cutting down the rights of his own son. The testator lived for over a year and no objection was taken by anybody to the Will or to the agreement. I may point out that, if any such objection had been taken and the testator had been informed that the parties would not abide by the Will or the ante-adoption agreement, he could easily have declared his intention to be separate and dispose of his separate property. If there was an arrangement before the adoption that the adoption should be subject to the testator's power to dispose of the properties as he did by the Will Ex.-A-1,

the fact that the natural father subsequently embodied the arrangement in writing would not affect the antecedent arrangement. In this view, even assuming that Ex. B-1 was subsequently written and antedated, the arrangement would still be valid. I agree with the Subordinate Judge in holding that there was an arrangement between the natural father and the adoptive father that the adopted son was to take only the properties that were given to him by the Will and that the adoption was made conditional upon such an arrangement and would never have been made if the arrangement had not been come to before the adoption.

The next question is, whether the agreement is binding on the appellant. According to the Will Ex. A, the total extent of the land belonging to the testator is 135 acres. The testator gives 12 acres 38 cents for the performance of charities which he had been already performing for several years. He gives his sister's daughter Subbammal 2 acres 3 cents and to another sister's daughter Savithri 7 acres 30 cents. He gives the sons of another sister's daughter 6 acres 34 cents and to a distant relation 37 cents. He gives the adopted son 43 acres 36 cents to take effect immediately on his death. He gives his wife 45 acres 63 cents to be enjoyed by her till her death and on her death 19 acres 30 cents were to be given to the plaintiffs her cousin's sons and 26 acres 35 cents were to revert to the adopted son. He gives the plaintiffs 17 acres 90 cents. The outstandings and other properties which he had he leaves to the adopted son. So, under the Will, the adopted son gets 43 acres 36 cents immediately and 26 acres and 35 cents on the death of the testator's wife. The testator's wife died on the 11th of June 1911 about two months after the testator. Before the adoption the share of the appellant in his natural father's property would have been insignificant. There can be little doubt that the adoption gave the appellant considerable properties to which but for the adoption he would have absolutely no claim. He was a very distant relation of his adoptive father and it cannot be said that there was any expectation that he would succeed to his properties at any time. That the arrangement entered into between the natural father and the adoptive father as evidenced by Ex. B-1 was beneficial to the appellant there can be absolutely no doubt.

As regards the binding nature of ante-adoption agreements, it is now settled law that an agreement between natural and adoptive fathers is binding on the adopted son if it is for his benefit.

In *Chitko Raghunath Rajadiksh* v. *Janaki* (8), it was held that an agreement between a widow who inherited her husband's property and the natural father of the boy whom she was going to adopt that she should be entitled to enjoy the property during her lifetime subject to the boy's education and maintenance was binding on the adopted son who would not have been adopted but for the agreement. In dealing with the power of the father to give his son in adoption, it was pointed out that it was a fallacy to suppose that for the purpose of giving the son in adoption the powers of the father are only co-extensive with the powers of a guardian and that if a millionaire gave his son in adoption, even though all his property was ancestral, to a family possessing no property, the adoption would be valid although the son may be deprived of all his interest in the ancestral property. This decision was followed in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3). In *Basava* v. *Lingauganda* (9), it was held that a gift of property by a Hindu father to his daughters is valid if at the time of the adoption the adopted son's natural father agreed to such a disposition. *Venkappa* v. *Fakirgowda* (10) was relied on; but this decision does not throw much light on the question as it proceeded more on the facts of that particular case. Sir Lawrence Jenkins, C. J., was of opinion that the agreement in that case was not binding on the adopted son. He accepted the test suggested by Sir Charles Farran in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3) and held that on that test the stipulations in the agreement were unreasonable. In *Vyasacharya* v. *Venkubai* (11), it was held on the facts of that case that the arrangement between the natural father and the widow making the adoption whereby certain properties were to be given to the daughter of the adopting widow was not

(8) 11 B. H. C. R. 199.
(9) 19 B. 428; 10 Ind. Dec. (N. S.) 289.
(10) 8 Bom. L. R. 346.
(11) 17 Ind. Cas. 741; 37 B. 251; 14 Bom. L. R. 1109 (F. B.).

enforceable against the adopted son. As Sir Basil Scott, C. J., in his judgment states that the reference to the Full Bench was limited with reference to the facts of that case and as the decision in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (3) was not dissented from, this decision does not throw much light on the question in dispute. In *Purshottam Mukund Samant* v. *Rakhmabai Mukund* (12), it was assumed that a fair and reasonable arrangement will be valid and the finding was that the arrangement in question was not binding. In *Balkrishna Motiram Gujar* v. *Shri Uttar Narayandev* (4), a Hindu possessed of ancestral property while making an adoption executed a document with the consent of the natural father of the adopted boy directing payment of an annual sum for the purpose of lighting lamps in a temple. It was held by Heaton and Hayward, JJ., that the grant in favour of the temple was invested. I find it difficult to reconcile this decision with the other decisions of the Bombay High Court which I have referred to. With all respect to the learned Judges I am unable to agree with them that before making the adoption the person who is absolutely entitled to the property would have no power to make it making the adopted son's right subject to the performance of certain charities. In *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya* (13), it was held following the decision in *Bhagbutti Devi* v. *Bholanath Thakoor* (14) that a Hindu had power, when giving his wife authority to adopt, to direct that so long as she was alive she should remain in possession of all his property.

In *Panchanon Majumdar* v. *Binoy Krishna Banerjee* (15), it was held that ante-adoption agreements between the widow making an adoption and the natural father of the adopted son will be valid if they are fair and reasonable and the difference was pointed out between such cases and cases where the widow purported to deal with more than her interest as a Hindu widow and which would not bind the reversioners.

(12) 23 Ind. Cas. 599; 16 Bom. L. R. 57.
(13) 8 C. 357; 6 Ind. Jur. 523; 4 Ind. Dec. (N. s.) 228.
(14) 2 I. A. 256; 1 C. 104; 24 W. R. 168; 3 Sar. P. C. J. 528; 3 Suth. P. C. J 186; 1 Ind. Dec. (N. s.) 65 (P. C.).
(15) 44 Ind. Cas. 538; 27 C. L. J. 274.

In *Harendra Nath Avasti* v. *Shibo Sundari Debi Chowdhurani* (16), Chitty and Richardson, JJ., held that a Hindu testator has the power to curtail the rights of his prospective adopted son and that an agreement between the widow making the adoption in pursuance of the Will of her husband and the father of the adopted boy that she should remain in possession over property for her life is valid and binding on the adopted son.

In *Shanti Parshad* v. *Dhan Devi* (17), it was held by Scott Smith, J., that an agreement between the adoptive father with the natural father postponing the rights of the adopted son to the widow is valid. In this case as the agreement was between the natural and adoptive fathers, the question as to the effect if the party was the widow of the last male holder did not arise.

So far as the authorities in Madras go, there is a long current of authority for upholding agreements which are not unreasonable. In *Lakshmi* v. *Subramanya* (1), it was held that an adopted son was bound by an arrangement which his natural father had agreed to before the adoption whereby the adoptive father's wife was to be entitled to certain lands for her life; Muthusami Iyer, J., called a finding whether, when the respondent was given in adoption, the person who gave him in adoption was aware of the existence of the settlement (marked as Ex. A in the case) and whether, but for the consent to it, the adoptive father would not have adopted the respondent. The learned Judge referred to, with approval, the decision in *Vinayak Narayan Jog* v. *Govindrav Chintan Jog* (18) and observed: "In that case it was held that when the adopted son and the person who gave him in adoption were fully cognizant of the disposition of property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place and when the disposition and the adoption might under the circumstances be regarded as one transaction, the disposition though contained in a Will could not be repudiated by the adopted son. The principle underlying the the decision is that the disposition was one which it was competent to the testator to make prior to the adoption, and that its

(16) 3 Ind. Cas. 378.
(17) 50 Ind. Cas. 113; 42 P. W. R. 1919.
(18) 6 Bom. H. C. R. (A. C. J.) 224.

acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary." Shephard, J., observed: "In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal* (19), but by the plaintiff's husband who, before adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If, being thus fully owner, he might before the adoption have disposed of his property in part or in whole in favour of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife, and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener.....The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of, and, therefore, no question can arise as to his guardian's competency to deal with it.

These considerations, if well founded, also dispose of the defendant's contention that, in view of the right of survivorship, Ramayyan's Will must as against him be inoperative. The Will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from Ramayyan's estate and applied to a particular purpose, which should take effect after his death. To that extent the defendant never acquired co-parcenary right in his father's property and consequently there was no right of survivorship. The circumstance that the disposition was made by Will makes no difference because the Will must not be regarded by itself but as part of the contract, and before the adoption took place it was competent to Ramayyan to bind himself by contract to make the Will which he did make. For these reasons I am of opinion that if it can be shown that the adoption was made on an understanding between the parties that the defendant should take his place in the family subject to the arrangement made by his adoptive father in favour of the plaintiff, the plaintiff ought to succeed in this suit". This decision of two eminent Judges of this Court shows that the fact that the disposition is by Will makes no difference, and disposes of the argument of the appellant s Vakil to that effect.

In *Jagannadha* v. *Papamma* (5), a distinction is drawn between the power of a widow making an adoption and that of her husband who was full owner making it, and it was pointed out that *Lakshmi* v. *Subramanya* (1) was a case of full owner of property while in the case under consideration the widow who had power of adoption from her husband had no power of disposition over the property and that in the absence of power given by her husband she could not impose any condition as to enjoyment of the property by the adopted son. In *Ganapati Ayyan* v. *Savithri Ammal* (20), Shephard and Subramania Ayyar, JJ. were of opinion that where a husband gave certain directions to his widows as regards some charities and also directed them to take a child in adoption, the adoption would be conditional on the properties being set apart for the performance of the charities which would be binding on the adopted son. Shephard, J., observed "If the condition had been originated by the widows, it might not have been binding on the adopted son, but seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the authority was excercised, I think the adopted son is in no other position than he would be, if Gopalakrishnaya himself had taken him in adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been no adoption if the requisition of the widows had not been obeyed, and as the widows were entitled and indeed bound to make that requisition, I do not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi* v. *Subramanya* (1), applies." Subramania Iyer, J , was of the same opinion and observed that the circumstances in which the adoption took place rendered it conditional on the alienation not being challenged by the adopted son, and the case was clearly governed by the decision in

(19) 4 M. 160; 1 Ind. Dec. (N. S.) 946.

(20) 21 M. 10; 7 Ind. Dec. (N. S.) 364.

Lakshmi v. *Subramanya* (1), *Narayansami* v. *Ramasami* (21) and *Basava* v. *Lingagauda* (9). The Full Bench decision in *Visalakshi Ammal* v. *Sivaramien* (2) settled the question so far as agreements by the natural father at the time of adoption are concerned. In that case a Hindu widow made an adoption in pursuance of authority given to her by her husband. An agreement was entered into between the widow and the natural father whereby it was declared that in the event of disagreement between the widow and the adopted son, certain properties which were about one-half of the properties left by the husband should be enjoyed by the widow during her lifetime and by the adopted son after her death. But for such consent of the natural father no adoption would have been made. After the adoption, owing to disagreement between the parties, a suit was filed by the natural father as next friend of the plaintiff to recover all the properties of the deceased. It was held that the provisions of the agreement were binding on the plaintiff. The Referring Judges Sir S. Subramaina Iyer, Offg., C. J., and Benson, J. felt some doubt as to the right of the natural father to bind the adopted son having regard to certain observations of the Privy Council in *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6): Benson, J., who delivered the judgment of the Full Bench observed as follows:—"If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu Law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu Law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu Law, or the purposes for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made, and are upheld by the authority of the case and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognize them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed that the natural father would not have agreed to the adoption, coupled with the disposition of the property, unless it was for the benefit of his son to do so: nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside, and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy. In the present case the condition as to the property is a reasonable one, and such as the Courts should uphold." In *Ramasami Aiyan* v. *Venkata Ramaiyan* (22), a suit was filed by the adopted son to set aside certain alienations made by the widow who adopted him. The defence was that the adoption was made on the faith of a written agreement with his natural father and that none of the transactions were to be disputed as the agreement was ratified by the plaintiff after he came of age. The High Court held that the agreement was not binding on the adopted son as the ratification was made without knowledge of all circumstances. Their Lordships of the Privy Council held that the natural father consented to give his son in adoption on the understanding that his son would inherit only about one-third of the adoptive father's property and that the adopted son validly ratified the agreement after he came of age. As regards the validity of the agreement itself, apart from ratification, their Lordships expressed no decided opinion but observed "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh* v. *Janaki* (8), certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life-interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but

(21) 14 M. 172; 1 M. L. J. 39; 5 Ind. Dec. (N. S.) 123.

(22) 2 M. 91; 5 C. L. R. 347; 6 I. A. 196; 3 Shome L. R. 39; 3 Ind. Jur. 472; 4 Sar. P. C. J. 42; 3 Suth. P. C. J. 663; 1 Ind. Dec. (N. S.) 335 (P. C.).

was, at the least, capable of ratification when his son became of age".

It will be seen from the cases cited that the agreements sought to be enforced against a minor adopted son fall under heads, (1) where the agreement is between the natural and adoptive fathers imposing terms and conditions, (2) where it is between a widow making an adoption in pursuance of a Will or deed of adoption which provides for the curtailment of the right of the boy to be adopted either by interposing a life-estate of the widow or giving portions of the property to strangers, (3) where it is between a widow acting under an authority to adopt, which does not restrict the right of the boy to be adopted but merely authorises an adoption, and reserves right of enjoyment in himself during his lifetime or (herself during her lifetime ?) creates right in third parties. So far as cases Nos. 1 and 2 are concerned the authorities showed that the adopted son would be bound by any valid restrictions the adopting father or testator may impose, and as regards the third case some cases decide that she cannot create an estate beyond her powers as Hindu widow and that even in cases of her own widow's estate she cannot keep it and postpone the right of the adopted son.

I am of opinion that where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by Will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted. There is no reason why the rights of the boy to be adopted should be tested with reference to what his position in the family would be *after the adoption* and to see whether the adoptive father could, *after the adoption*, have made the alienations which are disputed. As I have already pointed out, the right of a Hindu father to give his son in adoption is not governed by any questions of benefit to the adopted boy. For it is perfectly competent to the natural father to give his boy in adoption to a pauper and thus deprive his son of any interest in the natural father's property. If the adopting father would not make the adoption but for the conditions agreed to by the natural father and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant as he gets properties of large value which he would not have got but for the adoption, and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the Will and the adoption being conditional on the said disposition. There is a slight error in the decree and judgment. Plaintiffs will be entitled to mesne profits only from 15th January, 1912. The decree will be amended accordingly.

The appeal, otherwise, fails and is dismissed with costs of respondents Nos. 1 and 2.

As regards Appeal No. 461 of 1922, it is by the 2nd defendant against the decree of the Subordinate Judge directing him to pay the costs of the plaintiffs. Having regard to the facts of the case as set out in my judgment and the conduct of the 2nd defendant, I see no reason to differ from the Subordinate Judge as to costs. This appeal also is dismissed with costs.

V. N. V. *Appeals dismissed.*

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS APPLICATION No. 81 OF 1920.

April 18, 1921.

Present :—Mr. Raymond, A. J. C.

MESSRS. MITSUI BUSSAN KAISHA, LTD.—RESPONDENTS I

versus

FIRM OF TOTARAM-BHAGWANDAS—RESPONDENTS II.

Civil Procedure Code (Act V of 1908), O. VI, O. VII —Plaint, what is—Document setting forth cause of action—Institution of suit, date of—Arbitration proceedings—Suit filed, effect of—Award, validity of.

A document purporting to be a plaint setting forth a cause of action, and drawn up substantially in accordance with the rules contained in O. VI and O. VII of the C. P. C. is a plaint though it may contain some imperfections. [p. 896, col. 1.]

Assan v. *Pathumma*, 22 M. 494 at p. 502; 9 M. L. J. 37; 8 Ind. Dec. (N. S.) 353, referred to.

The date of the institution of a suit should be reckoned from the date of the presentation of a plaint, or from the presentation of a document purporting to be a plaint notwithstanding its imperfections. [*ibid.*]

Assan v. *Pathumma*, 22 M. 494 at p. 502; 9 M. L. J. 37; 8 Ind. Dec. (N. S.) 353, followed.

Dhondiram v. *Taba Savadan*, 27 B. 330; 5 Bom. L. R. 198 and *Gavaranga Sahu* v. *Botokrishna Patro*, 4 Ind. Cas. 503; 32 M. 305; 6 M. L. T. 129; 19 M. L. J. 340, referred to.

Where a reference to arbitration is proceeded with and the award made during the pendency of a suit between the same parties in respect of the same subject-matter, the award is bad and unenforceable. [*ibid.*]

The jurisdiction of a Court is not taken away either by a submission clause in a contract, or by the existence of arbitration proceedings; the right of a party to seek the assistance of the Courts is unrestricted, and the Courts will not permit their jurisdiction to be ousted. [p. 898, col. 2.]

As the jurisdiction of the Courts is not to be ousted, whenever a party to a submission brings an action in respect of any matter that he has contracted to refer, he may be liable to damages for the violation of his contractual obligation, but the Court that has seisin of the suit, is the only Tribunal for the time being invested with the jurisdiction to decide the rights of the parties and the arbitrators become *functi officio*, and their authority to deal with the dispute abates. [p. 899, col. 1.]

When a party to a contract files a suit in respect of any matter that he has contracted to refer to a private tribunal, the Court is not ousted of its jurisdiction to try the suit. It is open to the other party to apply for stay of the suit on the ground of the contractual liability to refer the matters in dispute to arbitration and the Court may in a proper case hold its hand and refuse to proceed with the trial of the suit. But in the event of no application being made to the Court for a stay of the suit, the Court that has seisin of the disputes between the parties can proceed to adjudicate upon them and its decision is binding upon the parties. [*ibid.*]

The Court in which the suit is filed acquires seisin of the suit immediately on its institution, and its jurisdiction to try it cannot remain suspended till such time as an application for stay of the suit has been made to it and it decides whether it should proceed with the suit or not. [p. 899, col. 2; p. 900, col. 1.]

(Case-law reviewed.)

Mr. *Dipchand Chandumal*, for Respondent No. I.

Mr. *Kimatrai Bhojraj*, for Respondent No. II.

ORDER.—This is an application to file an award under the Indian Arbitration Act. Various objections are raised to it which are set out below. To appreciate them, it will be useful to state the material facts which are based on the documents that have been filed at the hearing, and to determine what has been proved before I discuss the legal aspect. The firm of Totaram-Bhagwandas, hereafter referred to as respondents II carrying on business at Beawar consigned various quantities of wool through the firm of Mitsui Bussan Kaisha of Karachi hereafter referred to as respondents I, under five different contracts executed between November 19, 1917 and April 1918, filed in the case and collectively marked Ex. 7. Clause (8) of these contracts which are identical in wording provided for a reference to arbitration of two European merchants in the event of any dispute between the contracting parties. Disputes did arise in respect of a sum of Rs. 8,652-9-7 due on re-drafts which respondents II failed to pay though called upon to do so. On the 17th February 1920, Ex. 4 respondents I called upon respondents II to appoint an arbitrator within seven days from the receipt of Ex. 4 and warned them that in the event of their failing to do so they themselves would appoint one in accordance with the terms of Ex. 7. On the 26th February respondents II replied to respondents I Ex. 5 complaining that the guarantee broker of the latter had overcharged certain items in the advance accounts tendered to them and on the difference being refunded to them they would pay what they owed; no reference was made in the reply to plaintiff's demand for arbitration. On the 3rd March 1920, Ex. 6 respondent's I informed respondent's II by letter that they had appointed Mr. H. C. Cargill of Messrs. Forbes, Forbes Campbell & Co., arbitrator on behalf of the latter and Mr. W. U. Nicholas of Messrs. Anderson & Co., on their own behalf. The reference Ex. 8 in favour of the above named arbitrators was executed on the 19th March 1 920 and signed by respondents I only. On the 24th March 1920 the arbitrators gave a notice Ex. 9 to both the parties fixing the hearing before them for the 12th April 1920. It may here be mentioned that the reference to the arbitrators specified the contract numbers and the dates of the contracts in respect of which they were to arbitrate. On the 5th April 1920 respondents II through their Pleader sent notices Exs. 11 and 12 to respondents No. 1 and the arbitrators, objecting to the arbitration as they had paid all their dues and further informing them that they had filed a suit against respondents I in the Beawar Court which invalidat-

ed the reference to arbitration and, therefore, they should not proceed with it. On the 14th April 1920, the arbitrators made their award Ex. 13 awarding respondents I as against respondents II the sum above mentioned and on the 12th May 1920 the arbitrators applied for an order to have the award filed in Court.

On the 26th November 1919 respondents II had filed a suit Ex. 14 against respondents I in the Court of the Sub-Judge at Beawar for rendition of account. Respondents II contend that the subject-matter of the suit embraces the dispute referred to arbitration. The order by the Court on Ex. 14 is "Check report; to be put up on the 12th December 1919 "Ex. 15," Ex. 16 is a copy of an order made by the Court on the 1st May 1920, "the suit be registered and summonses for the final disposal of the suit may issue for the 27th May 1920." The suit is numbered No. 99 of 1920. On the 21st July 1920 respondents I applied under r. 18, Sch. II, C. P. C., or s. 19, Indian Arbitration Act for the stay of the suit which application the parties inform me has not been disposed of till this date.

It appears to me in the first instance essential to determine on what date the suit in the Beawar Court was instituted. Mr. Kimatrai for respondents II contends that the institution of the suit must be deemed to be on that date when the plaint was first presented in Court whatever its imperfections may be, and, therefore, the 26th November 1919 must be taken to be the date of the institution of the suit. Mr. Dipchand for respondents I argues on the other hand that the date when the suit was ordered to be registered by the Court which is the 1st May 1920 should be taken as the date of the institution of the suit. According to him it is only when a plaint is strictly in accordance with the provisions of the C. P. C. and is admitted and ordered to be registered that suit can be deemed to have been instituted. A certified copy of the diary of the proceedings in the Beawar Court, Ex. 18, is filed and explains the interval between the presentation of the plaint on the 26th November 1919 and the date of the order on the 1st May 1920. I have already referred to Ex. 15 and the order made on the presentation of the plaint. On the 12th December 1919 in consequence of a note by the clerk of the Court that the plaintiff had not filed (1) a copy of the account nor (2) was there a copy of the plaint and (3) some English words in the plaint were written in Urdu. The Court made an order that the plaint should be returned and "The plaintiff should present plaint within one week after amendment." Apparently the plaint was not actually returned and lay in the Court till the 3rd April 1920. This was due to the absence of the plaintiff from Beawar, and from time to time applications were made for extensions of the period allowed for amendment. On the 3rd April 1920, plaintiff applied to have the plaint for one month and the Court directed that it should be returned to him and the amended plaint filed within a week. On the 13th April, plaintiff re-presented the plaint with the necessary amendment on which after it was scrutinized by the clerk the order of the Court on the 1st May 1920 was that it should be registered. If now, as Mr. Dipchand contends that the 1st May 1920 is to be taken as the date of the institution of the suit, then the cause of action had been extinguished by the award which was made on the 14th April 1920 and the original rights and liabilities of the parties are merged in it. The word "plaint" has no statutory definition but, as pointed out in the case of *Assan* v. *Pathumma* (1), "plaint" in law means and has, before the days of Blackstone whose phraseology in regard to the explanation of the term has been accepted by Lexicographers, meant nothing more than "a private memorial tendered to a Court in which a person sets forth his cause of action; the exhibition of an action in writing." Now O. I, r. 1, cl. (1), C. P. C. of 1908 corresponding with s. 48 of the Code of 1882 lays down that "Every suit shall be instituted by presenting a plaint to the Court of such officer as it appoints in this behalf" and cl. (2) of O. I, r. 1, which is new and on which Mr. Dipchand strongly relies is to the effect that "Every plaint shall comply with the rules contained in O. VI and O. VII so far as they are applicable." Order VI discusses pleadings generally and O. VII deals with the requirements of plaints and Mr. Dipchand's argument is that unless a plaint complied in every detail with the formalities prescribed by O. VI and O. VII it cannot be deemed a plaint and its pre-

(1) 22 M. 494 at p. 502; 9 M. L. J. 37; 8 Ind. Dec (N. S.) 353.

sentation cannot be regarded as the institution of a suit. I am of opinion that a document purporting to be a plaint, setting forth a cause of action, and drawn up substantially in accordance with the rules contained in O. VI and O. VII of the Code is a plaint though it may contain some imperfections. Under the Code of 1882, by s. 53, cls. (*a*) and (*b*), and s. 54, the very power vested in a Court to return a plaint for amendment or to reject it connoted its presentation, it may be an imperfect plaint but it is still a plaint. Similarly under O. VII, r. 11 of of the Code of 1908, the Court is invested with power to reject a plaint, which implies that a plaint has been presented within the meaning of O. IV, r. 1, and further, it is important to observe in connection with the plaint that was presented in the Beawar Court and the order on it "Plaint should be returned, the plaintiff should present plaint within one week after amendment" which may have been a good order under s. 53 of the Code of 1882, cannot be justified under the Code of 1908, which does not contain any provision analogous to that in s. 53 returning a plaint for amendment, but only provides for its amendment under O. VI, r. 17, if the circumstances require it. The Beawar Court therefore was in error in directing the return of the plaint to the plaintiff for amendment; it should have retained the plaint on its file after presentation, and ordered the plaintiff to remedy its imperfections within a fixed period. But what were the alleged imperfections? The diary of the Beawar Court which is Ex. 18 in the case contains a remark by the clerk of the Court countersigned by the Judge that the plaintiffs have filed no accounts which would enable the Court to ascertain the Court-fees payable in the suit. The plaintiff as I have remarked prayed for a rendition of account and he valued his relief approximately at Rs. 500 on which he paid Court-fees, he could do no more considering that the accounts were with the defendants in the suit. On the plaintiff representing this fact to the Court, the objection was withdrawn. The other two objections to the admission of the plaint were that a copy of the plaint had not been filed, and some words were entered in the plaint in Urdu which should have been in English. A further objection was raised which hardly applies to the plaint that the translation fees had not been paid. I have set out the objections to the plaint specifically mainly for the purpose of pointing out that the plaint at the time of its presentation was substantially in compliance with the provisions of O. VI and O. VII of the Code and that the minor imperfections which did exist did not detract from its character. In cases where the defects in a plaint are of a far graver character, as for instance, where a plaint is insufficiently stamped, it has been held that the suit is instituted on the day the plaint is presented. In the case of *Dhondhiram* v. *Taba Savadan* (2), it was held that neither the Limitation Act nor the C. P. C. ordains or implies that in the absence of a sufficient stamp there can be no presentation. This case adopted the view of Subramania Ayyar, J., in the case of *Assan* v. *Pathumma* (1) who held that plaints must be regarded as filed on the day that they were presented though they may not be duly stamped or entirely unstamped. The latter case was approved of and followed by a Full Bench in the case of *Gavaranga Sahu* v. *Botokrishna Patro* (3); and whatever divergencies of opinion that existed in the various High Courts as to the date of presentation of a plaint not duly stamped, the new s. 149 of the Code of 1908 has been enacted for future guidance. I am, therefore, of opinion that the date of the institution of a suit should be reckoned from the date of the presentation of a plaint, or from the presentation of a document purporting to be a plaint notwithstanding its imperfections. I, therefore, hold that the suit in the Beawar Court was instituted on the 26th November 1919.

Now the objections to the award raised by Mr. Kimatrai such as he has pressed may be formulated as follows :—

(1) That the award is bad and unenforceable as the reference to arbitration was proceeded with and the award made during the pendency of a suit in the Beawar Court between the same parties and in respect of the same subject-matter, and which had not been stayed.

(2) That one of the arbitrators Mr. Cargill was not an European merchant within the meaning of the arbitration clause and hence his appointment as arbitrator was not valid.

(3) That in the notice given to respondents II calling upon them to appoint an ar-

(2) 27 B. 330; 5 Bom. L. R. 198.
(3) 4 Ind. Cas. 503; 32 M. 305; 6 M. L. T. 129; 19 M. L. J. 340.

bitrator, the contract numbers in respect of which the disputes arose were not mentioned in the letter nor was the subject-matter of the dispute clearly specified therein.

(4) That respondents I had no authority to appoint an arbitrator for respondents II unless they had appointed their own arbitrator and communicated the fact to respondents II.

(5) That the contracts in suit provide for a reference to arbitration only at the option of the respondents I and hence the submission is not valid in law.

Mr Dipchand for respondents I has contended that the subject-matter of the suit filed in the Beawar Court is not identical with and does not cover the disputes between the parties that are the subject-matter of the reference to arbitration and hence the arbitration proceedings and the award are not vitiated by reason of the pendency of the suit.

The main objection to the award is that embodied in the first objection raised by Mr. Kimatrai and I shall proceed to consider it, but it is essential to first dispose of Mr. Dipchand's contention that the matters in dispute that are referred to arbitration are not covered by the pending suit.

The first notice issued by respondents I to respondents II is Ex. 4 by which the former called upon the latter to pay a sum of Rs. 8,652-9-7 with interest thereon on account of re-drafts or to appoint an arbitrator. The reference to arbitration Ex. 8 shows that respondents I claimed the above amount as due in respect of five contracts between the parties the numbers and dates of which are specified therein. The suit filed by respondents II against respondents I in the Beawar Court recited that the former had consigned through the latter 793 bales of wool to Liverpool and that the account sales of only some of the bales were received, which showed a loss payable by respondents II ("by a wrong and illegal account submitted to them", to use the words of the plaint, which was paid) whereas respondent I ought to have recovered from respondents II only such amount as may be found due to them after the account sales for the *whole* of the consignment had been received and that respondents I have not allowed respondents II the discount in certain charges to which they are entitled. It was further stated that respondents II called upon respondents I to render an account which the latter declined and hence the suit was filed for rendition of account. Now, the main argument of Mr. Dipchand that the subject-matter in respect of which relief is sought in the suit is distinct from what was referred to arbitration, is that by the suit respondents II complain of overcharges, etc., in respect of the amount already recovered from them and that para. 4 of the plaint refers to specific items unwarrantedly thus recovered, and that the plaint demands an account from respondents I in respect of the *previous* account submitted by them whereas what respondents I seek to recover from respondents II by arbitration is the amount due to them in respect of five distinct contracts not embraced in the previous account and that a part of the amount of Rs. 8,652 includes items which were found to be due only after the suit. Now at this stage, I am not concerned with the maintainability of the suit filed by respondent II and whether there was, as a matter of fact, an account between the parties in respect of the consignments of wool or whether the contracts are distinct and separate. But I cannot interpret the plaint, as Mr. Dipchand asks me to do, as restricted only to the previous account, nor when the application for stay of the suit was filed, was the plaint understood as being confined only to the previous account. There is not a word in the stay application which suggests that the points in dispute in the suit are wholly different to those that are referred to arbitration, in fact if it were really so, no application for a stay of the suit would have been necessary, as the reference to arbitration and the award would cover different ground to that mentioned in the suit. Mr. Dipchand has strongly relied on Ex. 5 sent by respondents II in reply to the demand notice Ex. 4 of respondents I and he contends that the reply clearly indicates that respondents II's sole objection to the payment of the amount was that respondent I had overcharged certain items in the previous account and that unless there was a refund of the differences, they were not prepared to pay up the amount referred to in Ex. 4. It is true that Ex. 5 does not convey the impression contended for, but it is the suit in the Beawar Court that should be the determining factor whether it embraces or not the disputes that were referred to arbitration. In para. 1 of their plaint respondents II refer to the total wool transactions effected through

respondents I and para. 3 of the plaint is as follows: "That the defendant (respondent I) without the receipt of the account of the sales of the bales and without the settlement of complete account of *hundis*, cheques and differences, showed loss to plaintiffs' (respondents II) firm by wrong and illegal account and recovered the amount according to his own demand," and the prayer in the plaint after reciting that the plaintiffs called upon the defendant to rendtion of account which was refused, prays that the defendants be directed to render an account to the plaintiffs of their transactions with them that is of all their transactions through them and not only a part of them. Further by Ex. 11 the notice sent by respondents II to respondents I and the arbitrators, after they were informed of the reference to arbitration, respondents II intimate to the latter that a suit has been filed for accounts "which will settle the *whole* matter." Whether, therefore, the relief sought by the respondents II in their suit will be accorded to them or not, the suit on the file of the Beawar Court is one that embraces the disputes referred to arbitration.

The important question now arises, is the award bad by reason of the pendency of the suit? The suit was filed as I have pointed out on the 26th November 1919, the award is dated the 14th April 1920, and the application for the stay of the suit on which no order has yet been passed by the Court either staying in the suit or dismissing the application was made on the 21st July 1920.

In *Doleman and Sons* v. *Osset Corporation* (4), Fletcher Moulton, L. J., explained the position of parties when notwithstanding an arbitration clause in the contract between them, a suit has been instituted by one of them. "The law will not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power, in its discretion to refuse to a party the alternative of having the dispute settled by a Court of Law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant had abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows that in the latter case the private Tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. There cannot be two Tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted."

In the case of *Ram Prasad Surajmull* v. *Mohan Lal Lachmi Narain* (5), it was held that when an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration. The decision of the majority of the Court of Appeal in *Doleman and Sons* v. *Ossett Corporation* (4) was approved of and followed. In *Jokiram Kaya* v. *Ghaneshamdas Kedar Nath* (6), it was remarked that the principle enunciated in *Doleman and Sons* v. *Ossett Corporation* (4) was of fundamental importance in this class of cases and that when a reference to arbitration has been made and the private Tribunal has come into existence, the effect of the institution of the suit is that, from that very moment the arbitrators become *functus officio*, that is, their authority to deal further with the matter becomes extinguished and in *Appavu Rowther* v. *Seeni Rowther* (7), it was held that a private reference to arbitration of a subject of a dispute does not prevent either party filing a suit in a Court of Law in respect of the same matter. The arbitrators therupon become *functus officio* and any award by them is without jurisdiction.

It is clear that the jurisdiction of a Court is not taken away either by a submission clause in a contract, or by the existence of arbitration proceedings; the right of a party to seek the assistance of the Courts is unrestricted, and the Courts will not permit their jurisdiction to be ousted. When, therefore, a party who has either signed a contract containing a submission

(4) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(5) 60 Ind. Cas. 895; 47 C. 752; 38 C. L. J. 67.

(6) 61 Ind. Cas. 380; 47 C. 849; 25 C. W. N. 62.

(7) 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 243.

clause or has signed the reference to arbitration, files a suit in Court in respect of the matter that he has contracted to refer, to permit the other party to invoke the assistance of a private Tribunal would be to have two Tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision, involving a race between them as to which should be first to give its decision. As the jurisdiction of the Courts is not to be ousted, whenever a party to a submission brings an action in respect of any matter that he has contracted to refer, he may be liable to damages for the violation of his contractual obligation, but the Court that has seisin of the suit, is the only Tribunal for the time being invested with the jurisdiction to decide the rights of the parties and the arbitrators become *functus officio*, and their authority to deal with the disputes abates. The suit will not affect the validity of a prior reference which was in conformity with the agreement between the parties, but when a suit is filed in respect of a matter contracted to be referred to arbitration, the arbitrators must stay their hands either permanently, which implies the extinction of their authority, if the Court decides to reserve to itself sole jurisdiction in the suit, or temporarily, if the Court is of opinion on application made to it, that the parties should be relegated to the Tribunal of their choice, and their disputes decided by arbitration. I see no reason to dissent from the view which I, as a member of the Bench expressed in the case of *Ramchand* v. *Govindram* (8), where I made the following observations: "When a party to a contract files a suit in respect of any matter that he has contracted to refer to a private Tribunal, the Court is not ousted of its jurisdiction to try the suit. It is open to the other party to apply for stay of the suit on the ground of the contractual liability to refer the matters in dispute to arbitration and the Court may, in a proper case, hold its hand and refuse to proceed with the trial of the suit. But in the event of no application being made to the Court for a stay of the suit, the Court has seisin of the disputes between the parties, can proceed to adjudicate upon them and its decision is binding upon the parties." Undoubtedly in the present case an application for stay of the suit had been made after the award, but there can be no question that during the pendncy of the suit the arbitrators held their sittings and passed their award. I think the authorities are clear that they were not competent to do so.

(8) 56 Ind. Cas. 150; 13 S. L. R. 193 at p. 199.

Mr. Dipchand in his able argument has contended that unless and until the Court decides the question whether the suit should be stayed or not, it has not seisin of the suit filed before it and consequently there can be no conflict of jurisdiction. He relied on the case of *Khillooram* v. *Louis Dreyfus* & Co. (9) and discussed it at great length. In this case there was a reference to arbitration on the 21st May, on the 23rd May the suit was filed, on the 17th June an award was passed by the arbitrators and on the 4th August an order was made by the Court staying the suit. It was held that the filing of the suit did not invalidate the reference to arbitration and as the Sub-Judge stayed the suit, the arbitrators had jurisdiction to pass their award. There is an important distinction between this suit where an order for stay of the suit had been made by the Court though after the award and the present one where there is no order for stay and Pratt, J. C., expressed the opinion in the former case that if no stay of the suit has been obtained an award made after the suit is invalid. I think the judgment of Mukerji, J., in *Jokiram Kaya* v. *Ghaneshamdas Kedar Nath* (6) offers a satisfactory solution of the difficulties raised by Mr. Dipchand basing them on the judgment, in the case of *Khilooram* v. *Louis Dreyfus & Co.* (9). The following passages at page 855* are very pertinent to the point: "The institution of the suit cannot, however, retrospectively affect the validity of the reference which when it was made, was in exact conformity with the agreement of the parties". And again "In the case before us, the arbitration proceedings were properly instituted and carried on, till up to the moment of the institution of the suit; that suit could not, on any conceivable principle of law, relate back to the date of reference and affect the validity of the proceedings which had followed thereon". Hence though filing of the suit does not invalidate the reference to arbitration, yet the effect of the instiution of the suit is that from that very moment the arbitrators become *functus officio*, and a conflict of jurisdiction is avoided. This can only be on

(9) 52 Ind. Cas. 130; 13 S. L. R. 8.

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the hypothesis that the Court in which the suit is filed acquires seisin of the suit immediately on its institution and its jurisdiction to try it cannot remain suspended till such time as an application for stay of the suit had been made to it and it decides whether it should proceed with the suit or not.

I am therefore of opinion that the award made during the pendency of the suit is bad and must be taken off the file as of no effect. As my finding on this point has the support of decisions of eminent Judges, it is unnecessary to discuss the other objections raised to the filing of the award.

N. H. *Award set aside.*
Costs on respondents I.

MADRAS HIGH COURT.

CIVIL APPEAL No. 359 OF 1922.
August 4, 1924.
Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

L. A. SUBRAMANIA IYER—DEFENDANT No. 4—APPELLANT
versus
R. H. HITCHCOCK—PLAINTIFF—RESPONDENT.

Libel—Fair comment, what amounts to—Damages, assessment of—Nominal and exemplary damages, when can be awarded—Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. VIII, rr. 3, 5—Amendment of pleadings—Denial, what constitutes—Admission, whether can be retracted.

Bodies of trained, disciplined and organized servants of the Government acting under the instructions and directions of superior officers, such as the Police and the Military, are expected not to give way to feelings of vengeance and to observe a higher standard of conduct than untrained, undisciplined and unorganized rabble in the street among whom they are expected to keep order. [p. 902, col. 2.]

Just, however, as a higher standard of behaviour is expected from the Police and the Military as compared with the crowds in the streets, similarly from a body of cultured, highly educated gentlemen preparing to make an enquiry, is expected a calmer and more judicial attitude than is to be expected from mere casual narrators. [*ibid.*]

Where the facts stated are correct, reasonable and even plausible, criticism may be justified as fair comment, but if there are no facts to warrant the defamatory imputation the defence of fair comment cannot be maintained in an action for libel. [p. 903, col. 2.]

A person who makes a defamatory statement cannot escape liability in respect of it merely because he made it honestly but without due care. [*ibid.*]

In a suit to recover damages for libel nominal damages will be awarded only when the plaintiff is content to clear up his character, and does not care to put money in his pocket. [*ibid.*]

In assessing damages in a case of libel the conduct of the defendant during the proceedings may be considered but such conduct is only his conduct in the First Court. The repetition in the Appellate Court of the defence in the Court below cannot be considered as aggravating conduct. [p. 904, col. 1.]

Where no private malice or personal grudge has been proved and it is shown that the defendant acted throughout in the public interest, the case is not one for exemplary damages. [*ibid.*]

Per *Reilly, J.*—The right of fair comment on matters of public interest is a right which it is the duty of the Courts carefully to guard and liberally to interpret. [p. 912, col. 1.]

Rules 3 and 5 of O. VIII of the C. P. C. must be read together. The words "stated to be not admitted" in r. 5 must be taken to mean "specifically stated to be not admitted." [p. 906, col. 2.]

A High Court Vakil, like any one else, may make a mistake or omission in his pleadings and if he has really done so he is as much entitled as any one else to put the matter right by amendment in order that the real question in controversy between him and his opponent may be decided. So far from being slow to grant leave to amend pleadings or from pinning the parties to the strict letter of their pleadings, it is the duty of the Court to assist parties in bringing out clearly the real questions in issue between them. The questions in controversy between the parties, however, which should be brought out clearly and decided are, save in exceptional cases, the questions in controversy when the parties join issue, that is, when the defendant puts in his written statement. They do not include new questions which the defendant neither wished nor intended then to dispute but which at a later stage in the proceedings, either because he has changed his mind or something has happened after he filed his written statement, he thinks it profitable to dispute. [p. 907, col. 2.]

A defendant who deliberately and under no mistake or misapprehension admits a material fact in his written statement cannot be allowed, at a later stage in the proceedings, to change his front and make a new case for himself by denying that fact. [*ibid.*]

In criticising the conduct of the Police on the occasion of a riot, the defendants stated in a report that the Police and the superior officers were, before the commencement of the riot, engaged in a criminal conspiracy for the purpose of provoking a breach of the peace and violence on the part of non-co-operators and then using reprisals and finally fixing the responsibility on the movement of non-co-operation, and they went on to say that they considered the evidence was conclusive and unimpeachable about the complicity of plaintiff, who was the District Superintendent of Police in the transaction. In a suit for damages by the plaintiff for libel, it was found that the Policemen had misbehaved on the day in question, but that there was no proof of any conspiracy much less of plaintiff's complicity in it:

Held, that the report had gone far beyond the limits of justifiable criticism and any plea of fair comment must, therefore, fail. [p. 912, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in O. S. No. 56 of 1921.

Messrs. *T. R. Ramachandra Iyer, C. V. Anantakrishna Iyer, P. S. Narayanaswami Iyer, T. S. Anantharama Iyer* and *C. S. Swaminathan*, for the Appellant.

The Advocate-General and Mr. *A. V. K. Krishnan Menon*, for the Respondent.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit by Mr. Hitchcock, the District Superintendent of Police, South Malabar against five defendants for damages for libel, contained in a report issued, in April-May 1921, by them entitled—"Police Crimes in Ottapalam." The Subordinate Judge gave a decree for Rs. 6,000. Only the 4th defendant, the only defendant who filed a written statement (in the proper sense of the term) and defended the case—appeals.

Mr. T. R. Ramachandra Iyer, for the appellant argued, at the outset, certain preliminary matters relating to the course of the trial in the Court below. The issues were settled on 15th February 1922 and the case came on for trial on the 3rd April 1922—to which day it was first posted. It is now argued (1) that the Subordinate Judge erred in refusing the adjournment prayed for by the 4th defendant on that day and in proceeding with the examination of plaintiff's witnesses; (2) that the Subordinate Judge ought to have re-called the plaintiff for cross-examination in June, the 4th defendant not having cross-examined him on the 3rd April; (3) that the Subordinate Judge ought to have framed the new issue applied for by the 4th defendant (see page 18 of the pleadings), and (4) that the Subordinate Judge ought to have permitted the amendment of the 4th defendant's written statement (*vide* page 21 of the pleadings).

Points 1 and 2 are to a certain extent connected; Point 4 is similarly dependent on point 3.

I do not think it necessary to deal with these points in detail as my learned brother has done so at great length—I agree with the Subordinate Judge and with my learned brother in their conclusions. As to the first point, the question now is not whether the Subordinate Judge might not or might have granted on adjournment on the 3rd April but whether his refusal calls for any interference on our part now. Seeing that the trial of the case was not closed on that day but was adjourned to June and that only the plaintiff's witnesses were then examined, I am not satisfied that the procedure of the Subordinate Judge has prejudiced the defence. Nor am I satisfied that there was any justification for the defendant in refusing to cross-examine the plaintiff on that day with the materials then available. It follows that the appellant's contention on the 2nd point also must be disallowed.

I do not feel called upon to discuss the large number of English decisions cited by Mr. Ramachandra Iyer on the other points. On a careful perusal of the written statement and having regard to the fact that application for a new issue and for amendment of the written statement were not made on the 3rd April when the case was partially tried but only in June, I am satisfied that the additional defence was not originally intended to be raised by the original written statement. In saying so, I do not mean to say that the 4th defendant took part in the preparation of the report. Perhaps he did not. All that I mean is that, at the time, he was content to sail in the same boat along with the other defendants and not to raise any defence peculiar to himself though available. This is also the conclusion of the Subordinate Judge.

I now come to the merits of the case.

On the 26th April 1921, there was a students' conference at Ottapalam. It followed three other conferences—The Kerala Provincial Conference (23 and 24th), an Ulema Conference and a Khilafat Conference (25th). First, we have to ascertain the events that happened on the 26th April. It appears that the District Magistrate ordered the plaintiff to have men for preserving peace. The plaintiff ordered the special Police to be kept in reserve and not to be in evidence. The three days (23rd to 25th) passed off quietly. The plaintiff says "All through the week the Sergeant and the men of the reserve Police were complaining to me of insults by the party calling themselves volunteers. The shorthand Sub-Inspectors were complaining about the treatment accorded to them in the *pandal* and that they were refused soda water by the persons outside. The members of the force behaved very well. I have cautioned them against offering insult." I accept this evidence of Mr. Hitchcock. I believe that, not only he received complaints from his men but that it is likely that petty insults and annoyances (not actually amounting to any violence) were offered by some of the

volunteers, though I do not think that the Sub-Inspectors have any right to complain if they did not get soda-water. The report of the defendant itself Ex. B supports Mr. Hitchcock's evidence. At page 5 it says "Until then there was every reason to believe that the reserve Police headed by Mr. Hitchcock, the District Superintendent of Police, the Assistant Superintendent of Police and other Officers contributed a good deal to the success of the conference by their non-interference."

Mr. Hitchcock was to leave Ottapalam by the mail train of that day which was to arrive at 10-30 A.M., but arrived late at 11-8. He went to the Railway Station but on being informed that the train would be late went back to the Police Station, having left a Sergeant at the station to inform him of the arrival of the train. At about the time that the train arrived the Sergeant rushed on a cycle to inform the plaintiff of the train's arrival. Mr. Hitchcock immediately hurried to the station. The train left at 11-13 and he arrived at Calicut at about 1-30 P.M. There is not the smallest doubt about the time mentioned above apart from the fact that Mr. Hitchcock has not been cross-examined for no justifiable reason. During the time that he was at the Police Station between 10-30 and 11-8 the Special Police Constable No. 615 came up with D. W. No. 6 Kunhappa Menon, the Captain of the Volunteers for the Conference and told him that he was insulted by the latter. The plaintiff "told Constable No. 886 to find out what was the matter and sent them away." Mr. Hitchcock also swears "During the time I was at Ottapalam, there was no complaint made to me against any Police Officers about insults offered to any member of the Congress party or Conference party." I unreservedly accept this evidence of Mr. Hitchcock.

But as a matter of fact, other incidents happened at Ottapalam on the 26th April—unknown to Mr. Hitchcock.

According to the statements which form the appendix to the report and which were analysed in the report, the following persons have been insulted, beaten or otherwise roughly handled by the Police men of the Reserve Force.

[The incidents were then considered in detail and his Lordship proceeded:—]

My conclusion as to the incidents of the 26th are;

(1) The Reserve Policemen received sundry petty insults from the volunteers and others; but kept themselves under restraint during the first three days (23rd to 25th).

(2) The pent up feelings burst forth on the 26th and they were guilty of discreditable conduct. I say, 'discreditable' in spite of the insults they received, for bodies of trained, disciplined and organised servants of the Government acting under instructions and directions of superior officers (such as the Police and the Military) are expected not to give way to feelings of vengeance and to observe a higher standard of conduct than untrained, undisciplined, and unorganised rabble in the street among whom the former are expected to keep order.

If the report had contented itself with criticising the conduct of the Reserve Policemen or even said that Mr. Hitchcock committed an error of judgment in not keeping the Reserve Policemen under greater control on the 26th (for he admits "I know that the people would insult them and it would be difficult to keep one's temper when insulted") the report would not have been libellous.

But, as it is, the report has gone far beyond the limits of justifiable criticism; just as we expect a higher standard of behaviour from the Military and the Police as compared with the crowds in the streets, similarly we expect from a body of cultured, highly educated gentlemen preparing to make an enquiry, a calmer attitude and a more judicial attitude than casual narrators. The defendants have grievously fallen from this high standard. Even with reference to the statements before them, their report contains grossly inaccurate statements of fact. At page 24 the report says about Kunhappa Menon "It was in their presence that his Khilafat badge was removed. He explained to them how he was beaten, kicked, and dragged to their presence by the Police." These statements are not supported by his deposition before them.

The following statements in the report (*viz.*), (1) it also shows that "the superior officers are accessories before the fact and after the fact," (2) "there is evidence on record to show that the attack was the result of a conspiracy carefully designed before hand"—may not necessarily refer to the plaintiff. As to the third sentence complained of in the plaint, *viz.*, "it was a decided victory, etc.," I do not think it has any

thing to do with the incidents of 26th April. At page 25 the report refers to an article by Mr. Ramunni Menon in the *Hindu* dated 3rd March 1921 under the title of "Vagaries of the District Authorities" and proceeds to summarise it. The next sentence refers to Mr. Thomas. The last sentence remarks "after referring to various other vagaries of these District Officers *Mr. Ramunni Menon pointed out that*..... the people maintained perfect non-violence and that it was a decided victory etc." If the last sentence is an unfair summary of Mr. Ramunni Menon's article, it may be libellous but not with reference to the incidents of 26th April.

The next sentence complained of is "we consider that the evidence is conclusive and unimpeachable about the complicity of Mr. Hitchcock in the transaction." The two incidents discussed in the sentences immediately preceding this conclusion relate to Unni Krishna Menon and Kunhi Koya. I have already observed that the former's identification of Mr. Hitchcock is now known to be wrong. Kunhi Koya never named him. One would have thought that the defendants before using the words "conclusive and unimpeachable" took greater care to satisfy themselves of the connection of Mr. Hitchcock with these two men, instead of being content with the statement of Unni Krishna Menon. As the facts had now turned out, we know Mr. Hitchcock did not see these men, and the conclusions stated without proper enquiry and manifestly erroneous cannot be held to be justified. The fifth sentence complained of is "Is it believable that the Mallapuram Reserve Police could have thought of attacking the innocent people of Ottapalam without being aided by the superior officers and the local Police." Leaving aside the doubtful innocence of the Ottapalam people one would think the answer is "yes." The natural explanation of the occurrences is not to bring in the aid of the superior officers but to attribute it to the men themselves. In the present case, the petty insults of the preceding days are enough to explain the fracas. Assuming these petty acts of insult were not known to the framers of the report, even then the *prima faice* conclusion should be to attribute the conduct of the Policemen to the men themselves and not to explain with reference to a supposed aid or instigation by superior officers.

I do not think it necessary to refer to the 6th and 7th sentences complained beyond saying that they were unjustified.

If the facts stated are correct, reasonable and even plausible criticism may be justified as fair comment [*Hunt* v. "*Star*" *Newspaper Co.* (1)], but if there are no facts to warrant the imputation, the defence of fair comment cannot be maintained in an action for libel [*Joynt* v. *Cycle Trade Publishing Co.* (2)]. The defendants cannot justify the libel by saying they believed in the presence of Mr. Hitchcock in the Police Station when Unnikrishna Menon and Kunhikoya were taken there, for the enquiry on which such belief could be based was incomplete and they could easily have ascertained the actual facts if they took greater care to ascertain it. The statement about the evidence of his complicity being conclusive and unimpeachable was made at their risk and they cannot escape liability merely because they made it honestly but without due care. [See also Halsbury's Laws of England, Vol. 18, ss. 702-3 and page 706)].

In *Cooper* v. *Lawson* (3), it was held that the statement "there can be but one answer to these very natural and reasonable queries, he is hired for the occasion" was rightly held to be libellous as it contained a statement of fact which the defendant failed to prove.

As to damages, this is not a case for nominal damages which will be awarded only when the plaintiff is content to clear up his character and does not care to put money in his pocket (Odgers on Libel and Slander, page 374). The libel is also serious. The appeal is also dismissed with costs.

The plaintiff has filed a memorandum of objections for enhancement of damages; I do not think it necessary to enhance the amount of damages for the following reasons.

1. No special damage has been proved.

2. The Trial Court has made an honest endeavour to arrive at a figure which will fairly compensate the plaintiff for the annoyance and mental suffering which the libel must undoubtedly have caused. It is for the respondent to satisfy us that it is

(1) (1908) 2 K. B 309 at p. 320; 77 L. J. K. B. 732; 98 L. T. 629; 24 T. L. R. 452.

(2) (1904) 2 K. B. 292; 73 L. J. K. B. 752; 91 L. T. 155.

(3) (1838) 8 A. & E. 746; 1 P. & D. 15; 1 W. W. & H. 601; 8 L. J. Q. B. 9; 2 Jur. 919; 112 E. R. 1020; 47 R. R. 713.

inadequate. Besides the Rs. 6,000 awarded in this case, he obtained a decree for another Rs. 1,000 in the suit against the *Hindu* for the same libel. He never filed an appeal against the other defendants.

3. The learned Advocate-General referred to the fact that the 4th defendant continued in this appeal to justify his libel.

But while the conduct of the defendant may be considered in assessing the damages, such conduct is only the conduct in the First Court. The repetition in the Appellate Court of the defence in the Court below cannot be considered as aggravating conduct.

4. While the reckless conclusions of the defendant may amount to malice in law, no private malice or personal grudge has been proved in the case. The defendants acted throughout in the public interest. Therefore, it is not a case for exemplary damages.

5. The incident of 26th April lead to the fair comment that Mr. Hitchcock might have more efficiently postponed his departure for another day and in any event, did not on the 26th April exercise such efficient control over the men of the Reserve Police as the public had a right to expect and as he exercised on the previous days. This is also a ground of disallowing exemplary damages.

In the result the memorandum of objections is dismissed but without costs.

Reilly, J.—The plaintiff who was District Superintendent of Police, South Malabar, sued the five defendants for damages for certain statements contained in Ex. B a printed pamphlet entitled "Police Crimes in Ottapalam, being the report of the Emergency Committee appointed to investigate and report on the Police tyranny in Ottapalam on 26th April 1921," at the end of which are printed the names of the defendants with the symbol "Sd." before each as if each had signed the original, and contained also in a copy of the report which appeared over the names of the 5 defendants in the issue of the Madras newspaper *The Hindu* for 11th May 1921, Ex. A. Defendant No. 4 alone contested the suit. The Subordinate Judge made a decree for Rs. 6,000 and costs against the defendants. Defendant No. 4 appeals.

2. Mr. Ramachandra Iyer for defendant No. 4 argued grounds Nos. 4 and 7 of his appeal as preliminary grounds. They are to the effect that the Subordinate Judge misconstrued the pleadings in the suit and misunderstood appellant's defence, that he erred in dismissing the appellant's petition to frame a special issue whether appellant wrote or published or caused to be published the report in question and that if there was any ambiguity in appellant's written statement, the Subordinate Judge should have allowed appellant's applications for its amendment. In considering these contentions, it is necessary to examine the pleadings in some detail. In para. III (*c*) of the plaint, it is set out that some incidents are said to have occurred at Ottapalam on 26th April 1921, in which some members of the Mallapuram Special Police Force are said to have taken part, and that plaintiff was apprised of some of the said incidents for the first time when he reached Calicut Railway station from Ottapalam between 1 and 2 P. M. on that day. In para. III (*d*) it is alleged that defendants constituted themselves or were constituted into what has since been described as an "Emergency Committee" with the professed object of investigating the causes and details of the said incidents and wrote and published and caused to be published the so-called report Ex. B. In para. III (*e*) are set out 7 extracts from the report Ex. B, which plaintiff alleges were written, published and caused to be published by defendants falsely, maliciously and without probable cause and constitute grave and serious libels against plaintiff personally and in the way of his office as superior District Officer of the Police Force of South Malabar. In para. III (*f*) it is stated that the so-called investigation into the alleged incidents was un-authorised, highly coloured by bias and used as a convenient pretext for the malicious vilification of the executive heads of the Malabar District, of whom plaintiff was one. In para. III (*h*) plaintiff charges defendants with having in their so-called report fastened upon him, out of malice and spite, unworthy motives and criminal acts with the full consciousness of his absolute innocence and with deliberate object of holding him up to public odium as an official tyrant unworthy of his office. In para. III (*i*) plaintiff states that he has been greatly injured by the libels in his reputation and by way of his office and has been brought into public odium, ridicule and contempt; and in para. III (*j*) he claims damages from defendants, which he assesses at Rs. 20,000. Defendant No. 4 filed his written statement in the suit on

24th October 1921. In para. 1 of the statement he says: "This defendant does not admit all or any of the allegations in the plaint except such as have been expressly admitted herein and as regards those allegations (by which I understand the allegations not expressly admitted) this defendant puts the plaintiff to the proof of the same". Then in para. II he submits that the report Ex. B embodies the conclusions arrived at honestly and in good faith at an inquiry held openly and impartially on a matter of public importance and is based upon evidence, which there is no reason to disbelieve and states that the report is fair comment made in good faith and without any malice or spite on a matter of public interest and is in law justified and privileged. In para. 3 he submits that the extracts from the report quoted in para. III (*e*) of the plaint constitute no libel and afford no cause of action to plaintiff and states that he does not admit the correctness of the various inferences drawn and the innuendoes, suggestions and interpretations made in respect of them in the plaint; In para. 4 of the statement defendant No. 4 denies para. 3 (*f*) of the plaint. In para. 5 he denies the charge of malice and spite in para. III (*h*) of the plaint; in para. 6 he denies that plaintiff has been injured or brought into public odium, ridicule and contempt; and in para. 7 he denies that he is liable to plaintiff in damages. It will be noticed that this written statement besides raising pleas of justification and fair comment specifically traverses every material averment in the plaint except the allegations that defendant No. 4 was one of those who constituted themselves or were constituted into the "Emergency Committee" and that he wrote and published and caused to be published the report in question. On 15th February 1922 the following issues were settled in the presence of the Vakils of plaintiff and defendant No. 4, *viz*

(1) whether the report mentioned in the plaint and the extract therefrom quoted in the plaint constitute a libel on the plaintiff;

(2) whether the report in question is a fair and *bona fide* comment on a matter of public interest;

(3) whether the report was justified and privileged;

(4) whether the plaintiff is entitled to any damages, and if so what;

(5) Whether the report was published maliciously.

It will be noticed that there is no issue about publication of the alleged libels from which it appears that the Judge understood that there was no controversy about publication and that defendant No. 4 admitted publication. On the issues so settled the parties went to trial, the final hearing being fixed for 3rd April, 1923.

3. On that day defendant No. 4 put in a petition for adjournment (I.A. No. 156 of 1922) which was dismissed. Plaintiff's witnesses were then examined and the suit was adjourned to 19th June 1922 for the examination of defendant No. 4's witnesses after a petition (I. A. No. 152 of 1922) that the cross-examination of plaintiff's witnesses might be reserved had been dismissed. On the next day defendant No. 4 presented a petition (I. A. No. 158 of 1922) that plaintiff's witnesses might be summoned for cross-examination at the next hearing. That was dismissed by the Judge on 7th April 1922. On 4th April 1922 defendant No. 4 also put in another petition (I. A. No. 159 of 1922) in which he prayed that summons might be issued for the production of certain official records; but that too was dismissed on 7th April, 1922, when defendant No. 4 applied to this Court for the transfer of the suit to some other Court; but that application was dismissed on 5th May 1922. When the suit came on for hearing on 19th June 1922, defendant No. 4 applied (I. A. No. 183 of 1922) for the framing of an additional issue, *viz.*, "whether the 4th defendant wrote and published and caused to be published report in question". In the affidavit, Ex. R., accompanying this petition, defendant No. 4 says that in his written statement he said that plaintiff's allegation that the defendants wrote and published and caused to be published the report was not admitted and that plaintiff should prove it, no issue was framed about the signing or publication of the report; but in his order of 7th April 1922 on I. A. No. 158 of 1922, that is, the petition for summoning plaintiff's witnesses to attend again for cross-examination, the Subordinate Judge had remarked that defendant No. 4 was one of the persons who signed the report; as a matter of fact defendant No. 4 did not take any part in writing the report or in its publication, nor did he sign it. As a mis-apprehension in regard to defendant No. 4's responsibility

for the prepartion and publication of the report had "crept in", a specific issue should be framed on the point. The Subordinate Judge dismissed this application for framing an additional issue, his view being that the proposed issue did not arise on the pleadings, on which it must be held that defendant No. 4 had admitted the allegation in the plaint that he among others wrote and published and caused to be published the report. On the failure of his petition for a new issue defendant No. 4 on the same day put in a petition I. A. No. 184 of 1922 for the amendment of his written statement by the addition of a paragraph denying that he even was a member of the Emergency Committee and denying that he was in any way responsible for the report and that he wrote and published it or caused it to be published. The Subordinate Judge dismissed this petition for amendment also and proceeded with the trial of the suit on the issue originally framed.

4. Mr. Ramachandra Iyer's argument for defendant No. 4 on this part of the case is two-fold, firstly, that publication is sufficiently denied in his client's written statements as it stands, and secondly that if that is not so defendant No. 4 should have been allowed to amend his written statement so as to bring out the denial of publication which he intended originally to plead. The question whether defendant No. 4 in his written statement did deny publication sufficiently for the purpose of pleadings depends on the construction of rr. 3 and 5 of O. VIII, C. P. C. Rule 3 of that Order lays down that "It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

That rule gives directions how denials are to be made. Defendant No. 4's denial of publication in his written statement has to be found, if anywhere, in para. 1 of that statement. In that paragraph he says that he "does not admit all or any of the allegations in the plaint except such as have been expressly admitted" and as regards the unadmitted allegation he "puts the plaintiff to the proof." No one can contend that this paragraph contains a specific denial of publication. The paragraph is clearly a general denial such as the rule states to be insufficient; r. 5 of the Order goes on to state the consequence of a defendant failing to observe the directions of r. 3. It states that every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted (except as against a person under disability). Now it is clear that the allegation in the plaint that defendant No. 4 among others wrote and published and caused to be published the report in question is not specifically denied in defendant No. 4's written statement. Nor, in my opinion, can that allegation be said to have been denied by defendant No. 4 in his written statement "by necessary implication" within the meaning of r. 5 on the ground that a general denial includes the particulars within the purview; as that would be to construe r. 5 in a sense inconsistent with r. 3. Similarly the words "stated to be not admitted" in r. 5 must be taken to mean if we are to read the two rules together, as we must "specifically stated to be not admitted." To my mind the strict interpretation of the two rules presents no difficulty. It is true, as urged by Mr. Ramachandra Iyer, that it has often been recognised that rules of pleading should not be enforced to a party's detriment so strictly in this country as in England; but I am here confining myself to the interpretation of the two rules in question. In this connection Mr. Ramachandra Iyer has drawn our attention to two English cases *Adkins* v. *North Metropolitan Tramway Co.* (4) and *Grocott* v. *Lovatt* (5). In the former case to each paragraph of the plaintiff's statement of claim the defendants replied that they denied each and all the several statements and allegations set out in paragraph so and so of the statement of claim; and it was admitted that the defendants intended to traverse all the material allegations in the statement of claim. The decision was that there was no ground for striking out the defence so framed. In *Grocott* v. *Lovatt* (5) the plaintiff alleged in para. 3 of his statement of claim that the defendants on or about a certain date falsely and maliciously wrote, printed and published a certain handbill. The first paragraph of the defence was "The defendants deny the facts alleged in para. 3 of the statement of claim". The Court of Appeal decided

(4) (1894) 63 L. J. Q. B. 361; 10 R. 600.
(5) (1916) W. N. 317; 61 S. J. 28.

that, although the defence was pleaded in a loose and irregular form, the Trial Judge was wrong in treating the case as one in which defendants had admitted publication. It will be seen that neither of the cases quoted is really similar to the present case. In each of the cases quoted the defendant went much further towards a specific denial of the allegations in the plaint than defendant No. 4 has done in the general expressions used in para. 1 of his written statement. To my mind on a strict interpretation or indeed on any reasonable interpretation of rr. 3 and 5 of O. VIII, C. P. C., defendant No. 4 cannot be held to have sufficiently denied the allegation of publication and must, therefore, be held to have admitted publication.

5. Mr. Ramachandra Iyer's contention that defendant No. 4 should have been allowed to amend his written statement so as to bring out clearly the denial of publication which he intended originally to plead is more serious. Mr. Ramachandra Iyer has referred to several cases, *Tildesley* v. *Harper* (6), *Cropper* v. *Smith* (7), *Hollis* v. *Burton* (8) and *Kisandas Rupchand* v. *Rachappa Vithoba* (9), as showing the principles on which leave to amend pleadings should be granted. Those cases do not go beyond the well-recognised principle that, however the necessity to amend may have arisen, leave to amend should always be granted and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise. At this time of day it is hardly necessary to quote authorities to support that principle, which has certainly not been disputed by the learned Advocate-General in this case. *Hollis* v. *Burton* (8) may perhaps be noticed for a moment as in that case Burton, who was a Solicitor and, therefore, might have been expected to know better, made a very serious admission by mistake and was subsequently allowed to withdraw it by amendment. That case is of some particular interest in comparison with the present case as it appears that defendant No. 4 is a High Court Vakil of long standing and large experience, who is no doubt well-acquainted with the rules of pleading. But a High Court Vakil like anyone else may make a mistake or omission in his pleadings, and, if he has really done so, he is as much entitled as any one else to put the matter right by amendment in order that the real question in controversy between him and his opponent may be decided. So far from being slow to grant leave to amend pleadings or from pinning the parties to the strict letter of their pleadings, it is the duty of the Court to assist parties in bringing out clearly the real questions in issue between them. But, when we speak of the real questions in issue or in controversy between the parties, we must be careful as to the stage of the proceedings to which we refer. The questions in controversy between the parties which have to be brought out clearly and decided are, save in exceptional cases, the questions in controversy when the parties join issue, that is, when the defendant puts in his written statement. They do not include new questions which the defendant neither wished nor intended then to dispute, but which, at a later stage, in the proceedings, either because he has changed his mind or because something has happened after he filed his written statement, he thinks it profitable to dispute. A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement cannot be allowed at a later stage in the proceedings to change his front and make a new case for himself by denying that fact. As I understand him, Mr. Ramachandra Iyer does not urge that defendant No. 4 should be allowed to do anything of this sort. His contention is that defendant No 4 when he filed his written statement really intended to deny that he had published the report in question. What we have to consider is whether it is possible to accept that contention.

6. In the plaint there is a clear allegation that defendant No. 4 among the other defendants wrote, published and caused to be published the report in question, and with the plaint was filed the pamphlet Ex. B and the issue of the *Hindu* Ex. A in each of which defendant No. 4's name is printed at the end of the report in such a way as to indicate that he had signed its original.

(6) (1879) 10 Ch. D. 393; 48 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249.
(7) (1884) 26 Ch. D. 700; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.
(8) (1892) 3 Ch. 226; 67 L. T. 146; 40 W. R. 610.
(9) 4 Ind. Cas. 726; 35 B. 644; 11 Bom. L. R. 1042.

Defendant No. 4 in his written statement traversed the other material allegations in the plaint individually; but according to his own account he did not think it necessary to refer to the very important allegation of publication except in his general refusal to admit in the *omnibus* paragraph with which he opened his statement. At a very late stage of the hearing Mr. Ramachandra Iyer has drawn our attention to the fact that in his written statement defendant No. 4 has not specifically denied the allegation in the plaint that plaintiff was apprised for the first time of some of the incidents which happened at Ottapalam on 26th April 1921 when he reached Calicut, that day. That statement, Mr. Ramachandra Iyer contends, the whole course of defendant No. 4's conduct of the suit shows, he intended to deny but there is no specific denial of it, from which Mr. Ramachandra Iyer asks us to infer that defendant No. 4 intended to deny it in his general refusal to admit in para. 1 of his written statement, and from this again he asks us to infer that it may be true that defendant No. 4 intended to deny also the allegation of publication in the same general paragraph. The answer to that is that logically it was not necessary to defendant No. 4's case to deny that plaintiff was first apprised of some of the incidents at Calicut and that, so far as that statement in the plaint was in any way material, it was sufficiently traversed by implication in the plea of justification set up by defendant No. 4. The Subordinate Judge has fallen into an error in para. 19 of his judgment in saying that the plea of justification set up by defendant No. 4 itself implied an admission of authorship. Defendant No. 4 was quite at liberty if he wished, in such a case to deny publication and then to set up alternative pleas of justification, etc. It is not because a denial of publication would conflict with a plea of justification that we can infer in this case that defendant No. 4 never intended to deny publication. But the learned Advocate-General has asked us to compare the written statement with the plaint and to note the particularity with which other allegations in the plaint are traversed and to contrast the vagueness of the general refusal to admit, by which it is now contended defendant No. 4 intended to deny the allegation of publication. He asks and it may well be asked, is it likely that any reasonable man, intending to contest such a case as this and to put forward the cardinal plea that he did not publish the alleged libels and had nothing whatever to do with them would have put in a written statement containing no specific mention of the plea though traversing in detail almost every other allegation in the plaint. And here it must be remembered that defendant No. 4 is not an ignorant or illiterate man, but a lawyer of experience. As I have said a lawyer like anyone else may make a mistake or omission in the pleadings in his own case. But is it likely that a lawyer of experience intending in such a case as this to deny publication would have filed such a written statement as that of defendant No. 4 in this suit? The statement was verified and signed by defendant No. 4 himself. Defendant No. 4 is asking us to believe in spite of the form of his pleadings that he did intend to deny publication. In the circumstances I think we may legitimately look into his further conduct in the suit to see whether there is anything in it to make it probable or improbable that he had that intention. Issues in the suit were framed on 15th February 1922. If one had never seen the pleadings in the suit the first thing that would attract one's attention on looking at the issues would be that there is no issue about publication. That shows at least that the Subordinate Judge was under the impression when framing the issues that no question of publication was in controversy but that on the contrary defendant No. 4 had admitted publication. If, as is represented, defendant No. 4 intended to deny publication and believed that by his written statement he had denied publication, how was it that his Vakils in whose presence the issues were framed and who must have understood that that was a cardinal part of his defence, did not protest at once that a most important issue had some how been omitted? The denial of publication was not only an obvious plea, which it would be almost impossible for them to forget; it was a line of defence which, if seriously intended would be far more easy to maintain than most of the other pleas raised. Can it be believed that defendant No. 4 and his Vakils were so negligent that they did not observe that on the issues as framed the most valuable line of defence was not available to them. But the matter does not end there. The Subordinate Judge has mentioned in his judgment that defendant No. 4's senior

Vakil submitted draft issues in the case and that it does not appear from those draft issues that there was any intention to deny publication. The draft issues have not been submitted to this Court but the Subordinate Judge's statements regarding them are not disputed. This shows at least how defendant No. 4's senior Vakil understood his written statement. It is possible that defendant No. 4 really intended to deny publication but his Vakil was under the mis-apprehension that he had admitted it? And when the suit came on for final hearing, it is clear that defendant No. 4 contested it strenuously. As has been stated, he put in petitions for adjourning the trial, for reserving the cross-examination of plaintiff's witnesses, for re-calling plaintiff's witnesses and for the production of further documents, and he also applied to this Court for the transfer of the suit from the Subordinate Judge's file. As he has shown by his affidavits in support of those petitions, defendant No. 4 himself was watching his interests in the suit keenly. But in spite of all this, we are asked to believe that it was not until some time after the examination of plaintiff's witnesses had been concluded that defendant No. 4 discovered that such an important part of his defence as denial of publication had been omitted from the issues. An examination of the pleadings and defendant No. 4's own conduct in the suit leave no doubt upon my mind that he did not intend to deny publication when he filed his written statement. In my opinion, therefore, the Subordinate Judge was right in refusing to allow him at a later stage to change his front and to put forward by amendment a new case denying publication.

7. At the very close of the hearing of this appeal Mr. Ramachandra Iyer in his reply has suggested that the averment of publication in the plaint is not sufficiently specific, that it does not state where or to whom publication was made nor how defendant No. 4 was responsible for publication either in Ex. A or B. Nothing was said about this before the Subordinate Judge, and the point is not raised in the appeal memorandum. If there would ever have been anything in the objection, it has been raised too late. Mr. Ramachandra Iyer has also brought to notice at the same stage of the proceedings the fact that there appears to be a mistake in the plaint in giving the date of the cause of action That point too should have been raised before the Subordinate Judge if of any importance.

8. Mr. Ramachandra Iyer has urged that the Subordinate Judge should have granted defendant No. 4's petitions of 3rd and 4th April 1922 for reserving his cross-examination of plaintiff's witnesses and for re-calling those witnesses on another day for cross-examination on the ground that defendant No. 4 had not then obtained the originals of the statements appended to Ex. B. on which that report was professedly based. The statements as printed at the end of Ex. B. were in defendant No. 4's hands; but Mr. Ramachandra Iyer has urged that for the purpose of cross-examining plaintiff the original statements were required. He has not been able, however, to explain to us why equally effective questions could not have been put to plaintiff on the basis of the printed statements as on that of the manuscript originals. In his order on I. A. No. 150 of 1922 the Subordinate Judge has remarked that defendant No. 4 adopted a defiant attitude at the hearing of 3rd April 1922 and declined to cross-examine plaintiff's witnesses. Defendant No. 4's conduct in this matter appears to have been very unreasonable; and when a party behaves in such a way at the trial, he puts those who have to defend his conduct in the Appellate Court in an unenviable position. Neither in this matter nor in the other interlocutory applications which I have mentioned do the Subordinate Judge's orders appear to be improper.

On the merits of the case it is unnecessary for me to add much to the judgment just pronounced by my learned brother with the result of which I agree. Mr. Ramachandra Iyer has urged that most of the extracts from the report which have been set out in the plaint do not necessarily apply to plaintiff. It is true that the first two extracts, *viz.*, (1) "it shows also that the local Police and superior officers are accessories before the fact and after the fact" and (2) "there is evidence on record to show that the attack was a result of a conspiracy carefully designed before hand" taken by themselves, do not necessarily refer to plaintiff. The 3rd extract *viz.*, "It was a decided victory for non-co-operation movement and a correspondingly decided failure for the authorities as their attempts to goad the people to violence

had so thoroughly and signally failed" appears in the report only as a remark made by D. W. No. 5 in a news paper article published by him in March 1922. But when we come to the 4th extract, *viz.*, "We consider that the evidence is conclusive and unimpeachable about the complicity of Mr. Hitchcock in the transaction", the reference to plaintiff is specific. In regard to this extract Mr. Ramachandra Iyer has contended that the "transaction" referred to is merely the taking of one Kunhi Koya to the Police Station, which is mentioned in a few lines earlier in the report. But we must go further in the report to see what the "transaction" was. At the bottom of page 26 of Ex. B. we find "hence the necessity for a conspiracy to provoke a breach of the peace at Ottapalam on the morning of the 26th of April, and, if any untoward casualties or injuries were caused to the Police, to bring in all their instruments of destruction into play and then attribute the whole thing to the movement of non-co-operation. There is ample proof on record that the Reserve Police of Mallapuram committed in furtherance of the common object the various offences with which they have been charged". *i.e.*, house-breaking, robbery, grievous hurt, robbery, assault and mischief as mentioned on page 8 of the report. Then on page 28 we find "what do all these expressions prove? They prove not only a pre-existing conspiracy but also the method and manner of execution resolved upon by the conspirators. They establish beyond ever a shadow of doubt that all these conspirators before they started out, resolved to get at the Captain of the volunteers, Vakil Ramunni Menon, all Khilafat workers and volunteers, the Khilafat flags and any others who might oppose them and assault them as roughly as possible so as to provoke violence and then use their arms and ammunitions in the name of order and peace. They also show that it was part of their campaign that the local Police should abet and aid the Reserve Police by accompanying them to point out the persons they wanted. In this connection the important question is whether Mr. Hitchcock, the District Superintendent, and the Surgeant of the Reserve Police had left Ottapalm before the riot commenced with full knowledge of the same." Then on page 31 we find the extract in question, *viz.*, "We consider that the evidence is conclusive and unimpeachable about the complicity of Mr. Hitchcock in the transaction." The argument of the report from the bottom of the page 26 until we reach this extract is continuous, and it is clear that the "transaction" referred to is the alleged conspiracy and the facts alleged to have been done in carrying out its object. In the 5th extract *viz.*, "is it believeable that the Mallapuram Reserve Police could have thought of attacking the innocent people of Ottapalam without being aided by the superior officers and the local Police," it is clear I think from the context that plaintiff is included in "the superior officers." The 6th extract is "At Calicut there was no riot and house-breaking by the Police, whereas at Ottapalam riot and house-breaking proceeded the attack on the Khilafat emblems and workers. Mr. Hitchcock and his Assistant did all that was necessary to use this unlawful Assembly of the Reserve Policemen as an instrument to serve their own purpose, without directly implicating themselves. And the next sentence of the report explains the last words of this extract by saying "Mr. Hitchcock hurried to the station with full knowledge of what was going on with a view to avoid responsibility and save his reputation." The 7th and last extract appears in the report after the words "on a review of the whole evidence" and is "we are of opinion that the Reserve Police of Melapuram the local Police of Ottapalam and the superior Police Officers were before the commencement of the riots engaged in a criminal conspiracy for the purpose of provoking a breach of the peace and violence on the part of non-co-operators and then using reprisals and finally fixing the responsibility on the movement of non-co-operation. We are also of opinion that all the above named offences were committed by the Reserve Police of Melapuram in furtherance of their common object and that they failed to secure desired result." Here again it is clear that plaintiff is included in "the superior officers" mentioned. It must also be remembered, on page 19 of the report it is stated that one of the questions for consideration is "if it (*i.e.*, the conduct of the Police) was the result of the previous conspiracy, whether the District Superintendent of Police Mr. Hitchcock and the Assistant Superintendent of Police and the local Police were parties to the conspiracy and to what extent, if any." Taken with their

context there can be no doubt, I think, that the 4th, 5th, 6th and 7th extracts set out in the plaint refer to plaintiff.

It has not been contended by Mr. Rama-Chandra Iyer that if these extracts refer to plaintiff, they are not defamatory. Indeed they are most gravely defamatory. Hardly a graver allegation could be made against an officer in the position of plaintiff whose duty it was to preserve the peace of his district than that he played the hateful and shameful part of deliberately provoking a section of the public to break the peace in order that the Police might have an excuse to bring "all their instruments of destruction into play." Further it is alleged that plaintiff entered into a conspiracy with his subordinates to carry out this disgraceful plan. And finally it is alleged that he was guilty of the crowning meanness of deserting his men and leaving Ottapalam while the plan was being carried out in order to conceal his part in it. These are atrocious allegations.

11. Defendant No. 4 has set up the plea of justification, to make out that plea he has produced evidence that Madhava Menon, D. W. No. 6, the local chief of the "Khilafat volunteers" was beaten by a Police constable at the Ottapalam Railway Station on the morning of 26th April 1922, was kicked by some other constables and was then taken to plaintiff at the Ottapalam Police station but made no complaint to plaintiff and was sent away, that Ramunni Menon, D. W. No. 5, the local Congress secretary after hearing about 10-30 A. M., that some shop-keepers and others had been beaten went with D. W. No. 10 and another man towards the Railway Station and then towards the Court building of which the Police Station forms part and on their way passed plaintiff who was going to the Railway Station, but did not speak to him, that when got to the shop of Narayana Menon, D. W. No. 11, which is opposite the Court building, they found that he had received a wound on the nose, that his brother, D. W. No. 14, had been beaten and that D. W. No. 12 had an injury on his leg, that after an altercation with a Police constable, a student who was with Ramunni Menon was hit on the back of his neck by the same constable and that a little later Ramunni Menon was seized by some constables and dragged towards the Police Station but was released before he reached it. The evidence of D. Ws. Nos. 11, 12 and 14 is to the effect that when they were all in the shop of D. W's Nos. 11 and 14 some Police constables who had been chasing another man entered the shop; D. W. No. 14 resisted them; the constables hit him, and he jumped down into the road; his brother D. W. No. 11 went to his rescue; he in turn was hit by the constables and pulled out of the shop; he fell into the road-drain and injured his nose, breaking one of its bones; D. W. No. 12 was also beaten by the constables and fell down and hurt his hand and knee. It is not clear from the evidence of D. Ws. Nos. 11, 12 and 14 when all this happened. D. Ws. Nos. 11 and 14 say it was between 10 and 11 A. M., D. W. No. 12 says he posted a letter "about 10 or 11 A. M." and was sitting in the shop after that when the constables arrived. From the evidence of D. W. No. 5 Ramunni Menon it appears that D. Ws. Nos. 11, 12 and 14 had been beaten before he reached the shop, which was very soon after he passed plaintiff going to the Railway Station from the Court building opposite to the shop. But how soon after Ramunni Menon and his companions met plaintiff he got to the shop has not been made clear. D. W. No. 2, a correspondent of the *Madras Mail*, says that he saw the assaults of Ramunni Menon and on D. Ws. Nos. 11, 12, and 14 and that all these incidents happened within 10 minutes. D. W. No. 14 says that after he had been beaten by the Police he was taken to the Police Station; he saw two *sahibs* there, he heard that they were Superintendents but he cannot say that they were not Sergeants. It does not appear that D. W. No. 11 or 12 or 14 had anything to do with the non-co-operation movement and their evidence suggests rather that some Police constables had some private reason for attacking them. There is evidence that plaintiff left Ottapalam Railway Station by the train for Calicut at 11-13 that morning. D. W. No. 3 who was in charge of the Ottapalam branch of a Calicut Bank says that he saw some men in *khaky* shirts chasing a man in front of his office. They abused him and made preparation to get into his office, desisted when one of them read the notice board; he sent a telegram about the incident to his head office at Calicut about 11-15 A. M. that day. It will be seen that, if every word of evidence produced by defendant No. 4 is true, it does not show that plaintiff knew before he left Ottapalam that any one had been

assaulted by the Police and that it is ludicrously insufficient as a basis for the other allegations made against him. I agree that the plea of justification falls.

12. There remains the plea of fair comment. The right of fair comment on matters of public interest is a right which it is our duty carefully to guard and liberally to interpret. But can the statements in question be brought within even the widest interpretations of fair comment? The conduct of the Police is undoubtedly a matter of public interest. If the evidence adduced by the defendant No. 4 regarding the conduct of the Police at Ottapalam on 26th April 1922 is true and it must be remembered that it was not necessary for plaintiff's purpose in the suit to controvert that evidence, it was a subject on which comment, very strong comment, was legitimate. But the report goes far beyond that. Mr. Ramachandra Iyer has harped upon the argument that, if Police constables at Ottapalam acted in the way the evidence shows they acted on the morning of 26th April 1922, while plaintiff was still in the village or immediately after he left, it might reasonably be said that plaintiff was responsible for their conduct. In one sense the head of the District Police Force is responsible if the descipline of the force breaks down and the men get out of hand. If the evidence in this case is true, strong language might have been used on the way in which plaintiff appeared to have discharged that responsibility without over-stepping the legal limits of fair comment. But from the position that plaintiff must be held responsible for the conduct of his subordinates to the allegation that he joined them in a conspiracy for the vile object attributed to him in the report we have to jump over an unbridged chasm in the argument. The 4th, 5th, 6th and 7th extracts quoted in the plaint contain unjustified allegations of fact. It makes no real difference in this respect that the 5th extract is put in the form of a rhetorical question and that the 4th and 7th extracts are stated as conclusions of fact drawn from evidence. As the learned Advocate-General has contended, these extracts are not fair and they are not comment. The plea of fair comment also fails.

13. In regard to damages I agree that there is no sufficient reason to interfere with the Subordinate Judge's decree.

14. I agree that the appeal should be dismissed with costs and the memorandum of objections should be dismissed without costs.

V. N. V.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 265 OF 1922.

July 9, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

PERIGI VENKOBACHARLU—DEFENDANT—APPELLANT

versus

SANJI RADHABAYAMMA—PLAINTIFF—RESPONDENT

Procedure—Evidence in one case used in another—Objection by party—Irregularity.

Where on the application of one of the parties to a suit, the Court used as evidence in the case the evidence in another case, though the application was opposed by the other party:

Held, that the procedure was opposed to law and vitiated the whole trial as irregular.

Appeal against a decree of the Court of the Subordinate Judge, Anantapur, in Original Suit No. 16 of 1920.

Mr. *L. A. Govinda Raghava Iyer*, for the Appellant.

The Advocate-General, for the Respondent.

JUDGMENT.—The Subordinate Judge has used the evidence in Original Suit No. 6 of 1920 as evidence in this case on the application of the plaintiff though it was opposed by the defendant. This procedure is opposed to law and vitiates the whole trial as irregular. The appellant contends that he has been prejudiced by the irregularity and we cannot say he was not, for the Sub-Judge states he perused the whole of the evidence so admitted and actually refers to the evidence of two witnesses in his judgment.

The decree is set aside and the suit remanded for fresh trial to be disposed of according to law. Costs to abide result. The Court-fee paid by the appellant will be refunded.

V. N. V. *Suit remanded.*

CALCUTTA HIGH COURT.

MISCELLANEOUS CASE No. 87 OF 1924.

August 19, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

SUBODH CHANDRA ROY CHOWDHURY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 54 (7), 491—Extradition Act (XV of 1903), s. 23—Arrest without warrant, when justified—"Credible information," "Reasonable suspicion," what amounts to—Police Officer, duty of—Person liable to be extradited, when can be arrested—Procedure after arrest.

Petitioner's brother was arrested without a warrant by the Calcutta Police acting on the basis of two telegrams received from the Jodhpur State Police requesting the arrest and stating that the person whose arrest was requested was "wanted for embezzlement of money to the value of a couple of lacs of rupees." On an application being made by the petitioner under s. 491 of the Cr. P. C. for a writ of *habeas corpus*:

Held, (1) that the Criminal Appellate Bench of the High Court had jurisdiction to entertain and dispose of the application under s. 491 of the Cr. P. C.; [p. 914, cols. 1 & 2]

(2) that the arrest of the petitioner's brother was unlawful as the assertion contained in the telegrams from the Jodhpur State Police did not constitute "credible information" or create a "reasonable suspicion" as required by clause *seventhly* of s. 51 of the Cr. P. C. [p. 914, col. 1.]

Per *Mukerji, J.*—Section 54 *seventhly* of the Cr. P. C. gives a Police Officer personal authority and involves a personal responsibility and reasonable suspicion and credible information must be based upon definite facts which the Police Officer must consider himself before he acts under the section and he cannot delegate his discretion or take shelter unto the plea or judgment of another officer or authority. [p. 916, col. 1.]

The wording of clause *seventhly* of s. 54 of the Cr. P. C. clearly indicates that the arresting Police Officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend upon the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. [p. 916, cols. 1 & 2.]

The last portion of clause *seventhly* of s. 54 of the Cr. P. C. contemplates cases in which there is a present liability and not cases in which there may be liability in future for apprehension or detention. The issue of some sort of process for extradition under the law would create such a liability although the process may not have arrived and is not available for execution. [p. 917, col. 2.]

Even where all the conditions necessary to satisfy the requirements of clause *seventhly* of s. 54 of Cr. P. C. are made out and the arrest is validly or lawfully made the person arrested must forthwith be produced before a Magistrate in order that the detention may conform to the provisions of s. 23 of the Extradition Act. [p. 918, cols. 1 & 2.]

Application under s. 491 of Cr. P. C.

Messrs. *Pugh*, *A. K. Basu* and Babu *Satyendra Kissore Ghose*, for the Petitioner.

Mr. *B. L. Mitter*, for the Crown.

JUDGMENT.

Walmsley, J.—This Rule was obtained under section 491 of the Cr. P. C.

The circumstances are as follows:—

Subodh Chandra Roy Chaudhury, a servant of the Jodhpur State was arrested by the Calcutta Police without a warrant on August 11th. He was produced before the Deputy Commissioner on August 13th when an application for bail was practically refused, for the sum demanded was prohibitive.

It appears that the Calcutta Police received two telegrams on or about August 11th. The first in addition to personal description said "wanted for embezzlement." The second, in addition to suggestions about possible movements said "embezzlement of money to the value of a couple of lacs of rupees". This was all the information which the Calcutta Police had when they arrested the man; and the search of his house yielded nothing. Both these telegrams were sent by "Police" without further specification.

Since the arrest, and in answer to a telegram from Calcutta, telegrams have been received from the Judicial and Political member of the State Council and from the Inspector General of Police, and from the Resident. The two former give a considerable amount of information as to the nature of the charges preferred against the arrested man.

There is no doubt about the proper procedure in cases of this nature. Under s. 7 of the Extradition Act there should be a warrant issued by the Political Agent to the address of the Chief Presidency Magistrate. I can quite understand that that procedure may entail an amount of delay which would enable the fugitives to escape. That, however, is a danger against which there is a double safeguard. First, there is the one specially appropriate to cases, such as the present, namely, application to a Local Magistrate as provided by s. 10 of the Extradition Act. Admittedly, recourse was not had to this procedure. Secondly there is the wide power of arrest without warrant conferred upon the Police by s. 54 of the Cr. P. C. Of the clauses in that section, the seventh is the one on which reliance is placed for justification of the

arrest. It is urged that the conditions mentioned in that clause are fulfilled and the arrest was, therefore, lawful.

The first question is whether the statements in the telegrams of the 11th August constituted credible information or created reasonable suspicion. Now there was in the telegrams nothing but a bare assertion: no details as to how the embezzlement was effected or how it was detected, were given. It appears to me that an assertion like that may suffice for a requisition, but is not enough when the conditions suggested by the words credible and reasonable have to be satisfied. Those words must have reference to the mind of the person receiving the information, and such bare assertions cannot form the material for the exercise of an independent judgment: they are enough only if the receiver subordinates his judgment to that of another, consequently I think that the first half of the conditions mentioned in the seventh clause is wanting, and that the arrest without a warrant was unlawful.

It is urged that since then much more information has been received. That is true: but the nature of the offence alleged to have been committed is still obscure. Charges of forgery and cheating have been added, and very likely they are applicable, but the statement of facts suggests that the forging and the cheating may have taken place in British India. Even now, therefore, I am not prepared to say that all the elements required by the seventh clause to s. 54, Cr. P. C., are established. As I take this view, I need not go into the question whether later details may be used to supplement the information on which the arrest was made.

In my opinion the telegrams received on August 11th did not contain materials which would justify the arrest of the man Subodh Chandra Roy Chaudhuri without a warrant. His detention is, therefore, improper: and the order that we must pass is that he be set at liberty.

An objection has been raised to-day as to the jurisdiction of this Bench to entertain this application. It appears to me that the Amending Act of last year, Act XII of 1923, made such a great change that the Rules framed under the Code as it stood before the amendment and the practice that formerly obtained have now become out of date, and in my opinion the terms of s. 491, Cr. P. C., as it now stands, give this Bench jurisdiction to entertain and dispose of the application.

Mukerji, J.—I agree.

The learned Standing Counsel has raised a preliminary objection that the Criminal Appellate Bench of this Court has no jurisdiction to deal with an application made under the provisions of s. 491, Cr. P. C., or that, at any rate, having regard to the uniform practice which prevails as to the making of an application under that section before a Judge sitting on the Original Side of this Court, this Bench should not pass any order upon the present application. With regard to this matter I should like to say only this: that by the amendment introduced by the Amending Act (XII of 1923) to s. 491, Cr. P. C., the rules framed by this Court for dealing with an application under s. 491 have now become altogether in-apposite and judging from the context of s. 491, Cr. P. C., the Criminal Appellate Bench of the High Court being the highest Court of Criminal Appeal or revision has got ample power to deal with the application. I propose therefore, to deal with the merits. The facts of the case may shortly be stated as follows:—

Subodh Chandra Roy Chaudhury was arrested by the Police of Calcutta on the 11th August 1924 at about 5-30 P. M. He was placed before the Deputy Commissioner of Police on the 13th August 1924, 12th having been a Sunday, when an application for bail was made on his behalf, and it was urged that the arrest and detention were wholly illegal. The Deputy Commissioner of Police made an order that Subodh Chandra Roy Chaudhury might be released on bail of rupees two *lakhs*, to be furnished in ten sureties or less. Subodh Chandra Roy Chaudhury was unable to avail of the said order, and his brother Sushil Chandra Roy Chaudhury applied to this Court under s. 491 of the Cr. P. C. and s. 107 of the Government of India Act, 1915, for an order for setting him at liberty, and in the alternative, for reduction of the bail. In pursuance of our order Subodh Chandra Roy Chaudhury was produced before us. We ordered his release on his own bond of Rs. 5,000 and on his furnishing four sureties of Rs. 5,000 each or one surety for Rs. 20,000, whichever might be convenient to him, pending our orders on the application in so far as it purports to be one under s. 491, Cr. P. C.

It appears that the arrest was made on the strength of two telegrams received by the Calcutta Police on or about the 11th August 1924 which ran as follows:—

"O. T. Jodhpur, 9 Raj,

Police Commissioner, Calcutta.

Subodh Chandra Chaudhury Bengalee of 46A Bosepara, Baghbazar Calcutta, wearing eye-glasses, age about 35, bald head, stoutish, wheat complexion, of the State Audit Office wanted for embezzlement, please arrest if found, goes in European habits at times—Police."

" I. B. Jodhpur. 11 Raj. 66.

Commissioner of Police Calcutta.

My wire of 9th instant regarding Subodh Chandra Roy Chaudhury to your address enquiries show that he may go to Chandernagore, his wife and children at Calcutta at address given by me in my telegram embezzlement of money to the value of a couple of *lakhs* of rupees please search his and his father's house and attach all valuables including money.—Police."

After the arrest the Calcutta Police sent the following telegram to the Inspector General of Police, Jodhpur:—

"Jodhpur Raj Police, Jodhpur.

Your telegrams 9th, 11th Subodh Chandra Roy Chaudhury arrested nothing found on house search application going to be made in Calcutta High Court for release on bail wire full details of charges preferred and when extradition proceedings expected.

Police Commissioner Calcutta."

To this, two telegrams were received by the Calcutta Police by way of reply, one from the Political and Judicial Member, State Council, Jodhpur, and the other from the Inspector-General of Police, Jodhpur. They ran as follows:—

"Jodhpur 14-99.

Police Commissioner Calcutta.

Thanks for your telegram of the 13th to our Inspector-General of Police. Subodh Chandra Roy Chaudhury was Assistant Treasury Officer at Jodhpur when he fraudulently obtained from Railway Auditor two cheques Nos. B291780 and 48762 for one *lakh* each and cashed them fraudulently at Ajmer and Bombay respectively and misappropriated the amount. Wanted here under ss. 420, 409 and 467 Indian Penal Code. He should not therefore be released on bail. His co-accused under arrest here. Extradition proceedings will be sent shortly. Political and Judicial Member State Council Jodhpur".

"Jodhpur 14 Raj. 72.

Police Commissioner Calcutta.

Please refer wire of last night from Political and Judicial Member State Council Jodhpur, to your address. Offence under s. 409, Indian Penal Code non-bailable and in view of the grave importance of the offences the bail application of Subodh may kindly be opposed Moreover it is possible he may commit suicide or escape beyond reach if left to himself. Inspector General of Police."

It appears also that a further telegram was thereafter received by the Calcutta Police from the Resident of Jodhpur which ran thus:—

"Jodhpur Residency

Police Commissioner Calcutta.

2021 Reference. Arrest Subodh Roy Chandra (*sic*) Chaudhury by Jodhpur Darbar for offences under ss. 420, 409 and 467, Indian Penal Code. Warrant will be sent as soon as possible meanwhile kindly do not grant bail Resident."

The arrest as I have said was made on the first two telegrams set forth above and it is sought to be justified by reference to clause *seventhly* of s. 54 of the Cr. P. C. That clause runs thus:—

" Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India".

In dealing with the question as to the legality or otherwise of the arrest under this clause it would be convenient first of all to dispose of an argument based on the decision in the case of *In re Mukund Babu Vethe* (1) which has been put forward before us. That decision can no longer be treated as good law since the addition of clause seventhly to s. 54, Cr. P. C, by s. 3 of Act III of 1894 [See *Emperor* v. *Husein Ally* (2).]

(1) 19 B. 72; 10 Ind. Dec. (N. s.) 49.
(2) 7 Bom. L. R. 463; 2 Cr. L. J. 439.

To satisfy the requirements of this clause two conditions must be present : First, that the person to be arrested has been concerned in any act committed at any place out of British India which if committed in British India would have been punishable as an offence or against the person a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in such an act ; and second, that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to Extradition or under the Fugitive Offenders Act, 1881, or otherwise.

The first of these requisities contemplates either the proof of a fact, namely, the fact of the person having been concerned in the act or a *reasonable* complaint, or *credible* information or a *reasonable* suspicion of his having been concerned therein. The wording of this part of the clause is very similar to that of clause *firstly* of the section. Under that clause it has been held by this Court *In the matter of Charu Chandra Mazumdar* (3) that the section gives a Police Officer personal authority and involves personal responsibility and reasonable suspicion and credible information must be based upon definite facts which the Police Officer must consider for himself before he acts under this section, and that he cannot delegate his discretion or take shelter under the belief or judgment of another Police Officer. To provide for cases where one Police Officer has to act on a requisition issued by another Police Officer clause *ninthly* has been added by s. 10 of Act XVIII of 1923 which restricts the responsibility of the arresting Police Officer to the conditions mentioned in that clause. In cases, however, where clause *firstly* applies the responsibility is that of the arresting officer himself and the principle laid down in the case of *Charu Chandra Mazumdar* (3) still holds good. This new clause does not affect the provisions of clause *seventhly* and in fact it has not been suggested before us that it does. The wording of clause *seventhly* clearly indicates that the arresting Police Officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be *at least founded on some definite fact* tending to throw suspicion on the person arrested and not on mere vague surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of an information cannot be given ; both must depend upon the existence of some tangible proof within the cognizance of the arresting Police Officer and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge information or suspicion. The first two telegrams give no facts whatsoever and merely state that Subodh Chandra Roy Chaudhury was wanted for having embezzled a couple of *lakhs* of rupees. They do not set out even so much in the shape of facts as were set out in the communication upon which the Police acted in the case of *Charu Chandra Mozumdar* (3) referred to above. The first of the two conditions, therefore, in my opinion was not satisfied in the present case. In my opinion the arrest was not one authorised by law and Subodh Chandra Roy Chaudhury is entitled to his immediate release.

In view of the materials which the Calcutta Police obtained subsequent to the arrest it is necessary to consider the matter further as to whether those materials would not justify his re-arrest, for there would be no object in releasing him if on these materials he may be re-arrested and again put in custody, the consequence of which will probably be a further application to this Court when the matter will have to be considered again.

The latter telegrams judging from the sources from which they came must be taken as absolute guarantee of the truth of the information conveyed thereby, but they hardly supply the facts which the arresting Police Officer must have before him in order to form his own opinion as to the complicity of the person to be arrested in the *act* which he has got to consider under the first part of clause *seventhly* of the section. Of these three telegrams the first one discloses that the charge against Subodh Chandra Roy Chaudhury was that he had fraudulently obtained the cheques and fraudulently cashed them and misappropriated the amounts of the cheques. It mentions

(3) 37 Ind. Cas. 57; 44 C. 76; 20 C. W. N. 1233; 18 Cr. L. J. 73.

ss. 420, 409 and 467, Indian Penal Code, but sets out no allegations as to s. 467, Indian Penal Code, and gives no particulars upon which one can make out whether the *acts* alleged to have been committed amount to offences under ss. 420 and 409, Indian Penal Code. The next telegram speaks only of the offence under s. 409, Indian Penal Code. The last one merely says that Subodh Chandra Roy Chaudhury is wanted for offences under ss. 420, 409 and 467, Indian Penal Code. If one has to form an opinion as to whether these offences have been committed or not, the telegrams, I venture to think, will not enable him to do so and yet the arresting Police Officer is called upon to do so by the first part of the clause in order to make the arrest. The position would have been wholly different if there was any credible information that a warrant had been issued for that would have been very substantial material justifying the arrest.

Then as to the second condition. The question is what is the meaning of the expression "for which he is, under any law relating to Extradition or under the Fugitive Offenders Act, 1881, or otherwise liable to be apprehended or detained in custody in British India." Does this expression only qualify the offence and denote its character for which there *may be* such a liability or does it indicate a present liability for apprehension or detention. In my opinion it means the latter and that the act must be one for which there is a present liability to apprehension or detention in custody in British India under the laws of Extradition or the Fugitive Offenders Act or any other law. The word *is* suggests this interpretation. To adopt the other view will lead to absurdities. I purpose to give only two illustrations: Suppose a Police Officer in British India receives credible information that is to say from one who gives him positive proof as to the commission of an offence by a person outside British India and the offence is an extradition offence. If the Police Officer believes in the information he would be competent to arrest the offender and keep him in custody and in fact it would be his duty to do so. The arrested person will thus be arrested and detained though it may never be in the contemplation of the informant to take further proceedings against him and though the authorities within whose jurisdiction this offence was committed may never think of sending out an extradition warrant or a requisition. In my opinion it could never have been the intention of the Legislature to arm the Police with such powers and I am confirmed in my opinion by the provision in the Extradition Act which the Legislature has made for the arrest and detention of offenders in anticipation of the issue of warrant or requisition in such cases—provisions which lay down ample safe guards in the shape of magisterial intervention. Nextly it will be seen that clause *firstly* speaks of cognizable offences only, while clause *seventhly* includes all acts which amount to offences, provided only that they are offences for which there is a liability for apprehension or detention under the law. A Police Officer in British India cannot arrest without warrant a person who has committed a non-cognizable offence, say forgery in British India. Forgery however is an extradition offence. If the other view be adopted he would be competent to arrest the offender without warrant when the offence has been committed outside British India. This would be an anomaly and the anomaly would be greater if the Cr. P. C. applies to the State wherein the offence has been committed. The local Police will not be competent to arrest the offender without a warrant and yet the British India Police will have power to do so at the request of the local Police. The Legislature could never have been so unreasonable as to have intended this. In my opinion the expression contemplates cases in which there is a present liability and not cases in which there may be liability in future for apprehension or detention. The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution.

The Legislature has made ample provisions for the arrest and detention of persons under similar circumstances. Under the Indian Extradition Act (XIV of 1913) ample provision has been made by Ch. III for the surrender of fugitive criminals in cases of States other than Foreign States. Under s. 7 of the Act warrants for extradition offences may be issued by Political Agents and under s. 9 requisition

may be made to the Government of India or to any Local Government by or on behalf of any State not being a Foreign State for the surrender of a fugitive criminal in respect of any offence. Under s. 10 of the Act certain Magistrates in British India are empowered to issue warrants for the arrest of fugitive offenders who may have committed offences in any State not being a Foreign State and for whose arrest no warrant or requisition has yet been issued, and sufficient safeguards have been laid down for the exercise of the powers so conferred on the Magistrates by providing for the exercise of a sound judicial discretion as to the sufficiency of the materials, and for the submission of a report forthwith and prescribing the period of detention and making provision for bail. Similar provisions are to be found in the Fugitive Offenders Act of 1881 (44 & 45 Vict. Ch. 69) for the issuing of endorsed warrants and provincial warrants—the provisions for issuing provincial warrants corresponding in some respect to those contained in s. 10 of the Indian Extradition Act.

To allow a person to be arrested by the Police when no extradition warrant has been issued, nor any requisition made and no assistance is sought for from the Magistrate within the local limits of whose jurisdiction the offender is at the time, would be to subvert the whole law as to arrest of fugitive offenders as contained in the Indian Extradition Act which undoubtedly is the law regulating the procedure to be adopted in the case.

There is a further matter to which I think it necessary to refer. Even if all the conditions necessary to satisfy the requirements of clause *seventhly* of s. 54 of the Cr. P. C., are made out and an arrest is validly and lawfully made the Police must forthwith produce the person arrested before a Magistrate. There can be no doubt in this respect, whatever may be the view as to the power of the Police in Calcutta as to detention of persons arrested by them in the discharge of their normal duties under the Calcutta Police Act. Under that Act power of detention for an unlimited period is claimed in the Deputy Commissioners by virtue of their being Justices of the Peace. That has been doubted by this Court on more occasions than one. Whether there is such power or not, it is clear to my mind that when an arrest is made under s. 54 clause *seventhly* on the supposition that the person arrested is liable to apprehension under the provisions of the Indian Extradition Act he must forthwith be produced before a Magistrate in order that the detention may conform to the provisions of s. 23 of the Act. This does not appear to have been done in this case.

In my judgment, therefore, the arrest was improper and the detention unwarranted by law and Subodh Chandra Roy Chaudhury must at once be released and discharged from his bail.

Z. K. *Application allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 31 OF 1924.

October 14, 1924.

Present :—Mr. Dalal, J. C.

RAM BHUSHAN DAS—APPLICANT

versus

RAM LAKHAN SAHU—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Preliminary order, absence of, effect of—Revision.

Where a Magistrate fails to pass an order as required by sub-s. (1) of s. 145 of the Cr. P. C., subsequent proceedings under that section are vitiated and the final order is liable to be set aside in revision. [p. 919, col. 1.]

Subordinate Magistrates exhorted to study the Cr. P. C. [*ibid.*]

Reference made by the Sessions Judge, Fyzabad, by his order, dated the 15th August 1924.

Mr. *A. P. Sen*, for the Applicant.

Mr. *Niamatullah*, for the Opposite Party.

JUDGMENT.—This is a matter of Reference made by the learned Sessions Judge of Fyzabad. The whole trouble arose from the disinclination even of stipendiary Magistrates to read the Cr. P. C. If once they are attracted to a study thereof, I am certain that they will find considerable matter therein to interest them and to hold their attention. There is a well known story of a Colonel who was a Cantonment Magistrate. He held all the Codes of the Indian Lagislature to be anathema and devised to curb his authority and to give a loophole to dishonest people. After

considerable persuasion he was induced to read the Codes and when he came to the end of the Cr. P. C. his exclamation was "By Jove! the book does contain sense." I feel perfectly certain that if subordinate Magistrates are once induced to dip into the book even occasionally, they will find much to attract them and a considerable amount of sense.

What the learned Judge complains of is that the Deputy Magistrate did not prepare an order as he was required to do under s. 145 (1) of the Cr. P. C. An order was really passed but is in the handwriting of the Reader of the Court and does not specifically state that there was a danger of a breach of the peace. Possibly if the interest of a third person *Musammat* Budhna, who was not a party to the application, had not been concerned I would have held the order to be one which would give jurisdiction to the Magistrate. The Magistrate appears to be convinced that there is a likelihood of a breach of the peace and after going through the record I am not prepared to say that there is not. In my opinion it wiil not be equitable because of the deficient knowledge of law of the Magistrate to set aside his order and take no further proceedings. The muddle has been made by the Nazul Department which owns the land and there are two lessees who are claimants for possession of the land. One is a Bairagi and another a Municipal Commissioner, and there may be a possibility that men connected with these parties may come to blows. The Magistrate must decide whether such a possibility really exists or not. *Musammat* Budhna who is in possession of part of the land was a necessary party to the litigation and should have been asked to file a written statement. The learned Judge does not say that he is satisfied as to the non-existence of any danger of a breach of the peace. What he implies is that the Deputy Magistrate was not so satisfied, while the Deputy Magistrate on his part has stated in several places on the record that he did apprehend a breach of the peace.

An Appellate Court like this, dispensing justice at a distance from the scene of occurrence, is not the proper one to arrive at a correct decision on such a question of fact.

I think the best order to pass in this case will be to quash all proceedings after the order of the Magistrate of 11th June 1924. The Deputy Magistrate is requested to go through Ch. XII of the Cr. P. C. and take proceedings as directed in that Chapter if he still thinks that there is a danger of a breach of the peace. If he does not think that there is any such danger he shall cancel his order dated 11th June 1924. With these directions I remand the proceedings to the Court of the Magistrate having jurisdiction.

Z. K. *Proceedings remanded.*

CALCUTTA HIGH COURT.

DEATH REFERENCE No. 13 AND CRIMINAL APPEALS NOS. 583 AND 584 OF 1924.

December 1, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr Justice Mukerji.

EMPEROR—PROSECUTOR

versus

ALIMADDIN NASKAR AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, mode of—Duty of Court—Criminal trial—Procedure—Prosecution, failure of, to produce witnesses—Presumption.

Where the prosecution fails to examine witnesses who appear to have been present at the time of the occurrence, which is the subject of the trial, it may be presumed that if those witnesses had been examined they would not have supported the prosecution; but this presumption cannot render ineffective or outweigh unimpeachable evidence which has been produced in the case. [p. 926, col. 1.]

Per *Mukerji, J.*—Section 342 of the Cr. P. C. is for the benefit of the accused, the provisions embodied in the section being meant to enable the accused to explain the circumstances appearing against him in the prosecution evidence. The section is not, however, intended merely for the benefit of the accused. It is a part of a system for enabling the Court to discover the truth and it may happen that the explanation of the accused or his failure to explain is the most incriminating circumstances against him. The result of the examination may benefit the accused if a satisfactory explanation is offered by him; it may, however, be injurious to him if no explanation, or a false or unsatisfactory explanation, is given. The Court should, therefore, not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation but it must exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against the accused. [p. 930, col. 1.]

The word "generally," in s. 342 of the Cr. P. C. does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally, and should not be limited to any particular part or parts of it. [p. 930, col. 1.]

In examining an accused person under s. 342 of the Cr. P. C. the Court should always frame questions dealing with such salient points in a case as in its opinion call for explanation. Every precaution should, however, be taken not to entrap the accused to make incriminating answers, and all questions in the nature of cross-examination should be avoided. [*ibid.*]

The incompetency of a Tribunal in administering the law or the difficulty in administering it is no ground for whittling down its provisions. [*ibid.*]

Per *Newbould, J.*—What is necessary under s. 342 of the Cr. P. C. is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. A formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips, for instance, the question "What is your defence"?, is a sufficient compliance with the mandatory provisions of s. 342, since it enables the accused to explain any circumstances appearing in the evidence against him. [p. 934, col. 2.]

It is neither necessary nor desirable that there should be any detailed questioning of the accused under this section. The point at which the Court is bound to question the accused is after the witnesses for the prosecution have been cross examined. From that cross-examination it will usually appear to the accused what are the circumstances appearing in the evidence which require explanation. If this is apparent, it is not necessary for the Court to tell the accused what those circumstances are. [p. 935, col. 1.]

In the Court of the Committing Magistrate the accused was asked "what is your defence?" He replied, "I am innocent. What I have to say, I shall say in the Sessions Court." In the Court of Session this statement was read out to him and he was then asked "Do you wish to say anything more?" He then made a statement from which it appeared that he was not altogether ignorant of some of the salient points appearing in the evidence against him:

Held, (Per *Mukerji, J.*) that the examination of the accused was perfunctory and was not a sufficient compliance with the provisions of s. 342 of the Cr. P. C. [p. 933, col. 2]

(Per *Curiam*):—That, however, the object of the provisions contained in s. 342 of the Cr. P. C. having been attained the trial was not vitiated.

(Case-law discussed.)

Death Reference and Criminal appeal against the order of the Second Additional Sessions Judge, Alipore, dated the 20th September 1924.

Babu *Debendra Narain Bhattacharji*, for the Accused.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Mukerji, J.—Alimaddin Naskar, Belat Ali Naskar, Amir Naskar, Boynuddi Naskar, Farazali Naskar, Golam *alias* Golap Naskar and Dudali Molla were tried by the Second Additional Sessions Judge of 24-Parganas with the aid of a Jury. All of them were tried on a charge under ss. 302/120 B, Indian Penal Code, for having conspired to commit the offence of murder of one Momrej Boddy and other members of his family, and Belatali Naskar was tried also on a charge under s. 302, Indian Penal Code, for committing the offence of murder by causing the death of one Entaj Boddy, a son of the said Momrej Boddy. The Jury brought in a unanimous verdict of guilty on both the charges; and the learned Judge agreeing with and accepting the verdict, convicted all the accused persons in accordance therewith and sentenced Alimaddin Naskar and Belatali Naskar to death, and the others to transportation for life. The cases of Alimaddin Naskar and Belatali Naskar are before us on a Reference made by the learned Judge under s. 374, Cr. P. C. as well as on appeals preferred by them.

The facts of the case are fully set out in the learned Judge's charge to the Jury and the occurrence in all its gruesome details is graphically portrayed therein. A bare outline of the main features of the case, however, is necessary in order to visualize the evidence that is on the record.

In village Daria, within the jurisdiction of P. S. Canning in the District of 24-Parganas, there lived two families, the Boddys and the Naskars. Of the seven accused persons named above, the first six are brothers and belong to the family of the Naskars, and the one named last is their servant. The victims of the alleged conspiracy were the members of the family of the Boddys. The homestead of the Boddys was enclosed by a compound wall with two entrances, one on the north-west and the other on the east, and consisted of a number of thatched huts, a kitchen, some sheds for the poultry and several *golas* or granaries; and just outside the compound and to the south-east of it, there was a *khankagaur*. To the south-west of the said homestead and separated from it by a big tank were the houses of the Naskars.

On the night of Monday, the 7th January 1924, at about midnight or shortly thereafter, took place the occurrence out of which the present case has arisen. At that time five dwelling huts in the homestead of the Boddys were occupied thus. In the western one of the two huts on the north were

Momrej Boddy, his two wives Chandra Bibi and Dasa Bibi, one of whom was pregnant, his sons Jabed Ali, Safed Ali and Yunus, and his grandson (son of his eldest son Entaz) Jiadali, the ages of the four boys varying from ten years to two years and a half. On the verandah of that hut slept one Babur Ali Boidya. In the other hut on the north there were Momrej's mother Bibijan, a son of Momrej named Esherali and his wife Maurjan. In the hut that stood on the west of the homestead there was Entaj Boddy doing some accounts, and his wife Jasimon Bibi was sitting near him preparing betel and smoke for him; and there was also an infant girl of theirs sleeping. The hut to the south which used to be occupied by another son of Momrej named Montaz and who on that particular night is alleged to have been away at Basanti Abad, was occupied by one Sarafat Naskar, a nephew of Momrej. In the hut on the east there lived one Saira Bibi, who was a relation of Momrej but with her, it is said, Momrej was not on very good terms. In her hut were one Kanch Ali and a servant Nesar Ali. In the *khankaghur* just outside the compound and to the south east of it, there were two Muhammadan and four Uriya servants who used to guard Momrej's paddy in the *khamar*.

The prosecution case, shortly stated, was that suddenly the huts were set fire to, the exits from some of them being barred by chaining them up from outside, or closing them from outside with iron clamps, and the stamp of feet of several persons was heard, as also loud sounds of blows on the doors of the huts of Momrej and Entaz. Entaz called out that there were men on the *daba*; the reply was received that their *jamas* (messengers of death) had come. Entaz entreated that their lives might be saved, but he was told in reply that it was not their money but their lives that were wanted. Entaz stepped out with a gun which he had in the hut, after forcing open the door; but while yet on the threshhold the gun was snatched away from him, he was speared in the leg, and he fell on the courtyard. He tried to crawl and get up but was pressed down, and notwithstanding the entreaties of his wife Jasiman Bibi, was cut on the neck with a *dao* and killed, his head being almost severed from his body. Jasiman Bibi made entreaties to be allowed to reach her son who was in Momrej's hut and was shrieking out for her, but was prevented and threatened, and with the child in her arms she ran to the house of a neighbour. Bibijan Bibi succeeding in forcing open the door of the hut in which she was, and on her saying that she had recognised all the accused and that there would be retribution the next day, she was shot dead. Esher Ali and Mourjan Bibi managed providentially to escape. Sarafat failing to open the door of the hut he was in made an opening in the thatch and got out through the same. The villagers who came to the spot on hearing the noise of the crackling flames or the reports of guns which were being fired or on seeing the blaze or hearing the cries of others, were scared away.

The whole homestead of the Boddys, with the exception of the *khankaghur* was reduced to ashes. Those who arrived in the early hours of the morning found only ashes or burnt or molten materials there. In Momrej's hut close to the door were seven charred dead bodies lying in a heap; there were the four boys, the sons and grandson of Momrej, over them lay the two wives, and over them all lay Momrej himself. Entaj's dead body was lying near the threshhold partly burnt and his head almost severed from the body. Bibijan was lying dead on the verandah of her hut with her entrails out and blood flowing from the verandah into the yard. The hut in which Saira Bibi used to live was also burnt down, but her property was preserved being kept on a *machan* near a tank and even her poultry was saved.

The motive alleged for the crime is bitter ill-feeling which is said to exist between the families of the Boddys and the Naskars. This enmity is not disputed, and on the other hand is relied upon by the defence as a motive for falsely implicating the accused persons. It would appear upon the evidence that the two families are related to each other, and up till about four years before the occurrence good relations and amity subsisted between them. As deposed to by P. W. No. 9 Aynaddi Naskar whose house is on the west side of the homestead of the Boddys with a path intervening, the quarrel between the two families arose over a small plot of land which belonged to the witness's uncle. The land adjoins the homestead of the Naskars. It was mortgaged to Entaz, but was subsequently sold for arrears of rent and purchased by Alimaddin Naskar in the name of his wife,

Momrej took up the cause of the witness's aunt, helped her with advice and money, got her to institute a suit for setting aside the sale and himself looked after the litigation on her behalf. From the evidence of P. W. No. 24, the President *Panchayet*, P. W. No. 46, Assistant Sub-Inspector Basanta Kumar Singh, P. W. No. 47, Sub-Inspector Razai Robbani and P. W. No. 48, Sub-Inspector Soshi Bhusan Rai and the papers produced by P. W. No. 38, the record-keeper of the Magistrate's Court at Alipur as also other documents proved in the case, it appears that this quarrel led to a series of incidents and cases between the parties. On the 25th November 1920, when the aforesaid suit was pending Momrej was shot with a gun. In consequence of this occurrence Belatali Naskar and another person were arrested but a final report was eventually submitted by the Police on the 25th January 1921. On the 1st February 1921, Momrej was shot again, this time in his house. For this Alimaddin Naskar was sent up, tried in the Court of Sessions but acquitted on the 24th August 1921. On the 30th May 1922, Alimaddin Naskar was attacked and brutally wounded, receiving no less than 22 injuries on his person. Entaj and two others were tried by the Court of Session for this offence but were acquitted on the 25th April 1923. When this case was pending, on the 22nd June 1922 Amir Naskar lodged an information that Esherali Boddy and Momtaz Boddy had assulted him with knives, but they were not sent up for trial. The prosecution case is that the Boddys were nursing a grudge against the Naskars in consequance of these events and were not unreasonably cherishing in their minds a feeling of despondency begotten of an idea that recourse to law would yield no satisfactory result, and that this conspiracy was hatched to redress the wrongs done to them and put an end to the source of their troubles. The defence on the other hand urges that there is nothing on the record suggesting any fresh quarrel after April 1923, and that it is not likely that after such a long period as had elapsed since then, the old grievances would burst out. There is, however some evidence on the record that the Naskars used to threaten the Boddys even during this period; but whether we take that evidence to be literally true or not, for it must be admitted that that evidence is not sufficiently specific; it is abundantly clear that the Boddys were mortally in terror of their enemies, whoever they were, for they fitted corrugated iron sheets against the walls and windows of their huts, removed the rings that were on the doors on their outerside, and kept guards in the house for the nights. The defence contends that the Boddys had other enemies as well. That is undoubtedly so, for it appears that they had litigation with their *zemindar* one Radhika Mohan Roy, and during the Police investigation into the occurrence a village Doctor named Jatin Chakravarti and also Saira Bibi were suspected and arrested. It may be that there were reasons for the suspicion; and indeed, so far at least as Saira Bibi is concerned, the treatment accorded to her properties was suspiciously preferential. The whole question however is this : Whether the state of feeling between the Boddys and the Naskars was such as might induce the latter to commit the offences they are alleged to have committed; and on a careful consideration of the facts and circumstances connected with the different incidents that transpired, I find myself unable to answer this question in the negative. This, in my opinion, is sufficient for our present purposes.

The main facts of the occurrence have been deposed to by a very large number of witnesses who, for the sake of convenience, may be classified into three groups, *viz.*, the inmates of the homestead who survived or managed to escape, the villagers who came to the spot at the time when the huts were on fire, and the persons who came there after the occurrence was over and could only see the condition of things as it was when they came.

Amongst the first group of witnesses, the one who saw the occurrence at its very start, as far as it can be made out upon the evidence is P. W. No. 6 Baburali Boddy. He was on the *daba* in front of the hut in which Momrej himself was. He says he woke up on hearing Entaz shout and the *dum dum* noise on the doors. He ran towards Entaj's *daba* and was caught by three men whe took off his clothes, and tied his hands and feet with it. Of the three men he recognized two, *viz.* Belat and Boynuddi. They kept him tied in a fowl-shed near Entaz's *daba*. He saw Dudali light something long and with it set fire to Entaz's hut, and some other person then sprinkled something on the thatch. He then saw

Dudali proceed to Momrej's hut and set fire to it. He says he recognized in the blaze all the seven accused persons, and also saw two others whom he could not recongnize. He says that Alimaddin had a gun and Belat a *chowki*. Finding no body near he untied the fastenings of his hand with his teeth and ran out jumping over the wall near the entrance on the north-west, just outside which he noticed Amir standing. On going out he shouted out to the neighbours and came back with them or followed by them shortly after. At this time Alimaddin, Belat and others came running and shouted *mar mar*, and Alimaddin fired a gun, upon which all who came retreated. The most important witness of this group is P. W. No. 1 Jasiman Bibi. She states that Entaz was writing up accounts and she was sitting near him giving him betel and smoke, and there was her infant girl in the room. She describes how she heard the sound like the stamp of 8 or 10 men's feet in the *daba*, and loud sounds on the door of her hut and that of Momrej. She states that her husband said: "There are men on the *daba*", and on that Belat's voice was heard calling out in reply "Your *jamas* (messengers of death) have come". Her husband then cried out "Belat take our money and everything but spare our lives". Belat said "Are we thieves that we shall take your properties? We want your lives and shall have them". She describes how her husband put cartridges into his gun which was in the room and was about to step out when the gun was snatched away from him and he was speared on the leg, upon which he fell down from the *daba* to the courtyard. She came out with her infant in her arms and with the light of the burning thatches of her own hut and that of Momrej she could recognise the seven accused persons and saw two others with their faces covered up. She says how her husband was pressed down and how Belat cut off his neck with a tree tapping *dao* in spite of her entreaties; and how, as she stooped down and entreated, Entaz's blood spurted out and fell on her cloth. She then ran towards Momrej's hut to reach her son who was in Momrej's hut and was shrieking out for her and entreated Belat with folded hands to take out the son, but Belat prevented and theatened her. She says she was unable to remember what she did next, but that Amir and Alimaddi were shouting, and finding none near the entrance on the east she ran out with the child in her arms and found herself by the side of the tank there. There she met Mourjan and both ran to the house of the Malis on the north of the tank. P. W. No. 2 is Mourjan aged 13 or 14 years, wife of Esherali, another son of Momrej. She states who the inmates were of the hut in which she was. She states that Bibijan was anxious to go out, that Esher said: "Dacoits have attacked the house, don't open, they will kill us", but Bibijan opened the door forcibly and came out. Then some one shouted from the side of the cock-shed and upon that the accused party ran in that direction. At this time she came out and saw Alimaddin, Belat and Boynuddi and others whom she could not recognise. She states she did not look at their faces out of fear. She then ran out through the entrance on the east and ran up to P. W. No. 1 Jasiman Bibi who was then by the side of the tank and caught her by the hand and then they both went to the house of the Malis. P. W. No. 3 Esher Ali is the husband of P. W. No. 2 Mourjan. He got out of the room after Bibijan and Mourjan had come out and recognised Alimaddin, Belat, Boynuddi, Faraz and Dudali going through the courtyard towards Saira Bibi's hut. He says Belat had a *dao* and Boynuddi a *koch*. He ran to the east and scaled over the wall and went to the house of Jamiruddi Gazi, son-in-law of Saira Bibi and remained there for the night. P. W. No. 4 Kanch Ali Naskar, a boy of 12 or 13 years of age, a grandson of Saira Bibi, says that he slept in the hut of Saira Bibi that night, and that Nasarali used to sleep in the verandah of her hut at night, but he cannot say where he was that night. He woke up on hearing the sound on the doors of Momrej and Entaz, went to the *daba* and found the huts on fire. He then saw about eight men of whom he recognised Alimaddin, Belat, Faraz, Dudali and Golap. He concealed himself under a *gola* on the north side, got on a *neem* tree and reached the compound wall, jumped out and ran to the house of the Malis. He states he saw the faces of the five men whom he recognised, that they were between the *dabas* of Entaz and Momrej. The next witness is P. W. No. 5 Sarafat Naskar who was sleeping in the hut on the south which is occupied by Momtaz. He says that Momtaz was away at Basanti Abad. He heard the sound of the chains of his hut put up from outside and then he

heard *dum dum* noise. He asked "who is there", and for answer got abuse. He called to Momrej and others and heard them shouting. He opened a window, and saw the huts of Momrej and Entaz on fire. He tried to force the door open but failed. He then got up on a *machan*, made an opening in the thatch and got out to the roof, and from there got on the roof of a *gola*. From there he saw Belat with a *dao* and Boynuddi with a dagger and altogether seven or eight men moving between the *dabas* of Momrej and Entaz. He then jumped down and ran to the house of Jharu Naskar and remained there for the night.

The learned Vakil appearing on behalf of the accused has severely criticised the evidence of the aforesaid witnesses, and has pointed out even the minutest discrepancies that appear in it and has argued generally as to the improbabilities of their version of the occurrence. He has challenged the fact of recognition by P. W. No. 1 Jasiman Bibi as improbable on the ground that she is a *pardanashin* woman and for four years she had no opportunity of seeing any of the accused persons. He has commented on the conduct of those witnesses who profess to have seen the occurrence and then left the house and did not return again till the next morning. He has taken each witness separately and has attempted to make out that from the position in which he or she was at the time it was not possible for him or her to recognise the culprits. Having given the arguments all the serious consideration that they deserve I have come unhesitatingly to the conclusion that there is nothing substantial or tangible either in the evidence or in the probabilities as can throw the least doubt upon the credibility of the evidence given by these witnesses. Moreover there is ample corroboration of the evidence given by P. W. No. 1 Jasiman Bibi. A piece of cloth has been identified as the one she was wearing by P.W. No. 40 Ershed Ali, P. W. No. 42 Abdul Bari and P. W. No. 48 Sub-Inspector Soshi Bhusan Roy. The last mentioned witness took charge of the cloth and the Chemical Examiner's report, Ex. 16, shows presence of human blood on it. This affords a strong corroboration of her story to the effect that when she stooped down to implore Belat not to cut her husband, the cut was administered and blood spurted out and fell on her cloth. P. W. No. 14 Apal Mali and P. W. No. 15 Nepal Mali both corroborate her as to the manner in which she found her way into their house and prove that she gave the same story to them then as she gives now and also say that she said she had recognised all the seven persons. Four other witnesses, *viz.*, P. W. No. 17 Tamijuddin Naskar, P. W. No. 19 Golam Naya, P. W. No. 26 Kokil Mali and P. W. No. 40 Ershad Ali Mandal also speak of the fact that she gave the names of the said persons as having been recognised by her on one or other occasion afterwards and not later than the next morning. As to the recognition of the five men by Esherali, we have the evidence of P. W. No. 27 Jamir Ali and P. W. No. 40 Ershadali Mondal who heard their names from Esher Ali at the earliest opportunity. P. W. No. 27 Jamiruddin Gazi corroborates the story of Esherali as to the latter coming to his house and giving the names of the five men he had recognised.

Next we come to the second group of witnesses. P. W. No. 7 Mojahar Gazi, P. W. No. 8 Kachinuddi Naya and P. W. No. 19 Golam Naya came on hearing the cries of P. W. No. 6 Baburali Baidya and saw Alimaddin with a gun and Belat with a *dao* near the entrance on the north-west. P. W. No. 7 is the *Imam* of the local mosque, and says he has no quarrel with Alimaddin who is a near relation of his: he says that both the accused shouted out that any one coming near would be shot, and that Alimaddin fired at him and others. P. W. No. 8 also says that both of them rushed out from inside the homestead crying *mar mar* and Alimaddi fired his gun. P. W. No. 9 Ainuddi Naskar whose house is on the west of the homestead and not very far speaks of having heard the noise and shouts and having come near the said door and found Alimaddin with a gun and Belat with a *dao* standing there and says that Alimaddi was asking people to move away threatening them that otherwise he would fire. He also says that subsequently he noticed the said two accused as also Dudali with a gun coming out of the homestead. This witness however is the person with whose aunt Alimaddin had litigation about the price of land which has been referred to above and it has also been proved that there has been ill-feeling between him and the family of Naskars. His evidence, therefore, must be taken with some degree of caution, P. W, No. 19 Golam Naya says that on hearing Baburali's cries he got up, saw a glare, noticed Momrej's house on

fire, ran in that direction but fell back hearing a gunshot. P. W. No. 10 Dulal *alias* Dulo Naya lives on the west of the homestead. On hearing gunshots and shouts he ran up to the north west door and saw Alimaddin with a gun and also Boynuddi and says that both rushed at him, the former saying "Shoot the *shala*". He is a witness who is related to both the parties. P. W. No. 11 Hanif Molla who lives to the south also came up and met his cousin P. W. No. 12 Bahar Ali Molla standing near the homestead, had a talk with him and saw the homestead on fire and Alimaddin, Belat Ali, Faraz and Boynuddi came out, Alimaddin with a gun in his hand. P. W. No. 12 Baharali Molla corroborates P. W. No. 11 Hanif Molla as to having met him and as to the conversation that he had with him and says he saw the fire roaring and saw Alimaddin, Belat, Buynuddi, Faraz, Dudali, Golap, Amir and two or three others whom he did not recognise come out of the Boddy's house. Then there are two witnesses P. W. No. 13 Bharat Haldar and P. W. No. 18 Durga Charan Baniya. P. W. No. 13 says that he woke up on account of the illness of his boy servant and went to P. W. No. 18 and from the bank of a tank near the latter's house saw the conflagration. They both saw Alimaddin with a gun and Belat and Faraz come rushing at them. Belat was a pupil of P. W. No 18 Durga Charan Baniya at his *pathsala*. P. W. No. 20 Nanoo Naskar came to the spot on hearing the shouts of Sharafat, saw the fire and heard a gunshot inside the homestead and ran away. P. W. No. 29 Fakir Ali is one of the servants sleeping in the *khanka*. He woke up on hearing cries and gunshots, saw a blaze all round and feeling afraid ran away.

The next class of witnesses are those who came to the spot some time after and towards dawn or thereafter. P. W. No. 14 Apal Mali and P. W. No. 15 Nepal Mali and their father P. W. No. 26 Kapil Mali are persons to whose house Jasiman and Mourjan were helped to go to. P. W. No. 27 is Jamir Gazi who says that he woke up on hearing gunshot and cries, ran towards Momrej's house, saw the house burning, heard reports of gun and came back. Then there are two other witnesses whose evidence needs special mention; they are P. W. No. 16 Durgapada Dhali *Chowkidar* and P. W. No. 17 Tomijuddin Naskar. The latter is the father of Mourjan and lives a few *rashis* to the west. He says he woke up hearing a gunshot, went out and saw a glare to the east. He advanced and saw Momrej's house on fire. He went near the house, felt frightened and returned home. He again went to the spot before dawn. After him, he says, Golam Naya, Nanu Naskar, Samir Mondal, Jaker and Kopil Mali came. He saw the nine dead bodies, and was talking to Jaker when the *chowkidar* arrived at the spot. He abused the *chowkidar* for turning up late and the latter explained that he was ill, and he then sent the *chowkidar* to the *thana*. The *chowkidar*, P. W. No. 16, gave similar evidence, and speaks to having lodged the first information, which was recorded at the *thana* 12 miles off at 10 A. M.

The evidence of all the above witnesses has been criticised in great detail and points have been sought to be made out showing the improbabilities therein. The conduct of the witnesses who came to the spot and went away without doing anything or rendering any help has been severally commented on. The discrepancies in the evidence have been fully laid bare. Taking into account, however, all that has been said in this respect on behalf of the accused I have not been able to discover anything upon this evidence which may make me feel doubtful as to its truth. The evidence of each one of the witnesses is full of circumstantial details and there is a ring of truth that pervades their testimony.

Some points have been sought to be made out of the first information and they deserve special mention. In the first information, the *chowkidar* stated that at the spot he met Momtaz Boddy, Tomizuddy Naskar, Hamiz Boddy, Golam Naya, Samir Mondal, Nanu Naskar and many other persons and that he did not enquire whether any one was seen setting fire to the house and whether any one was suspected by any body, but that Momrej Boddy had bitter quarrel with Alimaddi Naskar and his brothers, and, therefore it was suspected by the *chowkidar* that they may have been implicated in the matter. In his evidence the *chowkidar* said that he had met five or six men on spot, and named Tomijuddi Naskar, Nanu Naskar, Golam Naya, Samir Mondal, Kopil Mali and a dark boy. It has been urged that the suppression of the name of Momtaz was deliberate and false, and that it was highly unlikely that if the *chow-*

kidar stayed on the spot for half an hour, as it is said that he did, he could not have ascertained the names of the accused. It will be seen however that of the witnesses Tomijuddi Naskar, Golam Naya, Nanu Naskar, Samir Mondal, Kokil Mali and Jaker Ali Sheikn none had seen the accused or met any one who had seen the accused at the occurrence. It will also be clear upon the evidence of P. W. No. 17 Tomijuddin, P. W. No. 29 Jaker Ali, and P. W. No. 32 Masoruddi and P. W. No. 35 Safar Ali and of P. W. No. 25 Momtaz himself that Momtaz was absent at Basanti Abad and information of the occurrence was conveyed to him there the next day. It is evident also that the *chowkidar*'s explanation that he mistook Jaker Ali for Momtaz is true.

The non-examination of witnesses by the prosecution has also been made a ground on behalf of the accused. Saira Bibi and Nesar Ali have not been called. It may be assumed that if called they would not have supported the prosecution. As to Saira Bibi, suspicion attaches to the manner in which her property and poultry came to be preserved. It is not clear whether Nasarali was actually in the homestead that night, but any way he was suspected of having been concerned in the crime. Hamja Boddy's name is in the first information but there is evidence that he is siding with the accused. Of the two Muhammadan servants in the *khanka* one appears not to have been called, but the point has not been made clear as to who he was. Of the four Uriya servants who were in the *khanka*, one was called in the Court of the Committing Magistrate but it is said has disappeared since then. Making every allowance for the presumption that may arise from the non-examination of the available witnesses, it is difficult to hold that that can at all outweigh the mass of unimpeachable evidence that is already on the record.

There is on the record the retracted confession of the accused Amir. That is of no value as against the two accused with whom we are concerned. The evidence relating to the said confession and that relating to finding of the gun at the spot in a tank pointed out by Amir has been discussed in detail before us for the purpose of showing that the conduct of the Police was not satisfactory. It is sufficient to say that I have not been able to discover anything in connection with this matter which may lead me to suspect that there was any unfairness of concoction on the part of the Police in this case.

After the occurrence two big iron clamps were found one in front of Momrej's door and another in front of Entaz's door, and a spade head was also found in front of Momrej's door. The evidence is that the doors of Momrej and Entaj had no rings or chains on the outside and the prosecution case is that the clamps were used for preventing the doors from being opened. The clamps were identified by P. W. No. 30 Ambika Charan Karmokar as having been made for Alimaddin about a week before the occurrence. The witness was able to recognise the clamps as they were somewhat out of the ordinary and were prepared by him from iron supplied by Alimaddi. Mention may also be made of the fact that in the course of search of the house of the accused amongst other things a *koch* with fresh blood on it was found. There is evidence also that on the night of the occurrence the thatches of Alimaddin's house were covered with coarse mats and quilts, suggestng that precaution was taken that the thatches might not catch the fire.

It is unnecessary to refer to the other evidence that is on the record. The evidence referred to above and which, as I have said, there is no reason whatever to disbelieve or discard, leaves no room for doubt as to the presence of the two accused persons at the homestead of Momrej Boddy at the time of the conflagration, and as to their participation in the acts that have been ascribed to them by the witnesses who have deposed in the case. Speaking for myself, I am not inclined to attach much importance to the evidence of the blacksmith P. W. No. 30 or the finding of the bloodstained *koch*, not that I do not believe that evidence, but because even apart from that evidence the guilt of the accused, to my mind, seems to be perfectly clear. Their presence at the spot, coupled with the acts attributed to them leaves no room for doubt in my mind that they came there in pursuance of a conspiracy to murder Momrej Boddy and other members of his family by setting fire to his homestead. The conduct of the persons involved in the occurrence also suggests that the lives of Momrej and Entaz were the chief objective of the conspirators, and the others perished because they happened to be in the same huts with Momrej. This would explain why Jasiman and her child and Mourjan and Esherali succeeded in es-

caping. As to Bibijan she was killed probably because of the threat that she uttered. I see no reason to disbelieve the evidence of Jasiman as to how Entaz was killed, and on that evidence I consider that the offence of murder as regards Belat Ali has been satisfactorily established.

There remain now for consideration a few other arguments that have been put forward on behalf of the defence.

Objection has been taken to the admissibility of the statement contained in the first information to the effect that Alimaddi was a Criminal Tribe convict. It is said that this statement is inadmissible in evidence as being evidence of bad character of the accused and should not have been let in, but should have been expressly excluded when the first information was proved in evidence; and that in any event, the learned Judge should have directed the Jury to leave it out of consideration or to use it only for the limited purpose for which the defence used it in the cross-examination of the *chowkidar* P. W. No. 16. Now, the expression used in the first information is "Criminal Tribes Act *Dagi*". It is not very clear whether by it was meant that Alimaddi was a convict or that he was merely a member of a Criminal Tribe and so came under the purview of the Criminal Tribes Act and was thus a *Dagi* in the sense of a branded person who is looked up by the Police during nights. If used in the latter sense, it would not necessarily imply that he himself was of bad character. Be that what it may the first information was proved in evidence during the examination-in-chief of the *chowkidar* and was presumably read out to the Jury. In cross-examination, the defence made the fact clear and evidently relied upon it as would appear from the following answers of the witness "Alimuddi is a Criminal Tribes Act *Dagi*. I used to look him up every night, but on the night of the occurrence, I did not look him up". After this cross-examination I do not think the learned Judge need have given any special directions in this matter, and in any event, I have no reason to think that in this case, this statement in the first information affected the verdict of the Jury in a way prejudicial to the accused.

It has been argued that believing all the evidence as to the occurrence the case would not go beyond a conspiracy to commit the offence of culpable homicide, and that it has not been proved that the object of the conspirators was to commit murder. This argument overlooks some very important circumstances which appear in the case. It is quite clear even discarding the theory of the prosecution as to the clamps having been put on the doors of Momrej and Entaz that the egress of the inmates out of the said two huts was barred, and Entaz when he got out and even after the gun was snatched away from him and he was powerless and was killed, and the position of the seven dead bodies in Momrej's hut indicated not confusion but deliberation due to despair on the part of inmates when they had failed to get out after making all possible endeavours for the purpose. There is also the fact that Jasiman was prevented from rendering assistance to her son who was in Momrej's hut, and that the chains of the door of the hut in which Sarafat was at the time, were put up to prevent his exit. These facts to my mind conclusively prove that the intention of the conspirators was to burn the inmates to death and that is nothing less than the offence of murder.

Lastly, it has been contended that there has been no adequate examination of the accused under the mandatory provisions of s. 342, Cr. P. C. The matter is one of considerable importance and is constantly coming up before the Court and I desire to deal with it here.

Section 342, sub-s. (1) is divided into two parts. The opening words of the sub-section: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" governs both the clauses that follow. It is with the latter clause, which is mandatory with which we are concerned here. Reading the aforesaid words into this clause in the place of the words "for the purpose aforesaid" the clause would run thus:—"The Court shall for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him question him, generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence." The precise question for consideration is what is the nature of this questioning that the Legislature had in view.

Under Act XXV of 1861 and Act VIII of 1869 the examination of the accused person was discretionary with the Court. Section 202 of Act XXV of 1861 which appears in the Chapter headed "On preliminary enquiry

by the Magistrate in cases triable by the Court of Session" ran thus: "It shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry to examine the accused person, and to put questions to him as he may consider necessary. It shall be in the option of the accused person to answer any such question." Section 373 of Act XXV of 1861 which was in the Chapter headed "Trial before the Court of Session" ran thus:—"The Court, at the close of the evidence on behalf of the accused person, if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person, which it may think proper. It shall be in the option of the accused person to answer such question." In Act VIII of 1869 a slight variation was made, s. 203 of the earlier Act being left untouched and s. 373 being altered as follows:—"The Court at the close of the case for the prosecution and at the close of the evidence on behalf of the accused person (if he produces any evidence), may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer to such questions, and after such questions shall have been answered by the accused person, he or his Counsel or agent may address the Court on the subject thereof." A new section, namely, s. 262 A was also introduced which provided that the Magistrate might examine the accused person subject to the provisions of ss. 202, 203, 204 and 205. The discretion thus vested in Courts was often not exercised and this led to the following instructions being issued by this Court by a letter dated 28th July 1864: "Although the Cr. P. C. does not make it imperative on a Magistrate to examine an accused person at any stage of the enquiry before committing him to stand his trial at the Court of Session, the Court thinks it necessary to impress upon all Magistrates the expediency of the general adoption of this course at some stage or other of the enquiry. In those few and exceptional cases, in which the guilt of an accused may be beyond reasonable doubt, the practice in force may be permitted without risk; but inasmuch as it is discretionary with a Magistrate to discharge or commit an accused person, according as he finds that the evidence is, in his opinion, sufficient for his conviction by the Court of Session or otherwise, it is obvious that the truth of any ordinary case will be best elicited and obscure points will be cleared away by any explanation that the accused may wish to give, when, after hearing all the evidence against him or at any time in the discretion of the Magistrate he may be subjected to *an examination before the Magistrate on points requiring elucidation*, it being clearly explained to the accused that it is his option to answer such questions or not. The Court, however, desires to explain that in issuing these directions, it in no way sanctions any proceedings of an inquisitional nature." The italics in the above extract are mine. It is clear upon the words that the examination was to be on points requiring elucidation, was not to be of an inquisitional nature, and the object aimed at was to elicit the truth by enabling the accused to explain matters and also clearing up obscure points by means of such explanations.

Then came Act X of 1872 in which the discretionary nature of the examination was retained so far as enquiries into cases triable exclusively by the Court of Session were concerned, and in the trial of these cases the examination was also made compulsory and a provision was introduced allowing a discretion in Courts for the examination of accused persons in all other enquiries and trials. The relevant sections in that Act were as follows:—

Section 193 in the Chapter "Of enquiry into cases triable by the Court of Session or High Court" ran thus:—"The Magistrate may from time to time at any stage of the enquiry and without previously warning the accused person, examine him and put such questions to him as he considers necessary. The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal." To this there was an explanation in these words "The answers given by an accused person may be put in evidence against him, not only in the case under enquiry, but also in trials for any other offences which his replies may tend to show he has committed."

Section 214 in the Chapter "On the trial of Warrant Cases by Magistrates" made the provisions of s. 193 to apply to trials conducted under that Chapter.

Section 250 in the Chapter headed "Trial by Court of Session" ran in these words: "The Court may from time to time at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

Section 342 in the Chapter headed "Evidence how taken" was in these words:—"In all inquiries and trials a Criminal Court may from time to time, and at any stage of the proceedings, put any questions to the accused person which such Court may think proper."

Section 343 ran thus:—"The accused person shall not be liable to any punishment for refusing to answer or for answering falsely questions asked under s. 342 but the Court shall draw such inferences as seem just from such refusal."

The above was the law introduced by Act X of 1872. To say the least the wording of the Statute was dangerously wide. For some time it went on being administered in the Courts producing all the consequences that the daparture from the general policy of the English Criminal Law was bound to bring on and more than fulfilled the expectations embodied in the view of Sir George Campbell as contained in his reported speech on the Bill. He is reported to have said as follows:—"Not only were these provisions (meaning the rules of English Law) now unnecessary in England but they are specially out of place in a country where it was not pretended that the subject enjoyed that liberty which is the birth-right of an Englishman; and it was not intended to introduce rules into the Criminal Law which were designed with the object of securing the liberties of the people. That being so, His Honour thought that they might fairly get rid of some of the rules the object of which was to secure for the people that jealous protection which the English Law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any code of fair play, but that their object should be to get at the truth, and anything which would elicit the truth was regarded to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for those things which his Hon'ble friend Mr. Stephen had called superstitions. For instance, His Honour did not see why they should not get a man to implicate himself if they could, why they should not do all they could to get the truth from him; why they should not cross-question him; and adopt every other means short of absolute torture to get at the truth." The way in which the law was administered was fraught with dangerous consequences and was found unsuitable in course of time and the different High Courts laid down a series of rulings in which it was held that the power that the law gave should be used to ascertain from the accused how he can explain the facts adduced in evidence against him and not to drive or entrap him into making self-incriminating statements, and it was enjoined that questions must not be put to the prisoner when there was nothing against him on the evidence adduced by the prosecution or in the middle of the case for the prosecution, so as to make out a case against the accused when there was none or so as to supplement the case for the prosecution when it was defective. These series of rulings made it necessary to amend the law when the Code was revised in 1882. In the amendment made by Act X of 1882 the provisions relating to the examination of an accused person, which were scattered in different Chapters in the previous Acts were removed from those Chapters and brought under the Chapter headed "General provisions relating to inquiries and trials." One noticeable alteration was made by the addition of the words "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him;" another was the substitution of the word "may" for the word "shall" as regards the drawing of inference against the accused; and there were other changes made as well. The result of the amendment was to frame the scattered provisions into one comprehensive section, *i. e.*, s. 342 of Act X of 1882 and it has retained its shape in Act V of 1898 and has not been affected by the Amending Acts of 1923. The object of the amendment is stated in the following extract from the report of the Select Committee on the Bill of 1882: "We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him,

and thus to enable the Court, in cases where the accused is undefended, to examine the witnesses in his interest. It was never intended that the Court should examine the accused with a view to elicit from him some statement which will lead to his conviction. We have, therefore, limited the power of interregating the accused by adding to the first paragraph the words, "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." "We think the accused should always have this opportunity of explaining and we have, therefore, required the Court to question him generally for the purpose before he enters on his defence."

The section as it stands is undoubtedly for the benefit of the accused, the provisions embodied in it enable him to explain the circumstances appearing against him in the evidence. I cannot, however, concur in the view that it is intended merely for his benefit. It is a part of a system for enabling the Court to discover the truth and it constantly happens that the accused's explanation or his failure to explain, is the most incriminating circumstances against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him; it may however be injurious to him if no explanation or a false or unsatisfactory explanation is given. These conclusions, to my mind, follow from the words "without previously warning the accused" which appear in the first part of sub-s. (1) and the provision as to the drawing of inference contained in sub-s. (2). If that be the intention of the Legislature, as I have no doubt it is upon the words of this section it inevitably follows that the Court should not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but that it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against him.

To this interpretation three main objections are suggested. It is said that the expression "question him generally" indicates, as contra-distinguished from the expression "put such questions to him as the Court considers necessary," that the points need not be put to the accused but a general question will suffice. In my opinion the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it. It will be seen that the word "generally" appeared in s. 250 of Act X of 1872 when the intention of the Legislature was quite clear as to why they were departing from the English rules or procedure. There is no foundation for the argument that the word "generally" was put in out of solicitude for the accused with a view to protect him against a detailed examination by the Court; and indeed when a detailed examination is permissible under the first part of the section, even without previously warning the accused there is no reason why it should not have been intended in the latter part as well. A second argument relates to the provision enabling the Court and the Jury, if any to draw an inference. It is contended that the expression "circumstances appearing in the evidence" mean those that appear to the accused, and it is argued that there is no point in requiring the Court to point out to the accused what appears to it as calling for explanation, for in a trial with the Jury, the Jury will also be entitled to draw inferences against the accused if the circumstances are not explained, and it is asked how can a Judge be expected to put to the accused what circumstances are weighing in the mind of the Jury. At first sight, this seems to be a difficulty, but it will be observed that sub-s. (2) provides for inference being drawn from the refusal to answer the questions and also from the answers given to the questions themselves and not from the omission to explain the circumstances. The Court can always frame questions dealing with such salient points in the case as in its opinion call for explanation. Lastly it is argued that it will be extremely difficult to frame questions such as would not elicit incriminating answers or the questions of a catching nature. To this the answer is that the incompetency of a Tribunal, in administering the law or the difficulty in administering it is no ground for whittling down its provisions. Besides, I do not see why it would not be

possible to put before the accused the salient facts and circumstances as they appear in the evidence against him and ask him if he has any explanation to offer.

There is scarcely any reported decision which directly bears upon the question of sufficiency of an examination under the mandatory provisions of s. 342, Cr. P. C. There are three unreported decisions of this Court to which I shall presently refer. In Criminal Revision No. 237 of 1924 decided on the 24th June 1924, where it appeared that the question put to the accused was "what is your defence?" it was argued that the question was not of the nature contemplated by the section. This Court (Newbould and Chakravarti, JJ.,) refused to follow the decision of a Single Judge of the Patna High Court in the case of *Bokhari Singh* v. *Emperor* (1) and held that the question was sufficient. In Criminal Revision No. 182 of 1923 decided by this Court on the 19th December 1923. the question put to the accused was "what is your defence?" In that case Greaves, J., (Panton J., concurring) observed as follows:—"I think there is no doubt that the proper method under s. 342, Cr. P. C. is to put at the close of the prosecution case and before the accused enter on their defence shortly and succinctly the main points which appear upon the prosecution evidence bearing against the accused. But what we have got to consider in this case is whether what has been done is sufficient compliance with s. 342 or whether s. 342 has been complied with. We do not for a moment suggest that the course adopted here is a desirable course and we think that the Magistrate should have followed the course which I have already indicated. But we are not prepared to interfere in the present case on the ground that s. 342 has not been complied with, for all the accused had an opportunity of stating what their defence was upon the evidence as given, and it was open to them to do as they have done and instead of answering the general questions put to them to rely on the written statements for the purpose of meeting the case for the prosecution." In Criminal Appeal No. 547 of 1913 [*Shamlal Singh* v. *Emperor*] decided by this Court on the 15th January 1924,* the accused had been asked if they desired to make any further statement to what they had done before the Committing Magistrate and they refused to do so. Greaves and Panton, JJ., observed thus in their judgment in that case:—"Now we have had occasions to point out more than once that the proper method of applying s. 342 is to bring to the attention of the accused specific matters which appear in the evidence against them and that merely questioning them generally as to whether they have anything to say or anything to add to what was said before the Committing Magistrate is not a satisfactory method of applying s. 342 and we hope that the Courts in future will bear this in mind when the time comes to question the accused under the provisions of s. 342 but we are not prepared to say that what was done in this case necessitates a new trial."

As I have said there is no reported decision in which the question directly arose for consideration but there are a series of cases in which the section has been interpreted by the different Courts which have had occasion to administer it, and though most of these decisions are not to be treated as binding on us, it is not undesirable to refer to them as they throw some light on the question. In the case of *Hossein Buksh* v. *Empress* (2) in dealing with s. 250 of Act X of 1870 quoted above Prinsep, J., observed (Morris, J., concurring) that the real object in the power given to the Court was to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused, in the commission of the offence with which he standscharged. In the case of *Queen-Empress* v. *Hargobind Singh* (3), Sir John Edge, C. J., and Tyrell and Knox,, JJ., observed that it required no knowledge of law to understand the section and to understand that it is not for the purpose of ascertaining what witnesses the accused intends to call, or what evidence they will give or what his defence is, that a Court is justified or authorised in examining an accused under that section. In the case of *Raghu Bhumij* v. *Emperor* (4), Sultan Ahmed, J., observed

(1) 81 Ind. Cas. 199; (1924) Pat. 198; 5 P. L. T. 445; 25 Cr. L. J. 711; (1924) A. I. R. (Pat.) 791.

*Since reported as 85 Ind. Cas. 716—[*Ed.*]

(2) 6 C. 96 at p. 102; 6 C. L. R. 529; 3 Shome L. P. Cr. R. 39; 3 Ind. Dec. (N. S.) 63.

(3) 14 A. 242; A. W. N. (1892) 83; 7 Ind. Dec. (N. S.) 525.

(4) 58 Ind. Cas. 49; 21 Cr. L. J. 705 at p. 709; 1 P. L. T. 241; 5 P. L. J. 430.

thus :—" The real object of the latter part of s. 342, cl. (1) is to ascertain from the prisoner how he can meet what the Judge may consider to be damnatory evidence against him." The same view has been taken by a later decision of this same Court in the case of *Bhokhari Singh* v. *Emperor* (1) in which Kulwant Sahay, J., observed that it was compulsory for the Court under s. 342 to question the accused in such a way as to enable him to explain any circumstances which appear in the evidence against him. It was held in that case that the mere asking the accused as to whether he has anything further to say is not a sufficient compliance with the second part of the section, and that the questions must be framed in such a way as to enable the accused to know what he is to explain and as to what are the circumstances against him and for which an explanation is needed. In another case of the same Court, namely, the case of *Panchu Choudhury* v. *Emperor* (5) in which the Committing Magistrate had put a specific question to the accused as to whether he had committed the offence and the accused answered in the negative, and then in the Trial Court he was asked whether he wished to add anything to the statement which he had made before the Committing Magistrate, Bucknill, J., observed as follows:—"It can easily be seen that if it is to be said that a Judicial Officer must ask this or that question or this or that series of questions under the provisions of s. 342, Cr. P. C., the practical effect of the working of that section could be criticised in revisional applications on every possible occasion. I can well-understand that, where an accused is undefended the Tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner, it would, I think, be altogether impossible to expect, or desirable to contemplate, a Tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into, what would be far worse, some sort of cross examination." With all deference to the learned Judge, I should observe that this distinction between a defended and an undefended case ignores the object of the section itself which has been so forcibly, pointed out by Rankin, J., in his judgment in the case of *Promotho Nath Mukhopadhya* v. *Emperor* (6) that this examination is a matter entirely between the accused and the Court and that the legal advisers do not come in or count in this examination at all. In another case of the same Court, namely, that of *Fatu Santal* v. *Emperor* (7), Sir Dawson Miller, C.J., and Adami, J., observed as follows:—" In the present case it does not appear that any question whatever was asked of him or that his attention was directed to any portion of the evidence which might appear to call for an explanation and, in these circumstances, it seems to us that the trial was entirely irregular and that the verdict cannot stand." In this case, the accused had been examined by the Committing Magistrate but there was no examination by the Trial Judge. The Lahore High Court in the recent case of *Harnama* v. *Emperor* (8) had to deal with the effect of non-examination of the accused when he filed a written statement and declined, when asked, to add anything to it. Broadway, J., while holding that the omission was not fatal, observed as follows:—"Although it would have been better for the Magistrate to have put definite questions to the appellants, I am unable to hold that the procedure actually adopted in the case was so illegal as to vitiate the whole trial." In the case of *In re Basru Venkata Row* (9) of the Madras High Court, Spencer, J., dealing with a letter from which an inference adverse to the accused was drawn by the Court observed as follows:—" If it was intended to treat this letter as a circumstance appearing against the first accused and to draw inferences from it against him it would have been a fair and natural procedure for the Judge, in the exercise of the power which he had under ss. 289 and 342, Cr. P. C., to examine the accused about it and put him such questions as would enable him to explain its significance. As it was, he was asked no question and he made no statement

(5) 66 Ind. Cas. 73; 23 Cr. L. J. 233; 3 P. L. T. 649; (1923) A. I. R. (Pat.) 91.

(6) 71 Ind. Cas. 792; 27 C. W. N. 389 at p. 406; (1923) A. I. R. (C.) 470; 24 Cr. L. J. 248; 50 C. 518.

(7) 61 Ind. Cas. 705; 22 Cr. L. J. 417; 2 P. L. T. 288; 6 P. L. J. 147.

(8) 60 Ind. Cas. 676; 22 Cr. L. J. 276; 3 U. P. L. (L.) 34.

(9) 14 Ind. Cas. 418; 13 Cr. L. J. 226 at 233; 11 M. L. T. 93; 22 M. L. J. 270; (1912) M. W. N. 125; 36 M. 159.

relative to this document." The precise point came up for consideration in a case in the Central Provinces, where the procedure seems to be well-settled, in the case of *Tani* v. *Emperor* (10) in which Batten, J. C., and Kotwal, A. J. C., following an earlier decision of the Nagpur Judicial Commissioner's Court *Emperor* v. *Katay Kisan* (11) held that the object of s. 342, Cr. P. C. is (1) to communicate to the accused, to the full extent what may be found necessary in each particular case, what is alleged against him in the evidence for the prosecution, and (2) to ascertain from him what explanation or defence in law or in fact, he wishes to put forward in respect thereof. It was expressly laid down by the Court that it is necessary that the attention of the accused should be drawn to all the vital parts of the evidence against him and that it was not a sufficient compliance with the provisions to ask the accused the general question. "Have you anything more to say in this case?" or "You have heard the prosecution witnesses against you: what have you to say?" I have not been able to find any opinion of the Bombay High Court in this matter, but specimens of examinations that are to be found in some of the reported cases point to a detailed examination being the practice that obtains in that Presidency. In one of the cases in that Court *viz.*, *Basapaningapa* v. *Emperor* (12) Hayward, J., characterised the examination of the accused person held by the Committing Magistrate as perfunctory, indicating that something more than a general question is necessary and observed that the law requires that an opportunity shall be given to the accused himself to explain and not that this important step in the procedure should be left to his Pleader. The same view has been endorsed by the Courts in Burma. In the Court of the Judicial Commissioner of Upper Burma Riggs, J. C., in the case of *Nga San Nyein* v. *Emperor* (13) held that the object of examining an accused person is to afford him an opportunity of explaining away evidence against him, that each point appearing in evidence should be put to him and he should be invited to offer his explanation or comment in it, anything in the nature of cross-examination being avoided. The Burma High Court, in the case of *Maung Hman* v. *Emperor* (14) had to deal with this question very recently and May Oung, J., held in that case that a Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point, otherwise it will be impossible for the accused to know what is in the Court's mind and he cannot be reasonably expected to explain it, and that it is not sufficient to put a general question to the accused such as, "What have you to say regarding the statement of the compainant's witnesses."

In the present case Alimaddin Naskar was asked by the Committing Magistrate "What is your defence?" he replied "I am innocent, what I have to say I shall say in the Sessions Court". In the Court of Session the said statement was read to him and he was then asked "Do you wish to say anything more?" He then made a statement. Belatali Naskar was put the same question in the Committing Magistrate's Court and he gave the same reply as Alimaddin Naskar. He was asked by the Judge the same question that was put to Alimaddin Naskar and he then made a statement. I am of opinion that the examination of the two accused persons was perfunctory and not a sufficient compliance with the provisions of the law. In my opinion the law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so. It may be that when a general question as to whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be of no use asking him any further question. If on the other hand, it does not appear that he would refuse to answer questions put to him, or it appears that he desires to respond his attention should be called to the salient points appearing against him, so that an opportunity is really afforded to him to explain them, if ho can do so. In such examination every precaution should be taken not to entrap him to make

(10) 48 Ind. Cas. 487; 20 Cr. L. J. 12.
(11) 17 C. P. L. R 113.
(12) 31 Ind. Cas. 365; 16 Cr. L. J. 765; 17 Bom. L. R. 892.
(13) 41 Ind. Cas. 150; 18 Cr. L. J. 774; 3 U. B. R. (1917) 8; 11 Bur. L. T. 140.
(14) 77 Ind. Cas. 887; 25 Cr. L. J. 437; 2 Bur. L. J. 288; I R. 689; (1924) A. I. R. (R.) 172.

incriminating answers and all questions in the nature of cross-examination should be avoided. In my opinion it is not impracticable to conduct the examination in the manner indicated above.

Though the examinations of the accused persons have not been adequate, the statements made by them indicate that they were not altogether ignorant of some of the salient points appearing in the evidence against them. Alimaddin endeavoured to explain that he had no motive, that he was not concerned in the earlier incidents, that the Naskars were named as accused out of enmity and that at a subsequent stage, and that the prosecution witnesses were relations and servants of Momrej. He also wanted to create an appearance in his favour by stating that the Naskars spent the whole day after the night of the occurrence at the spot but none named them then. Belatali stated that he was absent from the village and was falsely implicated. In the present case I am unable to hold that there has been any prejudice to the accused persons. A refusal to give the accused an opportunity to make a statemeat at a stage when the mandatory part of s. 342, Cr. P. C., is oparative vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate it.

For the above reasons, I am of opinion that the two accused persons have been rightly convicted. I accordingly uphold the conviction of Alimaddin Naskar and Belat Naskar under ss. 302, 120B, Indian Penal Code, and also the conviction of Belat Nasker under s. 302, Indian Penal Code.

As to the sentences, giving the matter my most anxious consideration and taking into account all the circumstances of the case, I am unable to find any reason for passing a lesser sentence on either of the two accused than the maximum penalty which the law provides for the offences of which they are guilty. The offences committed by them are most diabolical in their conception and brutal in their execution, and I accordingly confirm the sentences of death passed on the two accused and dismiss their appeals.

Newbould, J.—My learned brother in his judgment which he has just delivered has dealt fully with the facts and the evidence in this case. It is sufficient for me to say that I am in entire agreement with his finding that the convictions of Alimaddin Naskar and Belat Naskar under s. 302 read with s. 120B, Indian Penal Code and of Belat Naskar under s. 302, Indian Penal Code are right and that the sentences of death are necessary. The appeals are accordingly dismissed and the sentences of death are confirmed.

As regards the point of law that was raised in this case that there has been inadequate examination of the accused under s. 342 of the Cr. P. C. we are in agreement that the trial has not been vitiated by any failure to comply with the mandatory provisions of this section. But with the utmost respect for the opinion of my learned brother I am unable to agree with him that the examinations of the accused persons at the present trial were not adequate. I adhere to the view expressed by Chakravarti, J., and myself in the unreported case *Rez Mahamed Sheikh* v. *Emperor*, Criminal Revision No. 237 of 1924, decided on 24th June 1924. We there held in agreement with the decision of Rankin, J., in *Promohta Nath Mukhopadhya* v. *Emperor* (6), that what is necessary is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. We further held that the question put in that case "What is your defence" was a sufficient compliance with the mandatory provisions of s. 342, Cr. P. C. One of the reasons given for this decision was that for many years it had been the more usual practice for Courts when examining an accused under this section to put to him questions of a formal nature in words similar to those which had been used in that case and we applied the maxim *optima legis interpres consuetudo.*

I still think that a formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lip is a sufficient compliance with the mandatory provisions of s. 342, Cr. P. C., since it enables the accused to explain any circumstances appearing in the evidence against him. To what extent the Court, when complying with the mandatory provisions of the section, should also exercise its discretionary power under the other provisions of the section, is a different question. The

exercise of this discretion must vary with and depend on the circumstances of each particular case. But in the majority of cases it is, in my opinion, neither necessary nor desirable that there should be any detailed questioning of the accused. The point at which the Court is bound to question the accused is after the witnesses for the prosecution have been cross-examined. From the cross-examination it will usually appear that the accused understands what are the circumstances appearing in the evidence which require explanation. If this is apparent it is unnecessary for the Court to tell the accused what those circumstances are. The superior Courts of this country have repeatedly emphasised that the examination of the accused under this section should not be of an inquisitional nature. There is great danger, if the lower Courts are required to depart from the usual practice of putting a formal question and in all cases to specify the circumstances appearing in evidence against the accused, that something of the nature of cross-examination will frequently result. There is a very thin line of distinction between stating the circumstances which require explanation and asking the accused to explain those circumstances.

Z. K. *Appeals dismissed;*
Death sentences confirmed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 120 OF 1924.
August 14, 1924.
Present:—Mr. Justice Ross and Mr. Justice Sen.

RADHE SAHI AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal trial—Prosecution case found to be untrue—Acquittal—Procedure—Penal Code (Act XLV of 1860), ss. 147, 149.

Where in a riot case it is found that the case presented to the Court by the prosecution is definitely untrue it is not necessary for the accused to plead the right of private defence or to show that they have not exceeded the right of private defence. On the finding that the case for the prosecution is untrue the accused are entitled to an acquittal. [p. 938, col. 2.]

Appeal from a decision of the Sessions Judge, Muzafferpur, dated the 23rd June 1924.

Messrs. *Aziz* and *Janak Kishore*, for the Appellants.

The Assistant Government Advocate and Mr. *Jadubans Sahay*, for the Crown.

JUDGMENT.—The six appellants have been sentenced to transportation for life on conviction on charges under ss. 148 and 302 read with s. 149 of the Indian Penal Code. The charge under s. 148 was that they were members of an unlawful assembly the common object of which was to beat Munshi Rai, and that they were armed with deadly weapons. As Munshi Rai was killed in the course of the riot, there was a further charge under s. 302 read with s. 149 of the Indian Penal Code.

The case for the prosecution is that on the 19th August 1923, two men named Ramasis and Saheb Mahto were sitting on a *machan* in the field of one Nepal Mahto one or one and-a-half *gharis* before sunset. They are residents of Chanaotoli *alias* Jahangirpur, a village chiefly inhabited by Chanaos. Munshi Rai of the neighbouring village Lachminiatola, which is inhabited chiefly by Rajputs, and Babhans, was coming from village Deokali, where he had gone to visit the temple and was returning towards his home. When he came near the *machan* Saheb and Ramasis asked him to take tobacco. He stopped there and took tobacco whereupon Saheb seized him by one of his arms, Ramasis by the other and thirty and forty people armed with various weapons came from the adjoining field of Bishundeyal. The appellant Radhe gave Munshi Rai a blow with a *garansa* on his shoulder and the appellant Ganga gave another blow with a *garansa* on his right knee. Munshi Rai fell and then a cry was raised that he was killed and his assailants dispersed.

The reason for this occurrence was that the Chanaos had recently adopted the sacred thread and this had aroused the resentment of the Rajputs who had proceeded to commit various acts of oppression against them and a further motive is assigned in the fact that Ramasis, who was an employee of the Sheohar Raj had instituted a false rent suit against Munshi Rai in 1326.

The defence as gathered from the written statements of the accused was that ever since the Chanaos adopted the sacred thread the Rajputs and Babhans had been oppressing them. There had been numerous acts of aggression and oppression which had been reported to the authorities between the

20th of July and the 17th of August. A constable and some *chuakidars* and *dafadar* had been deputed to the village to prevent a breach of the peace; and on the 19th August they were informed that the Rajputs were looting the crops of the Chanaos on the south and on the north of the village. The constable and the *dafadar* went to the south and were unable to prevent the looting. They went to the north where they saw some people running away and were informed that two Rajputs had been killed.

The case was tried with the assistance of three assessors, all of whom disbelieved the case of the prosecution that Munshi Rai was waylaid. The opinion of the assessors was that he had probably gone with the other Rajputs to loot the crops of the Chanaos and it was in these circumstances that he received his injuries. All the assessors were of opinion that the Chanaos were acting in defence of their crops and should be acquitted.

The learned Sessions Judge disbelieved the story of the offering of tobacco to Munshi Rai. He did not think that it was necessarily Munshi for whom the Chanaos were lying in wait but thought that they were ready to attack any Rajput who came in their way. With regard to the death of the second Rajput which had been brought to the notice of the Police the learned Sessions Judge says that no evidence was given about him, nor was his dead body forthcoming. He was further of opinion that there was no evidence that Munshi Rai took part in any looting and that there was nothing in the evidence to show that the accused were acting in self-defence; and that while the looting on the south of the village had been established there was no proof of looting on the north. He, therefore, accepted the evidence of the prosecution and convicted the appellants.

The first point that falls to be considered is the state of feeling prevailing at the time between the Chanaos and the Rajputs. Exhibit B is an information to the Police given on the 20th of July 1923 about the breaking of the sacred thread of a Chanao by certain Rajputs and threats that they would loot his house. On the 24th of July a Head Constable who had gone to the village to enquire into certain complaints that had been made found an assembly of 500 Rajputs armed with *lathis* and other weapons prepared to commit disturbance over this sacred affair. With difficulty he persuaded them not to commit a breach of the peace and the Magistrate ordered proceedings to be drawn up under s. 107 of the Cr. P. C. against six Chanaos and forty-two Rajputs. Exhibit C of the 1st August and Ex. D of the 2nd August and Ex. E of the 3rd August are to the same effect as Ex. B. Exhibit F. reports an actual assault on a Chanao by a certain Rajput on the 10th August. On the 14th and the 15th of August there were occurrences of looting crops which ended in conviction. On the 20th of August a complaint was lodged by Ganga, one of the appellants, of an occurrence on the 17th of August when he was assaulted by certain Rajputs and had his sacred thread broken. This event immediately preceded the occurrence which is the subject of the present case.

The first information was given at midnight on the 19th the Police Station being five miles from the place of occurrence. There was, therefore, considerable delay on the part of Rambahadur, the informant, who deposed to having witnessed the occurrence, before going to the Police. The explanation that he gave of the delay was that he had to come from a long distance and the river was full. But this explanation is not sufficient and it is not comeplete. He says that after the occurrence he had taken the dead body of Munshi Rai east of the Barhamasthan and then he and Dharkhan Rai the nephew of Munshi Rai, crossed at the Sugiaghat and went to the *thana*. But from the evidence in the case it appears that much more had happened in the interval, as to which the informant was silent before the Police.

As to the actual facts of the occurrence the evidence in this case falls into two parts. In the first place there is the evidence of the Rajput witnesses who all tell the same story. That story is roughly speaking the same as the first information. But there is another body of evidence which consists of the depositions of the constable and the *dafadar* and *chowkidar* who were on duty in the village and it is necessary to examine that evidence also in order to discover what actually happened. The constable sent two *chowkidars* Janab Ali and Abdur Rahman to the Police Station and an information was recorded at I. A. M. on the 20th August 1923 (Ex. 6.) to the effect that a little before sunset the Rejputs with a view to cut by force the *makai* crop of

the Chanaos collected in a mob at Jahangirpur, some towards the south and some towards the north. The constable and the *dafadar* and the *chowkidars* went to stop the mob in the southern direction and in the meantime they heard that Munshi Rai of Lachminatola and a Rajput of Gossainpur belonging to the mob on the northern side had been assaulted. By the time the constable and *dafadar* and the *chowkidars* went towards that mob on the north the Rajputs had run away with the wounded men. Then the *chowkidars* went to the house of Munshi Rai and learnt that the wounded Munshi Rai was in his house, but his relations said that he had been attacked on his way back from Deokali by some Chanaos who had killed him and caused his body to disappear; and the relations did not allow the *chowkidars* to go inside the house. It was at this stage that these *chowkidars* were dispatched by the constable to the Police Station to give information. These facts have been stated in fuller detail by Ramsagar Singh constable, prosecution witness No. 20. He adds the fact that it was Ramasis who informed him that the mob had assembled; and that he received the information while he was sitting at Saheb Mahto's door. He further said that Saheb Mahto was not at his house on the 18th or 19th. As to the loot on the south of the village, that has not been disputed on behalf of Crown; and as to the loot on the north, the constable says that he saw that five or seven *kathas* of *makai* crop had been cut and some men were running away. He went to the house of Munshi and found a lame man who denied that a dead body had been brought there. Then he sent Janab Ali and Abdur Rahman to the Police Station and posted *chowkidars* round the house so that the dead body might not be removed. Then Rambahadur the first informant took him inside and showed him the dead body. He further added in cross-examination that three fields seemed to have been looted at the place where the blood was. The crops were partly ripe and partly unripe. This evidence is corroborated in all details by the *dafadar* Fasihuddin who further says that a Rajput of Sundarpur told him that Munshi Rai of Lachminatola and Kodai Rai of Gossainpur had been killed by a mob of Chanaos. He was then deputed by the constable to look for the other dead body and went to Gossainpur but could not find out what had become of the body. The *chowkidars* Janab and Garib further corroborate these witnesses. This is evidence offered by the prosecution as true evidence and no reason has been shown for disbelieving it. The Sub-Inspector who investigated the case found that the *makai* crop had been cut in four fields near the field where the blood was found. He noticed damage on the morning of the 20th on the north of the village and it was on the 21st that the damage on the south was pointed out to him. To my mind there can be no doubt that this body of evidence represents the actual state of things on the afternoon of the date of occurrence. Active looting was going on at two places, on the south and on the north of the village; and it was while the Police were going from the south towards the north and when they saw men actually going away from the scene of looting on the north that they received the information that not only Munshi Rai had been killed but another Rajput also. All these facts throw the greatest doubt on the story set up by the Rajput witnesses that Munshi Rai was waylaid.

The learned Sessions Judge evidently had some doubts about that part of the case. The story of offering tobacco is incredible, considering the relations between the parties and he rightly rejected it. That Munshi Rai had been to Deokali is deposed to by two witnesses, Paltu Sonar the tenant of a Rajput and Rajnandan Singh who is a Rajput and a connection of the deceased. This evidence seems to me to be suspicious for several reasons. The *post mortem* examination reveals the fact that there was partially digested rice and *dal* in the stomach of the deceased and these witnesses have come forward in the Sessions Court with a story that the deceased stopped at Sheohar on his way back from Deokali and took rice and *dal* a most improbable story in itself and one which was never mentioned to the Police or in the Court of the Committing Magistrate. Then Paltu gives the detail that Munshi Rai was carrying a *lota* and an umbrella and a *kurta*. This is the only reference to the *kurta* in the whole case. By the time the Sub-Inspector went to the scene of occurrence on the morning of the 20th, the body of Munshi Rai had been carried back to the field where he had been attacked and *lota* and an umbrella were found beside the body. But no witnesses ever noticed these

articles on the field the evening before. This seems to be a matter of the gravest suspicion and it is evident that these articles were placed baside the body in order to give support to the story that Munshi had been out of the village on a peaceable expedition. No witnesses from the Deokali temple which he is said to have visited were examined. The place selected for the way laying of Munshi Rai was hardly suitable for the purpose as it is close to the Rajput villages and at a distance from the Chanaos. There seems to have been a good deal of uncertainty about this part of the case in the mind of the prosecution at the beginning as not only was there delay in the lodging of the first information, but Rambahadur made discrepant statements before the Sub-Inspector as to the place from which he had seen the waylaying of Munshi Rai, naming first one Machan and then another which was separated from it by a considerable distance. I disbelieve altogether the story that Munshi Rai had been to Deokali and was waylaid on his return.

The occurrence itself as alleged by the prosecution does not seem probable. No reason is given for the sudden disappearance of the accused. They went away without any reason. But still more important and in fact the most important point in the case, is the removal of the body by the Rajputs. The learned Sessions Judge has suggested that they may have been unwilling to leave it on the field or to produce it before authorities unimportant than the Sub-Inspector. But this, in my opinion, does not explain their denial of the presence of the body in the house when the constable went there. There was nothing to be feared from the constable and there was no reason why the presence of the body in the house should have been denied. This strongly suggests that the Rajputs were the aggressors and were endeavouring to conceal their casualties. This view is confirmed by the episode of Kodai Rai of Gossainpur. Evidence was given before the Magistrate that this other Rajput had also been killed and that his body had been made away with. The Magistrate refers to this in his commitment order where he says that "A good deal of evidence has been led in this case to show that some of the accused had been seen carrying Kodai's body towards the Bagmati". That evidence was entirely dropped at the trial and yet it is clear from the statements of the Police witnesses which have already been referred to, that they were informed that Kodai Rai had been killed and that search was made for his body. The fact that Munshi Rai's body was removed by the Rajputs would suggest that the body of Kodai Rai, if he was killed, had also been removed by his fellow castemen. And if it is a fact that two Rajputs were killed, this not only throws the gravest suspicion on the tale of the waylaying of Munshi Rai, but adds strongly to the probability that what happened was that these men met their deaths in the course of the looting of the Chanao's fields. Rambahadur did not mention the fact of the concealment of Munshi Rai's body in the First Information; and the prosecution has given no real explanation of it. It seems to me that the inference that strictly follows from the concealment of the body is that the Rajputs felt that they were not in a position to go to the Police; that they were conscious that they were the aggressors; and that this death had been the consequence of their own act.

It was suggested by the learned Assistant Government Advocate that the number and the nature of the injuries on Munshi Rai are not consistent with the theory that he was killed in a riot. But it is by no means certain that all injuries were *anti mortem*; and, in any case, I see nothing in this which negatives the defence. It cannot be inferred from these injuries that Munshi Rai was entirely alone. He may have been isolated from the others; and the evidence to my mind leaves no doubt that looting by the Rajputs was going on the north of the village and that it is in the course of that looting that Munshi Rai came by his death.

In all these circumstances it seems clear that the case which has been presented to the Court by the prosecution is not a true account of how Munshi Rai was killed. It was, therefore, unnecessary for the accused to plead private defence or to show that they had not exceeded the right of private defence. The case for the prosecution being in my opinion definitely untrue, it seems to me that the convictions cannot stand and must be set aside. The accused must be acquitted. Those who are on bail will be released from bail and those who are in jail will be set at liberty.

Z. K. *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 125 OF 1924.

August 8, 1924.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

EMPEROR—COMPLAINANT—PETITIONER

versus

ASIMULLA MONDAL AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 438—Reference, when to be made—Adhiar, *whether labourer or tenant.*

A reference to the High Court in a criminal matter can only be made in respect of an error on a point of law.

An *adhiar* may be a mere labourer or he may be a tenant, and the question whether he is a mere labourer or a tenant must depend on the facts of each case.

Deb Nath Das Bairagi v. *Ram Sundar Barman*, 31 Ind. Cas. 579; 19 C. W. N. 1205, referred to.

Reference made by the Sessions Judge, Rungpur.

Babus *Girija Prosanna Sanyal* and *Indu Prokas Chatterjee*, for the Petitioner.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown

JUDGMENT.

Sanderson, C. J.—This is a reference by the learned Sessions Judge of Rungpur, dealing with the judgment of the Sub-Divisional Officer of Rangpur, Sadar.

It appears that complaint was brought by one Dunda against one Asimulla and others, alleging that they had committed offences under s. 143 and s. 447 of the Indian Penal Code; and, the Magistrate convicted them of these offences and imposed certain fines upon the accused persons. Upon an application to the learned Judge he made the reference to this Court with which we are now dealing; and, it is, of course, common knowledge that a reference can only be made in respect of an error on a point of law.

The learned Judge has set out in the reference the respects in which he considers the Magistrate made a mistake in point of law.

The third paragraph of the reference deals with the particular portions of the order which the Court making the reference considers to be an error in point of law, and, the first clause (*a*) is as follows: "The part of the order where the learned Sub-Divisional Magistrate negatived the contention that *adhiars* are mere labourers in the absence of evidence that the *adhiar* was a tenant and that the landlord's entry upon the land held by *adhiar* was not trespass (in the absence of evidence, that according to the contract in this case, the *adhiar* was a tenant").

The manner in which the point is stated is somewhat obscure but I think the learned Judge meant that the Magistrate should have held that the complainant was no more than a mere labourer, inasmuch as there was no evidence that he occupied the position of a tenant, and that as the complainant was a mere labourer, Asimulla and others could not be guilty of trespass.

The second clause of that paragraph is as follows :—"(*b*) That part of the order where the learned Magistrate held that in this case the accused landlord and those who acted on his behalf could not plead a *bona fide* claim of right".

On the first point, in my judgment there is no doubt that an *adhiar* may be a mere labourer or he may be a tenant; and, the question whether he is a mere labourer or a tenant must depend upon the facts of each case.

The facts of this case are as follows: The Magistrate has found that Dunda, the complainant, had been cultivating the land in Adhi under Asimulla for a long time and that he had in fact ploughed the land in June 1923, with a view to growing paddy on the land, as he had done in previous years. He drew attention to the fact that some witnesses had been called on behalf of the accused to prove that Asimulla had been in *khas* possession of the land and that the complainant had never cultivated the land at all.

The evidence, given on behalf of the accused, the Magistrate rejected; and, he accepted the evidence given on behalf of the complainant. He further came to the conclusion, having regard to the facts which are set out in his judgment which included the number of persons who went for the purpose of ploughing the land and the number of ploughs which were taken on the occasion in question that Asimulla and those who were with him, were not acting *bona fide* in the exercise of a claim of right.

Having regard to these facts I should be prepared to hold that there was evidence before the Magistrate which would

justify him in coming to the conclusion that the complainant was not a mere labourer but that he had some interest in the land as a tenant.

It is to be noticed that in the reference the learned Judge stated that the only evidence is that the complainant holds two plots of land in Adhi for which he gives half the produce as rent. I do not know whether the learned Judge quite appreciated what might be the effect of that sentence. If the sentence were taken alone, the natural inference would be that there was a relationship of landlord and tenant between the complainant and Asimulla. But I do not base my judgment upon that particular phrase used in the learned Judge's reference. I base my judgment on the facts as set out in the Magistrate's judgment.

My learned brother in the course of the argument referred to a case, *Deb Nath Das Bairagi* v. *Ram Sundar Barman* (1). That case came from this particular part of the country, Rangpur.

The Rule had been granted against the decision of the learned Munsif of Rangpur; and, the question was whether the plaintiff in that case was in possession as an *adhiar*; the learned Judges, who decided that case, came to the conclusion that he was more than a mere labourer, that he was a tenant and that his possession would be protected under s. 9 of the Specific Relief Act. The learned Judges pointed out that there was no affidavit before the Court that an *adhiar* in that part of the country means a 'labourer' and not a 'tenant' and that there was on the contrary a statement in the affidavit that the land was, "let out" to the plaintiff as *adhiar*, which term is appropriate to the existence of a tenancy. They then went on to say that "The various books upon the subject which were referred to, show that very largely, an *adhiar* is a tenant and the learned Judge who decided this case must be well aware of the meaning of the term in the district in which his Court is."

It seems to me, therefore, that the finding of fact at which the Magistrate arrived in this case is in accordance with the decision in the case which I have just cited.

(1) 31 Ind. Cas. 579; 19 C. W. N. 1205.

For these reasons in my judgment this reference should be refused.

Chotzner, J.—I agree.

Z. K. *Reference discharged.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 13 OF 1924.
March 4, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

In the matter of DULAL BACHAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Guilty intention, absence of, effect of.

Accused who was an "illiterate low caste cultivator" applied for Letters of Administration with the Will annexed to the estate of a deceased person who had made a registered Will in favour of the accused: Before Letters of Administration were granted but at a time when he had no suspicion that a *caveat* was likely to be entered, he removed a certain safe which was in the possession of the widow of the deceased, but which had been bequeathed to the accused under the Will. Subsequently, the widow entered a *caveat*, and charged the accused with the theft of the safe:

Held, that the conduct of the accused did not disclose the presence of a guilty intention on the part of the accused and that therefore he could not be convicted of theft. [p. 941, col. 2]

ARGUMENTS.—Babu *Norendra Kumar Basu* (with him Babu *Binode Lal Mukherji*), for the Petitioner.—In this case the accused, Dulal Bachar, has been convicted of theft of an iron-safe which was bequeathed to him by his uncle one Bhim Bachar. The accused was also appointed an executor under the Will of his uncle. He applied for a Probate of the Will and then on the 8th January went to the house of the testator and removed the iron-safe to his own custody. Then on the 11th January the testator's widow instituted the present criminal suit against the accused and on the 12th she filed her objection against the application for Probate. Now, under these circumstances was there any criminal intention on the part of the accused in removing the iron-safe? He may have acted under a wrong impression as to his rights under the law and it is admitted that he is an illiterate low caste cultivator. But cer-

tainly he had no criminal intention and there can be no offence of theft without criminal intention.

Babu *Satindra Nath Mukherji* (with him Babu *Monindra Lal Bose*), for the Opposite Party.—The accused applied for a Probate of the Will and in ordinary course of affairs he ought to have waited until it was granted. The undue haste about the removal of the iron-safe implies a criminal intention which can not be got over.

Babu *Norendra Kumar Basu* replied in brief.—When the iron-safe was removed no objection against the applicatian for Probate was filed. With him the grant of the Probate appeared to be merely a matter of form.

JUDGMENT.

Chotzner, J.—This Rule was obtained by the petitioner on the first ground specified in the petition which is that, on the findings of fact arrived at, the conviction is not sustainable in law.

The facts of the case appear to be simple. One Bhim Bachar died leaving a Will and on the 13th December 1922, the petitioner who is his nephew and an executor under the Will applied to the Court of the Subordinate Judge of Khulna for Letters of Administration with a copy of the Will annexed. The learned Subordinate Judge directed citation to issue and fixed the 12th January 1923, for proof of service. In the meantime, on the 8th January, the petitioner proceeded to the house of the testator and removed an iron-safe from there which led to the institution of the present charge by Phul Mala the testator's widow on the 11th January. On the 12th January 1923, she appeared in the Court of the Subordinate Judge and entered a *caveat*. The Judge accordingly ordered the petition to be returned for presentation to the Court of the District Judge as the case had become contentious. The learned Sub-Deputy Magistrate at the trial convicted the petitioner and sentenced him to undergo rigorous imprisonment for six months. On appeal to the Court of the Additional Sessions Judge the sentence was reduced to six weeks' rigorous imprisonment.

The learned Sessions Judge found that the safe which was the subject-matter of the complaint had been in the possession of Bhim's widow and heir and that the appellant had removed it. He further held that though it was conceeded by the prosecution that the Will purported to bequeath the safe to the appellant, the appellant had a criminal intention because he removed it before his application for grant of Letters of Administration had been disposed of by the District Judge.

It seems difficult to accept this conclusion. According to the learned Judge the appellant, to use his own words, is an "illiterate low caste cultivator". He had in his possession a registered Will which purported to demise the safe to him. He removed the safe on the 8th January; at a time when he could have no suspicion that a *caveat* was likely to be entered. These circumstances do not seem to us to disclose the presence of a *mens rea*, without which a conviction for theft cannot be maintained.

We are, therefore, of opinion that the Rule should be made absolute and the conviction and sentence be set aside.

With reference to the explanation submitted by the Sub-Deputy Magistrate that "the complainant," *i. e.*, the widow "having filed an objection, the petitioner should have waited for the decision of the District Judge in the case and the removal of the iron-safe before the Will was admitted to Probate or the grant of Letters was with dishonest motive", we may observe that the caveat was not filed by the widow until after the safe had been removed from her custody.

Sanderson, C. J.—I agree.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 65 OF 1924.

February 29, 1924.

Present:—Mr. Justice Scott-Smith.

JHANDU AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, 325—Attack with dangs—*Death caused by single blow—Culpable homicide—Grievous hurts—First Information, value of.*

A First Information Report is not like the deposition of a witness given in Court and cannot be considered to be exhaustive.

Accused, three in number, attacked the deceased with *dangs* causing two grievous hurts and one simple hurt. One of the grievous hurts amounted to the fracture of the skull of the deceased and resulted in

his death. There was no evidence as to which of the accused gave the blow upon the head of the deceased which caused his death:

Held, that none of the accused could be convicted of an offence under s. 304 II of the Penal Code, but that all of them were guilty of an offence under s. 325 of the Code.

Criminal appeal from an order of the Magistrate, First Class, with powers under s. 30, Cr. P. C., Ferozepur, dated the 15th October 1923.

Dr. *Nand Lal*, for the Appellants.

Mr. *Abdul Rashid*, for the Government Advocate, for the Respondent.

JUDGMENT.—Jhandu, Jaimal and Bhana have been convicted of the culpable homicide not amounting to murder of Natha, and Gurya has been convicted of abetment of that offence, and all have been sentenced alike to six years' rigorous imprisonment. They have filed a joint appeal to this Court.

The facts are not seriously disputed by Dr. Nand Lal who appears for the appellants. The occurrence was the result of the trespass of Gurya's cattle into Natha's melon field. They trespassed several times and on the third occasion Mahanda (P. W. No. 3) who was with Gurya turned them out and slapped Gurya on the face. Gurya cried out and the other three appellants came up from the village armed with *dangs* and attacked Mahanda and Natha. Grievous hurt was caused to Mahanda, and Natha recieved three injuries one of which resulted in the fracture of the skull, another caused abrasion to the cheek and the third resulted in the fracture of the left fibula.

Three main points were raised by Counsel for the appellants:—

(1) That having regard to the First Information Report it is not at all probable that Gurya instigated the other appellants to beat the deceased;

(2) That Bhana, according to the First Information Report, beat Mahanda, whilst his two companions beat the deceased;

(3) That one of the prosecution witnesses, namely, Muhammad Din, states that Jhandu did not beat Natha in his presence, and this introduces an element of doubt as regards him.

Now, it must be remembered that the First Information Report is not like the deposition of a witness given in Court and cannot be considered to be exhaustive. It is also necessary to remember that none of the prosecution witnesses appear to have any enmity with any of the appellants and there is no reason why they should give false evidence in the case. The witnesses in Court state that Mahanda was attacked first by Bhana and that then he and his companions beat the deceased. I see no reason to doubt the correctness of their evidence, I do not doubt that Gurya instigated the others to beat Mahanda and Natha.

It was finally urged that there is no evidence as to which of the appellants gave the blow upon the head which resulted in the death of Natha and that having regard to *Agra* v. *Crown* (1) they cannot be convicted of culpable homicide. There is force in this argument. Only one blow was struck on the head and there is no evidence to show which of the appellants struck that blow. At the same time when three men attack another with *dangs* and cause two separate grievous hurts, it can fairly be held that they all intended to cause or knew that they were likely to cause grievous hurt.

I, therefore, accept the appeal so far as to alter the convictions in the case of Jhandu, Jaimal, and Bhana to ones under s. 325, Indian Penal Code and in the case of Gurya to one under s. 325, 109, Indian Penal Code. These offences are not so serious as those of which the appellants have been convicted and I accordingly reduce their sentences in each case to one of four years' rigorous imprisonment including two months' solitary confinement.

Z. K. *Appeal partly accepted.*

(1) 27 Ind. Cas. 833; 37 P. R. 1914 Cr. 16 Cr. L. J. 209; 219 P. L. R. 1915.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 396 OF 1924.

August 6, 1924.

Present:—Mr. Justice Boys.

EMPEROR—APPLICANT

versus

RAM DIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Conviction, setting aside of—Accused previous convict—Sentence, adequacy of.

The High Court will not set aside a conviction and direct a re-trial merely because after the conclusion of the case the Crown has discovered that the accused is a previous convict and the sentence passed upon him is not adequate.

Queen-Empress v. *Kunjal*, A. W. N. (1891) 80, followed.

Criminal reference made by the District Magistrate, Jalaun, dated the 11th July 1924.

The Government Advocate, for the Crown.

JUDGMENT.—This is a reference by the District Magistrate of Jalaun asking this Court to set aside the conviction of one Ram Din under s. 379 of the Indian Penal Code and ordering his re-trial solely with the idea that he may be given a more severe sentence, the desirability of which is indicated by the fact that it has since been discovered that the accused has no less than six previous convictions. This in effect amounts to asking this Court to set aside the conviction because the Crown has since discovered further evidence which would be relevant on the question of sentence. It is certain that, ordinarily speaking, I do not say never, this Court would not set aside a conviction at the instance of the accused on the ground that he had not led evidence in his defence which it was possible for him to have led if he had exercised proper diligence. How much more so would it be improper under similar circumstances to set aside a conviction at the instance of the Crown. The Police reported on the 15th of June 1924 that the antecedents of the accused had not been traced and if they wanted more time they could have asked the Magistrate for it. He was, however, allowed to proceed to a conviction on the 19th of June 1923. In effect this Court is asked to remedy, to the prejudice of the accused, the consequences of neglect by the Executive to make proper enquiries and I do not think that this Court should interfere. The same opinion was expressed by Mr. Justice Knox in *Queen-Empress* v. *Kunjal* (1). I, therefore, decline to interfere. Let the record be returned.

Z. K. *Record returned.*

(1) A. W. N. (1891) 80.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 38 OF 1924.

November 13, 1924.

Present:—Mr. Dalal, J. C.

EMPEROR—APPLICANT

versus

SHEOPAL AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 342—Summons case—Examination of accused, whether necessary—Failure to examine accused—Prejudice.

Where an accused person in a summons case is prejudiced by the failure of the Magistrate to examine him at the conclusion of the prosecution case, the trial is liable to be set aside and a fresh trial ordered.

Quære:—Whether an examination of the accused under s. 342 of the Cr. P. C. is necessary in summons cases.

Ponnusami Odayar v. *Ramasami Thathan*, 74 Ind. Cas. 945; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 46 M. 758; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15, referred to.

Reference made by the Sessions Judge, Fyzabad.

The Government Pleader, for the Crown.

Mr. *Sri Ram Misra*, for the Accused.

ORDER.—The learned Judge has referred the matter here with a recommendation that the convictions of the applicants, Sheopal Pujari and Ram Gopal, who have been convicted of offences under s. 120 of the Indian Railways Act and s. 352 of the Indian Penal Code may be set aside and that their fines be remitted. The main ground for the escape of these criminals, if the allegation against them be true, is that the Deputy Magistrate who tried them was not well-acquainted with the Cr. P. C. The reason may be very satisfactory for the accused but would not cause the same satisfaction to the complainant, who came to Court in the expectation that the Magistrate who tries his case was acquainted with the law which he was paid to administer. So far as lies in my power I shall not let criminals escape because Deputy Magistrates are defective in the discharge of their duties.

After the prosecution evidence was over Sheopal Pujari and Ram Gopal were not questioned by the Court under the provisions of s. 342 of the Cr. P. C. They were not questioned generally on the case after the witnesses for the prosecution had been examined. Different High Courts have expressed different opinions on the subject as to whether such examination is imperative or not in trials of summons cases. The

learned Government Pleader drew my attention to a recent Full Bench ruling of 1923 of the Madras High Court in the case of *Ponnusami Odayar* v. *Ramasami Thathan* (1). That Court held that these provisions of s. 342 do not apply to trials in summons cases. Here, in my opinion, the matter goes a little further and it appears from the referring order of the learned Judge that the applicants were prejudiced by want of such examination. If such an examination had been held they would have been warned that they were likely to beconvicted of an offence under s. 352. I shall, therefore, not enter into the question whether an examination under s. 342 of the Cr. P. C. is necessary or not in the trial of summons cases. In the present case the applicants have been prejudiced and they are entitled to a fresh trial.

The observations of the learned Judge as regards the application of s. 352 are difficult to understand. What the learned Counsel of Fyzabad who appeared before me stated was that, right enough the applicants may have danced about with *lathis* in their hands and threatened to hit the complainant, if we believe the story of the complainant, but the complainant himself says that the applicants said that they would beat the complainant at some future time when the complainant went out of the railway fencing, so there was no assault. To interpret the learned Counsel correctly the complainant ought to have trusted the word of these men, who were dancing about in a threatening attitude in front of him with *lathis*, and not believed that even if the complainant gave them a chance they would beat him within the railway fencing. This, no doubt ,is very interesting but in the place of the complainant I certainly would not be prepared to trust the word of my antagonists and would not give them a chance of hitting me at the time. If what the complainant says is correct an assault was most certainly committed.

I set aside the conviction and sentence and direct the applicants to be re-tried according to law of offences under s. 120 of the Railways Act and s. 352 of the Indian Penal Code. The fines, if any paid by them so far, shall be refunded. The order under s. 106 Cr. P. C. is also cancelled.

Z. K. *Conviction set aside.*

(1) 74 Ind. Cas. 945; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 46 M. 758; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATIONS NOS. 110 AND 111 OF 1921.

October 14, 1924.

Present:—Mr. Dalal, J. C.

BAHADUR AND ANOTHER—PRISONERS—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 123—Procedure—Sessions Judge, duty of.

Proceedings under s. 123 of the Cr. P. C. are not proceedings in confirmation but for orders, and under that section the Sessions Judge must pass a definite order binding over and is not merely required to confirm an order passed by the Magistrate.

Reference under s. 123, Cr. P. C., made by the Sessions Judge, Gonda, dated the 24th July 1924.

The Government Pleader, for the Crown.

ORDER.—I sent for the record because the applicants produced as many as 30 witnesses in the Trial Court to speak to their good character. I have examined the record and read the elaborate judgments of the two subordinate Courts. They have carefully considered the defence evidence and I have come to the conclusion that the evidence produced on behalf of the prosecution was more reliable. Satisfactory reasons have been given by both the Courts for this opinion. I see no reason for interference except as to the period for which the applicants have been bound over. They had never been bound over before, so I think that two years will be a sufficiently long period. I, therefore, modify the order of the learned Judge and reduce the period from 3 to 2 years. The amounts and bonds of sureties are maintained.

The learned Judge is requested to note that proceedings under s. 123 of the Cr. P. C. are not proceedings in confirmation but for orders. He has to pass a definite order binding over and not to confirm an order passed by a Magistrate.

Z. K. *Order modified; Sentence reduced.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 190 OF 1921.

March 25, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

ABDUL RAHIMAN SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UTHUMANSA ROWTHER AND OTHERS—DEFENDANTS Nos. 2, 3 AND 5—RESPONDENTS.

Muhammadan Law—Settlement—Gift—Restriction on alienation—Construction—Vested remainder, creation of, validity of—Will—Bequest to one heir—Consent of other heirs, when effective—Family arrangement—Relinquishment, consideration for—Alienation by guardian—Direction of father—Discharge of debt—Sons, whether bound.

Where a Muhammadan by a deed of settlement gave certain properties to his sons "to be enjoyed by them from this date with all rights absolute," but later on, the document contained recitals that the sons "shall not subject the properties to mortgages or other alienations, and that both of them shall live with the income derived therefrom and maintain themselves, and that after them their descendants shall enjoy the same with the right of making alienations as they pleased":

Held, that the sons took an absolute estate in the properties settled upon them and the direction against alienation was invalid as being only in the nature of a pious wish that the sons should hand down the properties to their children unimpaired. [p. 946, col. 2.]

Under the Sunni Law a testamentary disposition by a Musalman is invalid in so far as it purports to dispose of more than one-third of the testator's estate or to benefit any of his heirs, unless the heirs whose rights are affected by such disposition consent to it after his death expressly or impliedly or by passive acquiescence. Consent during life is not enough. [p. 948, col. 1.]

The policy of the Muhammadan Law is to prevent a testator from interfering by Will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. It is incumbent upon those who seek to set up the consent of the heirs after the death of the testator to a Will made by him to show very clearly that the forms of the Muhammadan Law, whereby its policy is defeated, have been complied with. [p. 948, cols. 1 & 2.]

Nusrut Ali v. *Zeinunnissa*, 15 W. R. 116, *Khajoorconissa* v. *Rowshan Jehan*, 2 C. 184; 3 I. A. 291; 25 W. R. 36 (P. C.), relied on.

If there is a dispute and all the members of the family come to an arrangement, it is not open to any of the parties to go behind such an arrangement, but where a father and his sons amicably arrange that the father should settle all his property upon the sons reserving to himself little or nothing, it cannot be said that the essentials of a family arrangement are present, which would preclude any of the parties to the arrangement from claiming by inheritance to any other party. [p. 949, col. 2; p. 950, col. 1.]

In order to make out a valid family settlement by which a person can relinquish his right to property not only *in præsenti* but also *in futuro*, there must be in the first place consideration for such relinquishment, and in the second place there must be words which convey such an expression of intention on the part of the parties to the document. So long as the arrangement is merely a one-sided arrangement or where there is no dispute to be settled, a mere settlement of property by one person upon another cannot be considered to be a family arrangement under which rights which will accrue in future have been given up. [p. 950, col. 1.]

Under the Muhammadan Law, the father is entitled to deal with the properties as he likes and the sons cannot question any alienation made by him. Therefore, an alienation which was arranged to be made by a Muhammadan father and is carried out by the guardian of his minor sons, after his death, cannot be contested by them especially where it is for the purpose of discharging a debt incurred in the lifetime of their father. [p. 951, col. 1.]

Obiter.—The Muhammadan Law does not permit the creation of a vested remainder by a deed of settlement or by Will, but it is not opposed to the Muhammadan Law to make a bequest in favour of a legatee subject to the legatee paying a certain amount to another person. In other words, a trust can be created subject to which a legatee can take a bequest; but the words must be explicit for the purpose of creating such a trust. [p. 947, col. 1.]

Tarakalbhai Sultanbhai v. *Imtiyajbegam Mirbanesaheb*, 30 Ind. Cas. 96; 41 B. 372; 19 Bom. L. R. 97, and *Banoo Begum* v. *Mir Abed Ali*, 32 B. 172; 9 Bom. L. R. 1152, relied upon.

Appeal against a decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 61 of 1917.

Messrs. *T. M. Krishnaswamy Iyer* and *K. Narasimha Iyer*, for the Appellants.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.

Devadoss, J.—Plaintiffs are the grandsons of the first defendant by his elder son Muhammad Ganni, who died in 1911. The second defendant is the younger son of the first defendant. The third defendant is an alienee of some of the properties. The fourth defendant is a lessee and is in possession of some of the plaint properties. The fifth defendant is the plaintiffs' mother. The plaintiffs' case is that their father Muhammad Ganni and their grandfather, the first defendant Khader Sahib traded in Natal and acquired considerable properties, that by an arrangement in 1903, evidenced by Ex. B, they became entitled to A and B schedule properties, that their father left a Will Ex. C to which the first defendant was a consenting party, and that they are, therefore, entitled to the whole of the A and B schedule properties; and that the alienation in favour of the third defendant does not bind the plaintiffs and that they are entitled to the C schedule properties, half of the moveables in the D schedule and to the half share in the mortgage debt which is set out in schedule G. The

first defendant died without filing a written statement. The second defendant pleads that plaintiffs are entitled to only the property of their father as residuaries, that the alienation in favour of the third defendant is binding upon the plaintiffs, that they are not entitled to any of the moveables and that they are only entitled to 5/12th share in the mortgage debt. The third defendant contends that he purchased the property *bona fide* and for consideration from the guardian of the plaintiffs and that the sale is binding upon the plaintiffs. The Subordinate Judge granted a decree in favour of the plaintiffs for five-sixths of the A and B schedule properties and 5/12th of the G schedule debt and dismissed their claim as regards the C schedule properties and moveables and upheld the alienation in favour of the third defendant. The plaintiffs have appealed in respect of the reliefs denied to them. The second defendant has filed a memorandum of objections.

First point.—The first point urged by the appellants is that they are entitled to the whole of the properties mentioned in schedules A and B of the plaint. Their argument is that by Ex. B their father was given only a life interest and that they had a vested interest in the properties and that, even if it be held that their father was entitled to the properties, the plaintiffs are entitled to the whole of them inasmuch as the first defendant gave his consent to the Will Ex. C before it was executed and by his conduct acquiesced in the provisions of the Will subsequent to the death of Muhammad Ganni, and that, in any case, the arrangement evidenced by Exs. B, C and XIII should be considered as a family arrangement behind which neither the first defendant nor the second defendant could go. Exhibit B was executed on the 11th January 1908 by Khadar Sahib. It is called a deed of settlement and by it he settled his property upon his two sons Muhammad Ganni and Uthman Sahib. It was argued very strenuously by Mr. T. M. Krishnaswami Iyer that the settlement gave only a life interest to Muhammad Ganni and that the plaintiff got a vested right to the properties. Reliance was placed upon the following recital in the document. "Either of my sons shall not subject the properties aforesaid to mortgage with possession, hypothecation, security, sale or to any other alienations and both of them shall live with the income derived from the same every year and thus maintain themselves. After them their descendants shall enjoy the same with the right of making alienations as they pleased." The suggestion is that Khadar Sahib, who acquired considerable property by trading in Natal for a number of years, was anxious that his grandsons should enjoy the property so that the family may be perpetuated and as Muhammad Ganni was in a weak state of health at the time of the execution of Ex. B, it should be considered that Muhammad Ganni took only a life interest under Ex. B. The contention that Muhammad Ganni was given only a life interest, is opposed to the recital. "I have given away the *nanja*, *punja*, houses and ground and shops specified in schedule A to my eldest son Muhammad Ganni Sahib and he shall enjoy the said properties from this date with all rights absolute." In the same manner the settlor gave property, *nanja*, *punja*, house and ground and shops specified in schedule B to his second son Uthman Sahib. It cannot be said that the settlor wanted the sons of Uthman Sahib who were not then in existence to take the property subject to the life interest of Uthman Sahib. The Muhammadan Law does not permit such a bequest in favour of unborn sons and it cannot be said that in the case of one son the settlor wanted his grandsons to have the benefit subject to a life interest in favour of his son and in the case of the second son he gave him the property absolutely. It is unnecessary to speculate as to the intention of the settlor. We can only gather his intention from the expressions actually used in the deed of settlement. The direction against alienation is only a restraint upon alienation, a pious wish that the sons should hand down the properties to their children unimpaired. On a careful reading of Ex. B, the only construction which is consistent with the recitals and the clear words of the document is that both Muhammad Ganni and Uthman Sahib took an absolute estate in the properties settled upon them by their father Khadar Sahib.

In this view it is unnecessary to consider the question whether the Muhammadan Law permits the creation of a vested remainder by a deed of settlement or by Will. Any expression of opinion on the point can only be obiter. In *Abdul Wahid Khan v.*

Nuran Bibi (1), their Lordships of the Privy Council observe at page 603*: "To give the plaintiffs a title to the estate, it must be a vested interest which, on the death of their sons, passed to their heirs, and is similar to a vested remainder under the English Law. Such an interest in an estate does not seem to be recognised by the Muhammadan Law." In *Humeeda* v. *Budlun and the Government* (2), their Lordships held that the creation of such a life estate did not seem to be consistent with the Muhammadan usage and that there ought to be very clear proof for so unusual a transaction. It is not opposed to Muhammadan Law to make a bequest in favour of a legatee subject to the legatee paying a certain amount to another person. In other words a trust can be created subject to which a legatee could take a bequest; but the words must be explicit for the purpose of creating a trust. *Tavakalbhai Sultanbhai* v. *Imtiyazbegam Mirbanesaheb* (3) and *Banoo Begum* v. *Mir Abed Ali* (4). In the present case there is no trust created in favour of the plaintiffs. The settlement is in favour of the plaintiff's father and the plaintiffs can only inherit to their father and cannot claim independently of their father any right to the property settled under Ex. B.

The next contention is that the first defendant consented to the disposition under Ex. C, the Will of Muhammad Ganni executed on the 11th January 1903. Three documents Exs. B, C and XIII were executed on the same date. Exhibit B is the deed of settlement, Ex. C is the Will of Muhammad Ganni and Ex. XIII is the Will of Khader Sahib. Khader Sahib was at that time an old man of 80 years of age. Muhammad Ganni seems to have been in indifferent health and had arranged to leave the place for a time, for the evidence is that he left shortly after the execution of Ex. C for Natal where the father and the son carried on a lucrative trade. Mr. Varadachariar, on behalf of the defendants contends that Ex. C does not contain any disposition of property, that it only gives a direction for the management of the property during the minority of the plaintiffs and that by it only testamentary guardians have been appointed for the management of the properties during the minority of the plaintiffs. Mr. Krishnaswami Ayyar for the appellants, on the other hand, lays stress upon the words "He shall deliver the same to them." His argument is that the Will is in *Tamil* and that there are no proper words in the *Tamil* language which could clearly express an intention to bequeath property to a legatee. This is rather a startling argument. The *Tamil* language contains words capable of expressing the intention of a testator who wishes to bequeath property to a legatee. The mere fact that the Will is in the *Tamil* language is no ground for reading into it something which it does not contain. He relies upon the *Tamil* sentence: ("Minor Majoronapiragu Avergalvasam oppu vithu vidavendiyathu").

The testator appointed his father guardian of his minor sons should he survive him, and appointed Ahmed Karem as guardian in case" Khader Sahib died before the minors attained majority and directed Uthman Sahib to manage the properties along with his (the testator's) wife Amir Bai after he attained majority. Both in the case of his father and in the case of Ahmed Karim the words used are the same, namely, that the guardian should, on the minor's attaining majority, hand over the property to them. This expression by itself cannot mean that he bequeathed the properties to them and there are no other words in the Will bequeathing properties to the plaintiffs. From a careful reading of Ex. C, it is clear that Muhammad Ganni wanted to provide for the management of the properties after his death and during the minority of his sons and the specific directions as regards the amount to be spent for their marriages and the marriage of the daughter are clear indications that by Ex. C he only appointed testamentary guardians and did not devise the properties to the plaintiffs. It is unlikely that a Muhammadan would not have given a portion of his property to his daughter if it be contended that Ex. C is a Will. The argument on the side of the plaintiffs is that the plaintiffs' family though Muhammadan was Hindu in sentiment and, therefore, it was likely that Muhammad Ganni did not want to give a share to his daughter. This argument is not a sound one, for the mother of the plaintiffs is not likely to have con-

(1) 11 C. 597; 12 I. A. 91; 9 Ind. Jur. 283; 4 Sar. P. C. J. 627; Rafique & Jackson's P. C. No. 89; 5 Ind. Dec. (N. S.) 1157 (P. C.).
(2) 17 W. R. 525 (P. C.).
(3) 39 Ind. Cas. 96; 41 B. 372; 19 Bom. L. R. 97.
(4) 32 A. 172; 9 Bom. L. R. 1152.

*Page of 11 C.—[*Ed.*]

sented to an arrangement by which her daughter was deprived of her share of her father's property. In construing Ex. C., attention has to be paid to Ex. XIII. By Ex. XIII Khader Sahib appointed Khader Mastan Sahib guardian of his second son Uthman Sahib who was a minor and he directed how the property should be managed. It cannot be said that by Ex. XIII he devised the properties to his son Uthman Sahib, for he had no power of disposition over the properties as he had already settled the properties upon him under Ex. B. Exhibits C and XIII are almost similar in their terms as regards the main portions and the contention that Ex. C is a Will bequeathing property to the plaintiffs is very much weakened by the recitals in Ex. XIII, by which Khader Sahib could not have devised the properties covered by Ex. B to his son Uthman.

It is urged on behalf of the appellants that the grandfather consented to the disposition under Ex. C and, therefore, he is bound by such consent. Granting for argument's sake that Ex. C is a Will under which the plaintiffs took the property, let us see whether there is any evidence to support the contention that Khader Sahib consented to the disposition after the death of Muhammad Ganni.

The parties are Sunni Muhammadans. Under the Sunni Law a testamentary disposition by a Musalman is invalid in so far as it purports to dispose of more than one-third of the testator's estate or to benefit any of his heirs unless the heirs whose rights are affected by such disposition consent to it after his death expressly or impliedly or by passive acquiescence—Tyabji's Muhammadan Law, page 526. Consent during life is not enough under the Sunni Law. *Vide Nusrut Ali* v. *Zeinunnissa* (5), in *Khajooroonissa* v. *Rowshanjehan* (6), their Lordships of the Privy Council observed at page 196. The policy of Muhammadan Law appears to be to prevent a testator from interfering by Will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Muhammadan Law, whereby its policy is defeated, have been complied with. Such being the principle of Muhammadan Law, it is necessary to see whether the first defendant did consent to the disposition after the death of Muhammad Ganni. Muhammad Ganni, who returned from Natal in 1910, died in April 1911. Khader Sahib acted as guardian of the minors from the time of the death of Muhammad Ganni to the middle of 1914 when disputes seem to have arisen between the first plaintiff and his maternal uncle on the one hand and Khader Sahib on the other. The appellants strongly rely on the fact that Khader did not expressly claim a share in Mohammad Ganni's property and that he did not in any way set up a title to any portion of such property in antagonism to the plaintiffs. Khader was a very old man and did not probably intend to claim a share in his son's property till disputes actually arose. He gave almost all his property to his two sons in 1908 under Ex. B and perhaps he did not expect to survive his son Muhammad Ganni. It is not likely, therefore, that he thought of succeeding to his son Ganni and wished to claim any interest in his property after his death. The plaintiffs were minors, and Khader Sahib had probably no object or at least no occasion to claim a share in his son's estate. It was only after disputes arose that he thought of claiming a share in the son's estate. The plaintiffs are, no doubt, entitled to rely on the absence of any expression of any intention on the part of Khader to claim a share before 1919; but there are a few circumstances from which it can be inferred that the parties were alive to the fact that Khader Sahib as well as the fifth defendant were entitled to a share in the estate of Muhammad Ganni. Exhibit XXIII is a sale-deed in favour of the third defendant in which Khader Sahib, Uthuman Sahib, Amir Bi, and the plaintiffs joined. The plaintiffs were represented by their grandfather Khader Sahib. The fact that Amir Bi was made to join in the document is a circumstance going to show that the parties to the document were alive to the fact that Amir Bi had a share in Muhammad Ganni's property. Amir Bi did not receive any bequest under Ex. C. Her right to the property could have been only independently of Ex. C. If that was so, can it reasonably be contended that Khader Sahib was not also aware that he had a share in Muhammad Ganni's property? Exhibit XVIII is a lease deed

(5) 15 W. R. 146.
(6) 2 C. 184; 3 I. A. 291; 26 W. R. 36 (P. C.).

executed by one Swaminatha Pillai to the first and the fifth defendants and to the first defendant as guardian of the second defendant. In this there is an indication that the fifth defendant was considered entitled to an interest in Muhammad Ganni's property. Exhibit XXV is a hypothecation bond by the third defendant in favour of the first, second and fifth defendants and plaintiffs represented by their grandfather. These documents go to show that the parties were alive to the fact that the fifth defendant also had a share in Muhammad Ganni's property. * * * * It is strongly urged that Khader Sahib acted as guardian of the plaintiffs from 1911 to 1914 and that he got the plaintiff's suit O. S. No. 8 of 1916 dismissed on the ground that he was the guardian of the second plaintiff who was then a minor and it is not open to him now to say that he did not consent to the dispositions under Ex. C. The first defendant pleaded that on the plaintiff's own case, the suit should be dismissed as the first plaintiff could not sue as second plaintiff's guardian without removing the testamentary guardian. The Sub-Judge dismissed the suit on this ground, *vide* Ex. E. First defendant in his evidence went the length of denying any knowledge of the Will, *vide* Ex. N-1. A technical plea based on the averments in the plaint cannot be construed as an expression of consent to the dispositions under the Will.

Disputes arose between the first defendant and the plaintiffs in the middle of 1914. There were criminal proceedings and also civil proceedings. As soon as disputes arose, the first defendant transferred his right in A, B and C schedule properties to his second son Uthman Sahib by Ex. XXII, and by Ex. XXII-A he assigned his right in the mortgage bond for Rs. 2,000 executed by the third defendant for the balance of the purchase money due in receipt of the sale evidenced by Ex. XXIII. By an application made in 1914, the first defendant amended his written statement in O. S. No. 106 of 1912 of the Kumbakonam Subordinate Judge's Court, Ex. C, by setting up a claim to a share in Muhammad Ganni's property. From the evidence it is clear that, after disputes arose, Khader Sahib did all he could for the purpose of claiming a share in Muhammad Ganni's property. There was no opportunity for Khader Sahib before 1914 to express his intention as regards claiming a share in Muhammad Ganni's property. If an occasion had arisen and if he had omitted or neglected to claim a share it might be contended with some show of reason that he acquiesced in the disposition of the property under Ex. C. On the other hand, the moment disputes arose, Khader Sahib not merely claimed a share in Muhammad Ganni's properties but also made it impossible for anyone to doubt his intention by transferring his interest in them to the second defendant by Ex. XXII. In this connection it is urged by the respondents that the B schedule properties were acquired after the date of Exs. C and XIII and granting that Khader did consent to the disposition of the properties under Ex. C, it could not be said that he consented to relinquishing his rights in properties which were acquired after the date of Ex. C. The answer to that is that by Ex. C were devised all the properties of Muhammad Ganni to his sons and, therefore, Khader must be taken to have consented not only in respect of properties then in existence but also in respect of properties to be acquired thereafter; but the consent before the execution or at the time of the execution of Ex. C is immaterial. Only the consent subsequent to the death of Muhammad Ganni is of importance. In that view this argument by the respondents is not of much weight.

The next contention is that Exs. B, C and XIII evidenced a family arrangement by which Khader Sahib settled his properties upon his two sons and consented to or acquiesced in Muhammad Ganni disposing of his property in favour of his sons, and such an arrangement could not be departed from by any of the parties to it. Reliance is placed upon *Kanhai Lal* v. *Brij Lal* (7) in support of this contention. If there was a dispute and if all the members of the family came to an arrangement no doubt it would not be open to any of the parties to go behind such an arrangement, but where the father and the son amicably arranged that the father should settle all the properties upon the sons reserving to himself little or nothing, it cannot be said that the essentials of a family arrangement

(7) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom.L. R. 1048; 45 I. A. 118 (P. C.).

are present which would preclude any of them from claiming by inheritance to one of the parties to such an arrangement. At the time of the execution of the documents it was not perhaps in the minds of either the first defendant or of Muhammad Ganni that the first defendant would survive Muhammad Ganni. No doubt under Ex. C the first defendant is appointed guardian of the minor sons in case Khader Sahib survived Muhammad Ganni, but that alone is not a sufficient circumstance to show that Khader Sahib relinquished his right to succeed to Muhammad Ganni's estate in case Muhammad Ganni should predecease him. Under the Muhammadan Law a father is an heir, and granting that Khader Sahib could relinquish his rights of inheritance to Muhammad Ganni's property it would require very strong evidence to make out such an intention on the part of Khader Sahib. Khader Sahib gave away all his properties to his sons. He was not anxious to reserve anything to himself. He was an old man of eighty. At that time there were no disputes as regards either shares or particular items or as to anything about which the parties could disagree. In order to make out a valid family settlement by which a person could relinquish his right to property not only *in præsenti* but also *in futuro*, there must be in the first place consideration for such relinquishment, in the second place there must be words which would convey such an expression of intention on the part of any of the parties to the document. So long as the arrangement is merely one-sided arrangement or where there is no dispute to be settled, a mere settlement of property by one upon another cannot be considered to be a family arrangement under which it can be said that certain rights which would accrue in future have been given up. I do not consider that the arrangement evidenced by the three documents can be construed as a family arrangement which would prevent the first defendant from claiming a share in his son Muhammad Ganni's property. I hold that the Subordinate Judge is right in giving the plaintiffs five-sixths of the properties mentioned in A and B schedules to the plaint.

The next point urged by the appellants is that the C schedule properties were purchased by the first defendant out of the income of Muhammad Ganni's property and that, therefore, they are entitled to them. They contend that in any event they are entitled to half the property. The C schedule properties were purchased under Exs. II-U and II-W on the 25th November 1908 and the 22nd December 1908 for Rs. 144 and Rs. 100 respectively. The appellants rely upon a statement of Khader Sahib contained in Ex. N-1, deposition in Original Suit No. 8 of 1915 on the Subordinate Judge's Court, Kumbakonam, "I had no separate property after the date of the settlement deed." Upon this stray statement, the appellants want to build a case that C schedule properties were purchased out of the income of the property settled on Muhammad Ganni. Muhammad Ganni was absent at Natal from the middle of 1908, returned to India towards the close of 1910 and died in 1911. There is no evidence that the income of Muhammad Ganni's property was utilised for the purpose of buying C schedule properties. The first defendant made a statement that he had no property after the date of the settlement deed and added that he had some money paid to him by one of the creditors. Reliance is placed also by the appellants on a statement of the 2nd defendant in Ex. J, deposition in Original Suit No. 8 of 1915, to the effect that he did not know if the C schedule properties were purchased out of the income of the property settled on Muhammad Ganni. The sale-deed being in the name of the first defendant, the onus is on the plaintiffs to show that they were purchased with the income of the property belonging to their father. After the return of Muhammad Ganni, no claim seems to have been made in respect of such properties and such properties were not divided between Muhammad Ganni and Uthman Sahib. In fact no arrangement was made in respect of such properties. If the plaintiffs had not quarrelled with him, he might have given half of them to the plaintiffs, but inasmuch as they had quarrelled with him, he transferred his right in them to his second son. There is no evidence on the side of the appellants to show that the C schedule properties were acquired with the income of Muhammad Ganni's property. The claim of the plaintiffs to a half share therein would depend upon the proof that they were acquired partly with the income of the properties settled upon Muhammad Ganni and Uthman Sahib. There is no

such evidence forthcoming and the first defendant stated in Ex. N-1 that he purchased them with some money of his own. The consideration for the two documents being only Rs. 200 and odd, it was very likely that the first defendant had some funds of his own with which he purchased these properties. Any how the onus is on the plaintiffs and they have not discharged it. I, therefore, find this point against the appellants.

The third point is as regards items Nos. 114 to 135 of the A schedule. These items were sold under Ex. XXIII for Rs. 7,000 on the 29th April 1912 to the third defendant by the first defendant, the second defendant, the fifth defendant and the plaintiffs represented by their grandfather the first defendant. The appellants' contention is that there was no necessity to sell these items, that the plaintiffs were minors at the time and that, unless the third defendant could establish the necessity for sale, the sale is voidable as against them. This argument overlooks the fact that by Ex. XXIV an agreement dated the 25th March 1911, the first defendant and Muhammad Ganni agreed to convey these properties to the third defendant for Rs 7,000, and that, after the death of Muhammad Ganni, the first defendant and others carried out the agreement. I have already found that Muhammad Ganni was the owner of the properties settled under Ex. B and that the plaintiffs had no vested right in the lifetime of their father. Under the Muhammadan Law the father is entitled to deal with the properties as he likes and the sons cannot question any alienation made by him. This alienation was for the discharge of debts and the plaintiffs cannot contest an alienation which was arranged to be made by their father and carried out by their guardian after his death. Even if it be granted that the plaintiffs had a right to the property independent of the father, the sale by their guardian for the purpose of discharging a debt incurred in the lifetime of their father is a prudent act and is one which is binding upon the plaintiffs. It is unnecessary to discuss this point any further. I find this point against the appellants.

The fourth point urged is as regards moveables, which are mentioned in the D schedule to the plaint. The present contention of the appellants is that there was a division of the moveables after the death of their father and that the moveables remained in their possession in the front portion of the house which fell to their share and that they were taken away by a Commissioner appointed in Original Suit No. 8 of 1915. That suit was filed by the plaintiffs and their mother against Khader Sahib for possession of the moveables. The learned Subordinate Judge, who heard the case, dismissed it on the ground that the first defendant was the testamentary guardian of the second plaintiff and, therefore, it was competent for the first plaintiff to sue as guardian of the second plaintiff. In the course of the suit, a Commissioner was appointed for taking an inventory of the moveables in the portion occupied by the plaintiffs. Exhibits A (1) to A (7) are the lists prepared by the Commissioner. The appellant's contention is that they are entitled to them inasmuch as they were found in the portion of the house occupied by them. The front portion of the family house was given to Muhammad Ganni. Till at least May 1914 the parties seemed to have lived amicably. About the end of May 1914 the parties seemed to have quarrelled, and the first defendant filed a criminal complaint against the first plaintiff and his maternal uncle in June 1914 accusing them of theft of jewels. If the plaintiffs could substantiate their story that there was a division of all the moveables before May 1914, no doubt they would be able to make out a case, but there is no reliable evidence that the first defendant divided all his moveables between the plaintiffs and the second defendant. The appellants are not consistent in the case they put up. They contended in the lower Court that a great many of the moveables were brought from Natal by their father when he returned in 1910 and that it was their exclusive property. In this Court they want to make out that they got them in a division with their grandfather. Some of the moveables are four *Dekshas* said to be worth Rs. 1,000. The Subordinate Judge has rightly disbelieved their story that they were brought from Natal. They are, therefore, obliged to fall back upon the other contention that they got it in a division with their grandfather. The evidence as regards division is as meagre as it is unreliable. Great reliance is placed on a statement in Ex. G (para. 3) "I effected a division of all the moveable properties as well as the grain in the house." The original of this is in *Tamil* and it does not

support the contention of the appellants. What the document says is that (* * *) were divided. The translation "all the moveables" is not correct. A reading of Ex. G clearly shows that only the necessary articles for separate living were given, and that is made clear by a statement of the second defendant in Ex. J that only the necessary moveables were then divided by the mediators and given to each party. It is admitted that these moveables were taken out from the front portion of the house which was given to Muhammad Ganni under Ex. B. The mere fact that the moveables were found in that portion of the house would not necessarily make them the property of the plaintiffs. If the plaintiffs had been living for a considerable time apart from their grandfather and if there was some evidence of a division at the time when they began to live separately a strong presumption will arise in favour of the contention that the property found in their possession is theirs, but the evidence on the side of the plaintiffs is unsatisfactory. On the other hand, the evidence on the side of the defendants is that the first defendant and the plaintiffs began to live separately only about May 1914 and that only a few necessary things were given to the plaintiffs and their mother for the purpose of enabling them to live separately. The other moveables remained in the possession of the first defendant and the plaintiffs cannot claim them as theirs. Mr. Krishnaswami Ayyar, as a last resort, contended that the plaintiffs were at least entitled to half of them. It is difficult to see on what basis he could claim half of the moveables. If they were the joint property of the plaintiffs and the first defendant, no doubt, they would be entitled to half, but if they were the property of the first defendant, the plaintiffs would not be entitled to them, as the appellants are not heirs to their grandfather, under the Muhammadan Law, for the second defendant excludes them. Some of the properties were handed over to the plaintiffs with the consent of the first defendant so far back as 1914. Exhibit A (7) is a list of such properties and Khader Sahib, the old man, had no reason for making a false statement in order to gain a few moveables. The whole of his conduct seems to be that of a loving grandfather who tried to do his best for his sons as well as his grandsons, but the first plaintiff, evidently under the evil advice of his maternal uncle, quarrelled with the old man, which made him complain of theft against his own grandson. That the feeling became bitter after that is clear from the various proceedings, but even after such conduct on the part of the plaintiffs, the first defendant would have given to the plaintiffs half of the property that remained with him. In the light of the evidence in the case it is impossible to hold that the plaintiffs are entitled to the moveables in the D schedule or to a share in them. I find this point against the appellants.

The fifth point is as regards the mortgage debt set out in the G schedule. When the third defendant purchased under Ex. XXIII, the property belonging to the family for Rs. 7,000 he paid Rs. 5,000 and for the balance he executed a hypothecation bond in favour of the vendors. Exhibit XXV is a hypothecation bond. It was in favour of the first, second and the fifth defendants as well as of the plaintiffs represented by their guardian the first defendant. The plaintiffs have been given five-sixths' share of the amount. They claim half the amount, on the ground that Khader Sahib was not entitled to his one-sixth share of the mortgage debt. I have already held that the first defendant had no idea of relinquishing his right to share in his sons' estate and it is unnecessary to go over the same ground again. The document is in favour of the 1st defendant as well as in favour of defendants Nos. 2, 5 and the plaintiffs. That being so, the plaintiffs are not entitled to claim half the amount. I find this point also against the appellants.

In the result the appeal fails and is dismissed with costs. One set to second respondent and another to the other respondents proportionate to the value of their interest in the appeal.

The memorandum of the objections is as regards the share of the mother which has been decreed in the plaintiff's favour. The second defendant-respondent contends that the lower Court was wrong in granting a decree for five-sixths of the property in favour of the plaintiffs. The fifth defendant, their mother, is a party to the suit. The jurisdiction of the Court is not taken away in a case like this to grant the plaintiffs a decree in respect of their mother's share as well. If the mother was dead or if the mother was not a party, it might be said that the Court should not have given a decree in respect of her share to the

plaintiffs, but when she was a party to the suit, though she remained *ex parte*; the Court was not only justified but as well advised in giving a decree to the plaintiffs, for thereby the Court saved another suit by her for her share. There is no substance in this contention and I find this point against the second defendant.

The next point is as regards the fourth item, which is dealt with in para. 54 (IV) of the judgment of the lower Appellate Court. The second defendant urges that the plaintiffs should be made liable for their share of the debt. Defendants Nos. 1 and 2 executed a mortgage Ex. XXXIII in favour of Vythilinga Odayar on the 29th October 1912. There is no evidence to connect Ex. XXXIII with anything that was done to benefit the plaintiffs. There is no evidence that that debt was incurred on behalf of the plaintiffs. The first defendant was a guardian of the plaintiffs and he did not choose to execute the deed as guardian of the plaintiffs. There is no reliable evidence that any debt was borrowed under Ex. XXXIII for any purpose which could bind the plaintiffs. The lower Court has rightly disallowed this claim of the second defendant. It is also significant that, before this suit was filed, no claim was put forward in respect of this debt against the estate of Muhammad Ganni.

The next item is No. 7 which is dealt with in para. 54 (VII) of the lower Court's judgment. The second defendant's contention, if upheld, would only mean that the C schedule properties were purchased out of loans borrowed on behalf of the plaintiffs as well. I have already found that the C schedule properties belonged to the first defendant and any debt incurred for the purchase of those properties could not possibly bind the plaintiffs. There is no evidence that this debt could not have been paid out of the income of Muhammad Ganni's estate. The first defendant did not maintain any account as regards the income of the estate of Muhammad Ganni and there is no proof that this debt was incurred for any purpose which could bind the plaintiffs or that it could not have been paid out of the income of Muhammad Ganni's estate. I find this point against the second defendant.

In the result the memorandum of objections is dismissed with costs.

Spencer, J.—I agree on all points.

V. N. V.
Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2453 OF 1921.

March 17, 1924.

Present:—Mr. Justice Mukerji.

Srimati TARITBARANI DASI—DEFENDANT No. 1—APPELLANT

versus

BASUMATI DEVI—AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decision in previous suit not based on finding in dispute—Unnecessary finding—Defendant merely* pro forma *party, effect of.*

In order that the decision on a particular issue should operate as *res judicata* in a subsequent suit between the same parties in which that issue is again raised, it is not necessary that the decision of the issue should have been the basis of the decree in the previous suit. It is enough that the issue was finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally) for determination, that is to say, the decision of the issue should have been necessary for the determination of the suit, though it may not have been ultimately made the basis of the decree. If the determination of the issue was inconsistent with the decree it cannot be said that it was necessary for the determination of the suit and a finding on the issue will, in such a case, be treated as having been unnecessary and will not operate as *res judicata*. If, however, there was a real contest between the parties in the previous suit it is immaterial that the defendant was described as a *pro forma* defendant and that the contest was opened by him and not by the plaintiff.

(Case-law discussed.)

Appeal against a decree of the Subordinate Judge, First Court, Hooghly, dated the 9th of August 1921, affirming that of the Munsif, First Court, Hooghly, dated the 24th June, 1920.

Mr. *H. D. Bose* and Babu *Nani Lal De*, for the Appellant.

Mr. *U. N. Sen Gupta*, Babus *Probodh Kumar Das*, *Nalin Chandra Pal* and *Hemendra Nath Chatterjee*, for the Respondents.

JUDGMENT.—The only question which has been urged on behalf of the appellant in this appeal is whether the decision of an earlier suit operated as *res judicata* in respect of some of the issues which arose in the subsequent suit, out of which the present appeal arises.

The plaintiff Basumati Debi instituted the present suit against Taritbarani Debi the defendant No. 1 and her husband the defendant No. 2 seeking to eject them from a plot of land and for a decree for mesne profits, and in the alternative for a decree for rent in case it was found that she was not entitled to eject them.

Taritbarani had instituted a suit for a declaration of her right of way as a prescriptive right or an easement of necessity against one Chedi Dosadh a tenant under Basumati and also two persons as *pro forma* defendants of whom Basumati was one being the defendant No. 3 in that suit. In that suit no relief was claimed against her. She, however, contested the suit and amongst other things, contended that Taritbarani was her tenant and so could not claim a prescriptive right against her. The Court of first instance held that Taritbarani's claim was barred by limitation and she had not acquired any right of easement and in that view dismissed her suit but held further that Basumati failed to prove that Taritbarani was her tenant. Taritbarani appealed against the decree and Basumati preferred a cross-appeal against the finding declaring her liability to prove that Taritbarani was her tenant. The Appellate Court allowed the appeal of Taritbarani and remanded the suit to the Court of first instance for determination of certain questions which in the opinion of the Appellate Court arose in the case. Basumati preferred a second appeal to this Court and this Court set aside the order of remand and remitted the appeal to the lower Appellate Court to be dealt with in accordance with certain observations made in its judgment. This Court in setting aside the order of remand expressly left untouched the finding that Basumati had failed to prove that Taritbarani was her tenant.

The present contention is that the findings on the issues in that suit operated as *res judicata* in the present suit. It is necessary to set forth the relevant issues in the previous suits:

In the previous suit two of the issues were as follows:—

"No. 4. Has the plaintiff right to sue?

No. 5. Has the plaintiff a right of easement of way or of necessity over the disputed path?"

The Courts below have held, though upon different grounds, that the decision of the issues in the previous suit did not operate as *res judicata* in the subsequent suit.

First of all I propose to examine the grounds upon which the learned Subordinate Judge held that the previous decision will not operate as *res judicata*. The learned Subordinate Judge observes:—"The decree passed in the previous suit was not based on this finding but was passed in spite of it. It cannot be said that this question was heard and finally determined. The decision on the question of relationship of landlord and tenant between the parties in the previous suit was not final [see *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1).] The decree in the previous suit was in favour of the present plaintiff. She had no right of appeal. The fact that she preferred a cross-appeal cannot affect the question, as it was unnecessary for her to do so, inasmuch as this finding could not subsequently be held to be conclusive against her because the decree of the Court below was not based upon any finding but in spite of it [see the observation of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (2)"]. Now with reference to the observation of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (2), the observations should not be taken divested of the facts that appeared in that case. Read in the light of the facts the observations only mean, where after arriving at a conclusive finding on an issue (based, in that case, on the ground that the said finding had been arrived at in a previous litigation and was, therefore, *res judicata*) the Court proceeds to come to a different finding on the same issue, upon the evidence in the case, and bases its decision not on the latter, but on the former finding the latter useless finding cannot operate as *res judicata* in subsequent proceedings. There are certain passages in the judgment which stripped of the facts of the case may have been understood as supporting the proposition so broadly laid down in some cases that if a plaintiff's suit is ultimately dismissed, no finding in his favour can ever be *res judicata* under any circumstances. This proposition, in my opinion, goes far beyond the scope of the decision. If the finding was not necessary

(1) 18 C. 647; 9 Ind. Dec. (N. S.) 432.

(2) 11 C. 301 at p. 306; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).

at all, or was not intended to be final, or if, on appeal, the Appellate Court does not think it necessary to give its decision on it but finds it unnecessary to act on it for the purpose of its decision the finding will not, of course, operate as *res judicata*. I am unable to accept as correct the decision in the case of *Thakur Magundeo* v. *Thakur Mahadēo Singh* (1) and the other decisions of this Court in which a contrary view has been taken. These decisions, in my opinion, cannot be reconciled with the decision of a Full Bench of this Court in *Niamut Khan* v. *Phadu Buldia* (3). In my opinion the decision of this Court in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Dibee* (4) was wrong in so far as it professed to hold that the said decision of the Full Bench in *Niamut Khan* v. *Phadu Buldia* (3) was impliedly overruled by the decision of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer* (2). I am aware of the view taken by this Court in the case of *Peary Mohan Mukerjee* v. *Ambica Churn Bandopadhya* (5), where Banerji, J., observed that it may be taken as settled on the authority of the cases of *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Dibee* (4) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1) that the authority of the Full Bench decision in *Niamut Khan* v. *Phadu Buldia* (3) has in effect been overruled by the decision of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (2). If my decision in the present case had to rest upon the view that I take of these authorities I would have felt bound to send the case to be dealt with by a Regular Division Bench; but I do not find it necessary to do so for reasons which will appear hereafter. It will be seen that there is no clause attaching to s. 11 of the C. P. C. laying down that the decision of the issue should have been the basis of the decree. It is enough that the issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally), for determination and that only means that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. Of course if the determination of the issue is inconsistent with the decree, it cannot be said that it was necessary for the determination of the suit, and such a finding will be treated as unnecessary and will not operate as *res judicata*. In the case of *Krishna Behari Roy* v. *Bunwari Lall Roy* (6), their Lordships of the Judicial Committee observed that the general law of *res judicata* had probably never been better laid down than in the case of *Gregory* v. *Molesworth* (7) in which Lord Hardwicke held "that where a question was necessarily decided in effect, though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form." This law was followed in a long course of decisions, the greater part of which will be found noticed in the notes of Mr. Smith in the case of the *Duchess of Kingston*, (8). This general law was taken as supplementing the law contained in s. 2 of Act VIII of 1859 which ran as follows:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." [see *Soorjomonee Dayee* v. *Suddanund Mohapatter* (9) and *Krishna Behari Roy* v. *Bunwari Lall Roy* (6)]. Section 13 of Act X of 1877 ran in these terms:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title." This was construed by their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (2) as not having altered the law as contained in the somewhat imperfect Statute of 1859 supplemented by the general law. The language of this part of the section of Act XIV of 1882 and in Act V of 1908 needs no examination as substantially the provisions have remained unaltered. The general principles of law were invoked by the Judicial Committee

(3) 6 C. 319; 7 C. L. R. 227 (F. B).
(4) 13 C. 17; 6 Ind. Dec. (N. S.) 508.
(5) 24 C. 900 at p. 905; 12 Ind. Dec. (N. S.) 1269.

(6) 1 C. 144; 25 W. R. 1; 2 I. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93 (P. C.).
(7) (1747) 3 Atkyns 626; 26 E. R. 1160.
(8) (1776) 2 Sm. L. C. (10th Ed.) 713, (6th Ed.) 679 & (11th Ed.) 731; 31 H. L. J. 655; 20 Howell St. Tr. 537.
(9) 12 B. L. R. 304; 20 W. R. 377; I. A. Sup. Vol. 212; 3 Sar. P. C. J. 285 (P. C.).

in the case of *Ram Kirpal* v. *Rup Kuari* (10), where s. 13 of Act X of 1877 was not applicable and also in the case of *George Henry Hook* v. *Administrator-General of Bengal* (11) in a case which did not come within s. 11 of Act V of 1908. In the latter case it was held that it is an error to regard all questions of *res judicata* as being governed by the s. 11 of the C. P. C. and that section only prevents the re-trial of issues that have been directly and substantially in issue in a former suit between the same parties. Where the ground of the plea of *res judicata* comes within the scope of that section it will not be permissible to travel beyond the enactment but the Court will have to confine itself to the provisions of the Statute. As has been laid down by the Judicial Committee in the case of *Gokul Mandar* v. *Pudmanund Singh* (12): "In this respect (dealing with the aspect of the question arising under s. 13 of Act XIV of 1882), the enactment goes beyond s. 13 of the previous Act X of 1877, and also, as appears to their Lordships, beyond the law laid down by the Judges in the *Duchess of Kingston* (8). They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." Turning then to the character of the issues decided in the previous suit, and testing them in the light of the provisions of s. 11 of the C. P. C. I am clearly of opinion following the decision of Banerjee, J., in the case of *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (5) cited on behalf of the appellant that the determination of the issues arising in the former suit was necessary for the purpose of that suit and merely because the decision did not ultimately happen to turn on it, that would not be sufficient to oust the operation of the rule. As to the case of *Shib Charan Lal* v. *Raghu Nath* (13) to which I was referred on behalf of the respondent I may say that for the reasons given by Banerji, J., in the decision just above referred to, I cannot accept that decision as laying down good law.

Next I propose to deal with one of the several objections, which independently of and in addition to those noted by the learned Subordinate Judge were taken on behalf of the respondent. It was contended that the very fact that Taritbarani was merely a *pro forma* defendant in the previous suit stood in the way of the operation of the doctrine. In that behalf reliance was placed upon the decision of a Full Bench of this Court in the case of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (14). That case, however, may be readily distinguished from the present case on the ground that here there was a real contest between Basumati and Taritbarani which was taken up to the High Court. Taritbarani had no business to come in, yet she did come in and contest the suit; though she need not have appealed yet she did file a cross-appeal. The matter is one of substance and not of form. It matters not that the defendant is described as *pro forma* defendant if there was a real centest, and that notwithstanding that the contest was opened by the defendant and not by the plaintiff. In the case of *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (15), Mookerji, J., observed as follows: "As regards the second reason, the vital point is not, how the Ghosal defendant was described, but what part he took in the litigation. He not only helped the tenant defendant with funds, but himself actively contested the claim of the then plaintiff, as is indicated by his appeal to the High Court, though he was described merely as a *pro forma* defendant. In such circumstances, he could not reasonably escape the effect of an adverse decision which he unsuccessfully resisted." In the case of *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (16), a Full Bench of this Court dealing with the case of defendant who had intervened observed as follows: "On the other hand, it is argued by the appellant, that the claim in the former suit was for rent against the tenant; that the only

(10) 11 I. A. 37 at p. 41; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C).

(11) 60 Ind. Cas. 631; 48 C. 499 at pp. 507, 508; 19 A. L. J. 365; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 I. A. 187 (P. C.).

(12) 29 C. 707 at p. 715; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

(13) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.

(14) 12 C. 580; 6 Ind. Dec. (N. S.) 394 (F. B.).

(15) 27 Ind. Cas. 954; 21 C. L. J. 157; 19 C. W. N. 1280.

(16) 3 C. 145; 1 C. L. R. 35; 2 Ind. Jur. 349; 1 Ind. Dec. (N. S.) 682 (F. B.).

issue in that case was whether the plaintiff was entitled to the rent, and the question of title raised by the intervening defendant was only incidental to the main issue. But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the plaintiff, he, and those whom he represented must take the consequences of their intervention." The mere fact that Taritbarani (Basumati?) was a *pro forma* defendant in the previous suit will not affect the question, if otherwise the principle may operate.

The next question is based upon the ground on which the learned Munsif held that the previous decision did not operate as *res judicata*; and that ground has also been relied upon by the respondent. In order to consider that question it is necessary to analyse the provisions of s. 11 of the C. P. C. Now, under that section, apart from the identity of title, the competency of the Court, the finality of the decision and the identity of the parties, matters which do not arise for consideration in the present case, the matter directly and substantially in issue in the subsequent suit or issue, must be the same matter which was directly and substantially in issue either actually (as in Expl. III) or constructively (as in Expl. IV) in the former suit. The appellant's contention is that Expl. III does apply to the present case. We have, therefore, to see whether the matters in issue in the subsequent suit were actually and directly and substantially in issue in the previous suit or whether they were merely collaterally or incidentally in issue therein.

There can be no question that in the subsequent suit the issues relevant to this enquiry are: 1st: Whether Basumati had title to the disputed land (Part of Issue No. 4 as framed). 2nd: Whether Taritbarani was a *benamdar* for her husband? (Part of Issue No. 3). 3rd: Is the plaintiff entitled to eject or in the alternative to claim any rent from Taritbarani? (Issue No. 9). In the earlier suit Issues Nos. 4 and 5 were as follows: 1st: Has the plaintiff the right to sue, and 2nd: Has the plaintiff a right of easement of way or necessity over the disputed path? These two issues were, respectively, No. 4 and No. 5 in the said suit. In deciding Issues Nos. 4 and 5 the learned Munsif decided two questions, 1st: Whether Taritbarani was a *benamdar*, and 2nd: Whether she was a tenant under Basumati. These two questions did not, in my opinion, directly and substantially arise in the previous suit but collaterally or incidentally for the determination of Issues Nos. 4 and 5 referred to above. In the case of *Srihari Banerjee* v. *Khitish Chandra Rai Bahadoor* (17), a suit was brought by *A* against *B* and others for rent, the matter directly and substantially in issue was as to what the share was for which *A* was entitled to rent. The plaintiff obtained a decree for the whole rent. In a subsequent suit by *B* and others against *A* for declaration of title to land purchased by them in execution of their mortgage-decree, the defence was that the former decree for rent operated as *res judicata*. It was held that as the issue in the rent suit was for what share the plaintiff was entitled to rent and not to what share of the property was the plaintiff entitled as owner, the question of title could be said to have been in issue in that suit only incidentally and not directly, and it could not be said to have been entertained in the form in which it was raised in the subsequent suit. The question of title of Basumati or of Taritbarani did not arise in the previous suit in the shape in which it has arisen in the present suit. The pleadings of the parties in the earlier suit as noticed in the judgments therein have got to be examined in order to see in what shape the different questions arose. See *Indubala Debi* v. *Atul Chandra Ghosh* (18). It would appear from an examination of the pleadings that in the earlier suit it would have been enough to hold that Taritbarani held under Basumati in order to defeat the claim of Taritbarani but in the present suit it would be necessary to adjudicate on the titles of the two parties in order to find whether the interests of the respective parties were such that Basumati could eject Taritbarani and recover *khas* possession, or in case of the titles being such as to establish a subsisting relationship as between a landlord and her tenant one could recover rent from the other; in the previous suit the question as to whether Taritbarani was a *benamdar* was gone into in order to determine whether a cause of action lay in her for the pur-

(17) 24 C. 569; 1 C. W. N. 509; 12 Ind. Dec (N. S.) 1048.

(18) 57 Ind. Cas. 344; 31 C. L. J. 507.

pose of instituting a suit for enforcing an easement, in the present suit that question was necessary to be determined in order to see if it would enable her to resist an action in ejectment or oppose a decree for rent. These purposes make the question for investigation essentially distinct in character and if they arose in the previous suit they arose not directly and substantially but only incidentally or collaterally.

The view I take is in accord with that taken by this Court in the cases of *Gober Sheikh* v. *Alipuddin Sheikh* (19) and *Indubala Debi* v. *Atul Chandra Ghosh* (18).

In my judgment then the decisions of the questions are not in bar not by reason of fact that Taritbarani (Basumati?) was a *pro forma* defendant in the previous suit, nor because the decision of the earlier suit ultimately turned upon a different question, nor because the questions were not heard and finally determined, nor because the determination of those questions was unnecessary, but because they arose not directly and substantially but only incidentally or collaterally.

In this view of the matter the appellant's contention fails and this appeal must be, and the same is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

(19) 51 Ind. Cas. 356; 30 C. L. J. 13.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1 OF 1923.
September 16, 1924.

Present:—Mr. Justice Devadoss.

DHANAMATHI AMMAL AND ANOTHER—DEFENDANTS Nos. 7 AND 8—PETITIONERS

versus

JAYAKEERTHI NAIRAN AND OTHERS—DEFENDANTS Nos. 4, 6 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 3—RESPONDENTS.

Appeal, second—Finding of fact—Mistakes of law—Burden of proof, erroneous, view of.

A finding of fact in arriving at which a lower Court has committed vital mistakes on simple questions of law and has ignored the question of the burden of proof is not binding on the High Court in second appeal.

Second appeal against a decree of the Court of the Subordinate Judge, Vellore, in A. S. No. 51 of 1922, preferred against that of the Court of the District Munsif, Tiruvannamalai, in O. S. No 915 of 1916.

Mr. *N. Kunjitapadam*, for the Appellants.

Messrs. *K. Bhashyam Iyenger* and *V. C. Veeraraghavachariar*, for the Respondents.

JUDGMENT.—The point raised in this second appeal is that the Subordinate Judge has misdirected himself as regards the points to be determined in the appeal. The plaintiff sues for partition of the family properties. The first defendant is his brother, and the second defendant is another brother the 7th defendant is the father's sister of the plaintiff and defendants Nos. 1 and 2, the 8th defendant is her daughter. It is admitted that the 7th defendant's husband was possessed of some property which was inherited by her after his death. Some properties were acquired with the funds or with the income of the properties of defendants Nos. 7 and 8. The plaintiff claimed a share of all the properties on the ground that they were all family properties. The first defendant pleaded that the properties of defendants Nos. 7 and 8 were made over to him under some arrangements. The Subordinate Judge in discussing the evidence as regards that has fallen into a very grave error in thinking that the plaintiff and defendants Nos. 1 and 2 are the reversioners of the 7th defendant's husband. I think the learned Judge really overlooked the relationship in thinking that defendants Nos. 1 and 2 are reversioners of the 7th defendant's husband, who was only their paternal aunt's husband and related to them in no other way. This I think has evidently influenced the Judge a good deal in weighing the evidence in the case. In one portion of his judgment he distinctly says that items Nos. 4, 5, 19, 21 and 22 of the B. schedule properties originally belonged to defendants Nos. 7 and 8. There is no evidence that there was any gift of these properties to the first defendant. In another portion of the judgment he says "there need not be any writing for a surrender to the nearest reversioner by a Hindu widow." "I, therefore, hold that the plaint B schedule properties and Exs. 16 to 19 are joint family properties." It is not possible to uphold a judgment where a vital mistake has been made as regards a very simple proposition of law; for under no circumstances can a Hindu inherit to his paternal aunt's husband who is otherwise not a relation. Further the Judge has not kept before him the distinction between the properties which belonged to the defendants Nos. 7 and 8 and

those which belonged to the plaintiff's father. Some properties were acquired on *darkhast* in the name of the defendants Nos. 7 and 8. The contention on behalf of the plaintiff is that they were got *benami* in the name of defendants Nos. 7 and 8. When a land is granted on *darkhast* it cannot be said that it is given to a man *benami* for some other individual. The onus would be heavily on the plaintiff to make out such a case. There are also other errors in the judgment.

It is unnecessary to go into them in detail. I think the judgment is very unsatisfactory and should not be allowed to stand and I must, therefore, reverse the judgment of the Subordinate Judge on the first issue.

The case was heard afterwards by some other Subordinate Judge and he felt bound by the decision of the previous Subordinate Judge on this point. Seeing that I have reversed the finding of this Subordinate Judge on the main issue, the judgment of the Second Subordinate Judge dated 5th October 1922 is reversed. The Subordinate Judge will restore the appeal to file and record finding on issues Nos. 1 and 3 and dispose of it according to law.

The finding on the second issue recorded by the District Munsif will stand.

The costs on this appeal will abide the result.

The appellants will have refund of the Court-fee.

V. N. V. *Case reversed and remanded.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 51 OF 1923.
December 16, 1924.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Kendall, A. J. C.

MATA DIN—DEFENDANT No. 4—APPELLANT
versus
MAHRAJ DIN AND OTHERS—APPELLANTS—RESPONDENTS.

Hindu Law—Joint family—Decree against father on basis of contract of indemnity—Sons' property, whether can be attached.

One *B.* made a payment to *S.* in satisfaction of a claim in which the brothers of *S.* were jointly interested along with *S.* and *S.* undertook to indemnify *B.* against any claim made by his brothers. The brothers of *S.* subsequently sued to enforce their claim against *B* and obtained a decree. *B.* having died his heirs sued *S.* for the return of the money paid to him and obtained a decree in execution of which family property in the hands of the sons of *S.* was attached. The latter brought a suit for a declaration that the property in their hands was not liable to be sold in satisfaction of the decree obtained by the heirs of *B.*:

Held, that the decree being based upon the liability of *S.* to indemnify *B.* in the event of a claim being made by the brothers of *S.* the sons were under a pious duty to satisfy the decree and, therefore, property in their hands was liable to be attached in the execution of the decree. [p. 961, col. 2.]

(Case-law referred to).

Appeal against the judgment and decree passed by the Additional District Judge at Sitapur, dated the 16th October 1922, confirming that of the Subordinate Judge, Sitapur, dated the 29th January, 1920.

Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Mr. *Gokaran Nath Misra*, for Respondents Nos. 1 to 4.

JUDGMENT.

Kendall, A. J. C.—(*May 28, 1924*).—The plaintiffs sued for a declaration that a certain share in immoveable property, which has been admitted to be joint family property, is not liable to be attached and sold in execution of a decree against Sita Ram defendant No. 6, the father of the plaintiffs. It is unnecessary at this stage to go into the facts of the case. The First Court decreed the suit and that decree was upheld in the lower Appellate Court. The chief authority relied on in the lower Courts was the well-known decision of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) in which it was held that the pious obligation of the sons to pay their father's debts does not arise in the lifetime of their father. That decision has now been reversed in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2) in which their Lorships have re-affirmed the earlier view that the father may lay the estate open to be taken in execution upon a decree against himself even during his lifetime. It has been represented on behalf of the respondents that when the suit was heard in the lower Courts, and even when the present grounds of appeal were

(1) 39 Ind. Cas. 280; 44 I. A. 126; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(2) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129. (P. C.)

framed, the view taken in *Sahu Ram Chandra* v. *Bhup Singh* (1) was authoritative, and that they, therefore, relied on it both in framing their pleadings and in presenting their case. They ask that the case be remanded in order that the pleadings may be amended and a fresh issue or issues struck in order to allow them an opportunity of showing that the debt incurred by Sita Ram was tainted with immorality. It is most unusual for the pleadings to be amended at this stage. An obvious objection to the remand is that the respondents should have presented their whole case in the First Court. If the debt really was tainted with immorality, it is very difficult to believe that this plea would not have been taken at the earliest stage. The fact is, however, that the evidence already produced, undoubtedly, shows that Sita Ram acted in a way that may have been dishonest. As no issue was framed on the point, and as the arguments of Counsel in the lower Courts have evidently not been applied to the question of whether Sita Ram's conduct really amounted to legal immorality such as would relieve his sons of meeting their pious obligations, I consider that it would not be proper to decide the appeal on the materials at present before me. If the appeal were to be decided as it stands it would have to be allowed, but in the circumstances, and as the respondents have been placed at a disadvantage by the change in law, I direct that the case be remanded to the lower Appellate Court under O. XLI, r. 23, C. P. C. for a decision on the following issue:—

Was the debt in respect of which the money-decree was obtained against Sita Ram, defendant No. 6, tainted with immorality in such a way as to relieve the plaintiffs from the pious obligation to pay it?

The parties should be allowed to produce any additional evidence that may be necessary for the determination of this issue alone, and the findings should be returned to this Court within three months. Costs will abide the result. Ten days will be allowed to file objections in this Court.

Wazir Hasan, A. J. C.—(*December 16, 1924*).—This is the appeal by Matadin defendant No. 4. The plaintiffs are sons of Sita Ram defendant No. 6. Defendants Nos. 1 to 5 obtained a simple money-decree against Sita Ram on the 4th December 1906 for a sum of Rs. 1,117-13-0. The decree-holders attached the property in suit in execution of their decree and were proceeding to sell it by public auction when the suit out of which this appeal arises was instituted. The plaintiffs claimed the relief of a declaration that the property in suit was not liable to be sold in satisfaction of the creditors' decree. The ground of the claim was that it was joint family property of the plaintiffs and defendant No. 6 The suit succeeded on the ground that the father being alive there was no obligation on the sons to re-pay his debts. When this appeal first came to be heard by this Court the basis of the decision of the Courts below had vanished by reason of the pronouncements of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangal Prasad Rai* (2). On the arguments advanced by the respondents, however, this Court remitted the case to the lower Appellate Court for decision of the folllowing issues:—

"Was the debt in respect of which the money was obtained against Sita Ram, defendant No. 6, tainted with immorality in such a way as to relieve the plaintiffs from the pious obligation to pay it." Apparently by a clerical error the rule under which the issue was remanded was stated in the order of this Court, r. 23 instead of r. 25 of O. XLI of the C. P. C. The mistake has not misled either the Court below or the parties to this appeal. The lower Appellate Court has found the issue remitted for decision in the negative. The plaintiffs-respondents object to that finding.

The necessary facts are as follows:—Sita Ram, defendant No. 6, is one of the three sons of Mathura Prasad. Mathura Prasad was a co-mortgagee along with Bednath under a mortgage executed by one Chandan Singh many years ago. Chandan Singh's heirs afterwards sold some property to Bednath and thereby redeemed the mortgage. Bednath undertook to satisfy the claim of Mathura Prasad, the co-mortgagee. This claim amounted to about Rs. 10,000. Before this was done, however, Mathura Prasad died. In respect of that claim a settlement was arrived at between Bednath and Sita Ram. Under that settlement Sita Ram obtained some thing in the form of cash from Bednath and some thing in the form of a transfer of proprietary and mortgagee rights in certain immoveable property. This happened about the end of 1891. Whatever Sita Ram obtained from

Bednath under the settlement mentioned above was clearly not exclusively his own, because in the claim which was thereby settled each of the other two brothers of Sita Ram had an equal interest. Sita Ram, therefore, entered into a covenant with Bednath to protect him against any claim which his other brothers might make. One of the brothers did sue Bednath for his share in 1894 and obtained a decree. Subsequently in 1906 Bednath's heirs sued Sita Ram for the return of the property which Bednath had transferred to him in 1891 and got a decree. As a part of that decree they also obtained a decree for the recovery of Rs. 600 with interest which Sita Ram had realized under the redemption of a portion of the property transferred to him by Bednath and also for a sum of Rs. 300 as mesne profits. This decree for money is now being executed and furnishes the cause of action for the present suit.

The argument of the learned Counsel for the plaintiffs-respondents is that the nature of the debt for which the decree under execution was obtained against Sita Ram is such that the liability to re-pay it does not rest on his sons, the plaintiffs, under the Hindu Law. In support of this argument reliance is placed upon the decision of the High Court at Bombay in the case of *Darbar* v. *Khachar* (3). In giving judgment in that case Mr. Justice Knight quoted the following text of the Mitakshara:—

Ushana:—"A fine, or the balance of a fine, likewise a bribe or a toll or the balance of it, are not to be paid by the son, neither shall he discharge improper debts." (Mitakshara II, 48 –see Bhattacharya's Hindu Law, page 247, Ed. 2). The learned Judge then proceeded to consider the meaning of the word '*avyavahara*' which was translated as 'improper' in the above quotation. His observations are as follows:—

"The word translated *improper* in the concluding sentence of the latter text is *avyavahara*, which may perhaps be better rendered as *unusual*, or *not sanctioned by law of custom*. It is this word that has crept into our text-books under the guise, or disguise, of *illegal* or *immoral*: and it will be seen that it really bears a wider significance. Put into simple English, the texts amount to this : that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices." On the facts of the case before him he came to the conclusion that the debt was *avyavahara*. This text of the Mitakshara was considered at great length by the late Mr Justice Sir Asutosh Mookerjee in the case of *Chhakouri Mahton* v. *Ganga Prashad* (4) As to the decision of the Bombay High Court mentioned above the learned Judge said that it "places too restricted a construction upon the term "*Vyvaharika*," and excludes debts for which the son may be held legitmately liable." The case before me is covered by the opinion expressed by the learned Judge in the following passage :—

"I am rather inclined to adopt the view that the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, created a debt which might justly be recovered from the ancestral property in the hands of the son." The debts for which the creditors obtained the decree under execution against Sita Ram arose out of his liability which he had undertaken to indemnify Bednath in the event of any claim being made by any of the brothers of the former. The result is that the appeal succeeds.

I allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

Z. K. *Appeal allowed.*

(3) 32 B. 348; 10 Bom. L. R. 297.

(4) 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228; 16 C. W. N. 519.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 568 OF 1922

AND

CIVIL REVISION PETITION No. 510 OF 1922.

September 18, 1924.

Present:—Mr. Justice Devadoss.

VENKATASUBBAMMA MINOR BY NEXT FRIEND NARAPU REDDY PEDDA VENKATASUBBA REDDY—PLAINTIFF—APPELLANT

versus

PULIPULLA REDDY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 22—Addition of party

— *Limitation, expiry of—Application to amend plaint, whether can be allowed.*

If a new plaintiff is added as a party to a pending suit after the lapse of the period of limitation fixed for the suit, the bar of limitatian would not be saved. [p. 963, col. 1.]

Muthukrishna Pillai v. *Rajam Aiyengar*, 33 Ind. Cas. 357; 30 M. L. J. 157, distinguished.

A Court acts rightly in rejecting an application to substitute the name of a person in place of that of the plaintiff on record after the lapse of the period of limitation for filing the suit, when the new plaintiff claims under a different cause of action.

Second appeal against a decree of the District Court, Cuddapah, in A. S. No. 38 of 1921, preferred against that of the Court of the District Munsif, Proddatur, in O. S. No. 743 of 1919.

Civil revision petition, under s. 115 of Act V of 1908, and s. 107 of the Government of India Act, to revise a decree of the District Court, Cuddapah, in A. S. No. 53 of 1921, preferred against that of the Court of the District Munsif, Prodattur, in O. S. No. 744 of 1919.

Mr. *V. C. Seshachariar*, for the Appellant.

Messrs. *B. Sitarama Rao* and *K. Srinivasa Rao*, for the Respondents.

JUDGMENT.

S. A. No. 568 OF 1922.

The only point argued in this second appeal is that the lower Courts erred in not granting relief to the plaintiff to amend his plaint by substituting the name of Venkatasubba Reddy in the place of Venkatasubbamma.

The District Munsif refused to allow the amendment and dismissed the plaintiff's suit. The District Judge on appeal held that the District Munsif was right in not granting the amendment asked for. Mr. V. C. Seshachariar on behalf of the appellant urges that the amendment was necessitated by a new plea taken by the defendant at a late stage of the case. The suit was filed in 1919. The plaint was filed on 14th July 1919. The first defendant's written statement was put in on 15th September 1919. Issues were framed on 16th September 1919. On behalf of the plaintiff, the Will of her father was filed in Court. On looking into it the defendants raised the contention that the suit by the present plaintiff was not sustainable inasmuch as Venkatasubba Reddy was the executor of the Will and that, therefore, the executor was the only person competent to sue in respect of the defendant's debts due to the estate of the plaintiff's father. On this objection being raised an additional issue was framed. Issue No. 3, "Whether the plaintiff has title to sue for these debts and is this suit at her instance maintainable?"

The District Munsif held that the suit was not maintainable by the plaintiff inasmuch as there was a Will of her father and under the Will Venkatasubba Reddy was appointed executor. Thereupon the plaintiff applied for leave to amend the plaint by substituting Venkatasubba Reddy as the plaintiff in the place of the plaintiff on record. The District Munsif after consideration of the matter held that he could not add a new person as plaintiff as the claim against defendants had been barred before that time and he held that he could not allow an amendment in the circumstances of the case. Against this decree the plaintiff appealed and the District Judge, as I have already observed, dismissed the appeal.

It is contended by Mr. Seshachariar that inasumch as the application for amendment was necessitated by an additional issue at that stage of the case, the District Munsif ought to have allowed the amendment of the plaint before proceeding with the suit. No doubt if the bar of limitation was not in the way, the Court would have been well advised in granting the plaintiff's request. But under s. 22 of the Limitation Act, if a new plaintiff is added, the suit as regards him, shall be deemed to have been instituted when he is so made a party. Allowing the application of the plaintiff to bring Venkatasubba Reddy as the plaintiff on record would not improve matters as limitation would be calculated from the date when the cause of action arose and a suit will be considered to have been instituted when he is so made a party. The Munsif rightly held that in the circumstances he could not grant the application of the plaintiff. Mr. Seshachariar strongly urges that this is an unrighteous plea on the part of the defendants and that such a plea ought not be upheld. But that is not a matter which can be considered now. It is unnecessary to refer to all the cases quoted by both the learned Vakils. It is sufficient for me to refer to the judgment of the learned Chief Justice and Mr. Justice Ramesam reported as *Seerangathanni* v. *Vaithilinga Mudaliar* (1). They distinctly held that if

(1) 63 Ind. Cas. 101; 40 M. L. J. 532; 13 L. W. 392; 29 M. L. T. 281; (1921) M. W. N. 248.

a new plaintiff was added as a party or in other words if a party is added to a pending suit after the lapse of the period of limitation fixed for the suit the bar of limitation would not be saved. Mr. Seshachariar relied upon a case in *Muthukrishna Pillai* v. *Rajam Aiyengar* (2) as supporting his contention. In that case there was no new party added as plaintiff but the plaintiff on record who sued in his own individual capacity consented to represent a company. The cause of action was the same and the plaintiff was allowed to sue as representative of the company instead of representing only himself. In this case, it cannot be said that the plaintiff on record is the same as the person who wants to come on record. Now the plaintiff on record is the minor daughter of the deceased Butchi Reddi. Her claim was that she was entitled to her father's estate as daughter but the person who wants to come on record is the executor appointed under the will of Butchi Reddy. His right is entirely different from that of Butchi Reddi's daughter He does not claim the properties as his but as an executor. The cause of action being different, could Venkatasubba Reddy by any stretch of imagination be said to represent the interest of the present plaintiff? The facts in *Sevugan Chetty* v. *Krishna Aiyangar* (3) are distinguishable from the facts of the present case. If the Court allows a new plaintiff to put forward new facts on which to rest his case, an amendment under such circumstances would go against the provisions of s. 22 of the Limitation Act. Where the plaintiff on record is allowed to set up new facts or put forward a new cause of action that would not be tantamount to adding a new plaintiff. But here a new plaintiff is sought to be added and s. 22 of the Limitation Act is against such a course.

Then it is suggested that the plaintiff is a minor girl and so her guardian or next friend filed a suit on her behalf and, therefore, she should not be allowed to suffer on account of the fault or ignorance of her next friend. It is difficult to follow the argument for the next friend himself obtained a succession certificate a year before the suit (*i.e.*), 1918. He must have known that he was the person who was entitled to sue to recover outstandings belonging to the estate. It is not easy to believe that he was either ignorant or he was misled by his legal advisers.

Both the Courts have found that his action was not *bona fide* and that being a question of fact, I am bound by the finding.

In these circumstances, I do not think the lower Courts are wrong in refusing the application for amendment of the plaint.

In the result, the appeal is dismissed with costs.

CIVIL REVISION PETITION No. 510 OF 1922.

In this civil revision petition an application similar to that made in the second appeal which I have just disposed of was made for an amendment of the plaint. The District Munsif refused amendment and on appeal the District Judge held that there was no reason to interfere with the order of the District Munsif. As I have already held that the lower Courts were right in the view they have taken of the plaintiff's application, this civil revision petition fails and is dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

(2) 33 Ind. Cas. 357; 30 M. L. J. 57.
(3) 13 Ind. Cas. 268; 33 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1633 OF 1922.
July 31, 1924.

Present :—Mr. Justice Neave.

JAGANNATH PRASAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
JADO RAI—PLAINTIFF—RESPONDENT.

Hindu Law—Mortgage by widow—Necessity—Creditor whether entitled to personal decree—Execution against other property of last male owner, whether permissible—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.

Where a creditor lends money to a Hindu widow for legal necessity and obtains security for his debt in the form of a mortgage-bond, he is entitled, where the property secured proves insufficient to discharge the debt, to obtain a decree for the balance of the debt under O. XXXIV, r. 6 of the C. P. C., and in execution of such decree to attach property belonging to the deceased husband of the mortgagor.

Kallu v. *Faiyaz Ali Khan*, 30 A. 394; 5 A. L. J. 367; A. W. N. (1918) 173 and *Dhiraj Singh* v. *Manga Ram*, A. W. N. (1897) 69; 19 A. 300; 9 Ind. Dec. (N. S.) 196, distinguished.

Second appeal against a decree of the Subordinate Judge, Muzaffarnagar, dated the 16th May 1922.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *A. P. Dube*, for the Respondent.

JUDGMENT.—The issue remanded to the Court below has been decided in the affirmative, the learned Subordinate Judge holding as the Munsif did before him that the loan taken by the ladies was for legal necessity. This finding has been challenged on the grounds that it is based only on recitals in the deed itself and because no notice was given by the lower Court to the respondent to appear on the date fixed for determination of the issue. The latter ground has not been pressed. As regards the former the learned Subordinate Judge has considered other evidence which he has held to corroborate the recitals in the deed and to prove that actually the money was applied to the purpose alleged therein.

We have it then that *Musammat* Katori lent money to the widow of Asharfi Lal for legal necessity and secured the debt by the execution of the mortgage-bond. The property secured proving insufficient she obtained a decree for the balance under O. XXXIV, r. 6 and attached the money now in suit.

The lower Appellate Court has held that the case is covered by the authority of *Kallu* v. *Faiyaz Ali Khan* (1). The learned Counsel for the respondent relies on the same ruling and also cites *Dhiraj Singh* v. *Manga Ram* (2). In both these cases, however, there is one important difference which makes them distinguishable from the present case, for in both the debt, though for legal necessity, was unsecured. In *Kallu* v. *Faiyaz Ali Khan* (1), the Court remarked at page 398* "When Deokishen lent money to *Musammat* Gaura in 1883 he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree which he obtained on his simple money bond could only bind the rights and interests of his debtor on whose personal security he had advanced the money. *Musammat* Gaura is dead. She had only a widow's estate, and with her death the rights and interests in the property in suit purchased in execution of the decree against her came to an end." So too in *Dhiraj Singh* v. *Manga Ram* (2), the learned Judges say: "The plaintiff, if he had chosen, could, before lending his money, have obtained from the Hindu widow the security of the ancestral property by obtaining a mortgage. He did not choose to demand a mortgage before advancing his money; he accepted the personal liability of the widow. He now seeks to get a decree under which he can bring to sale the ancestral property in the hands of the reversioners. He seeks a decree which would bind that property. In other words, he is seeking a decree in this suit, there being no assets of the widow in the hands of the reversioners, which he could only have obtained if he had had a valid charge on the ancestral property." Here the facts are precisely the opposite. The creditor did obtain a mortgage and it is in execution of the decree she obtained on that mortgage that she got the further decree under O. XXXIV, r. 6 under which she now seeks to take the money in suit. I hold that she is entitled to do so and allowing the appeal I restore the decree of the First Court. The appellants will get their costs throughout including in this Court fees on the higher scale.

Issue remanded to the lower Appellate Court :—

"Was the debt in suit incurred by Mansa Devi and Udi for legal necessity or not"?

Z. K. *Appeal allowed.*

(1) 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173.

(2) A. W. N. (1897) 69; 19 A. 300; 9 Ind. Dec. (N. S.) 196.

*Page of 30 A.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 251 OF 1922.

September 16, 1924.

Present :—Mr. Justice Madhavan Nair.

ELAGAN—PLAINTIFF—APPELLANT

versus

NANJAPPAN AND OTHERS—DEFENDANTS Nos. 2, 4, 5 AND 1—RESPONDENTS.

Landlord and tenant—Construction of deed—Lease—Tenancy-at-will or permanent lease—Void lease, acceptance of, by lessee—Implied surrender—Hindu Law—Alienation by husband—Confirmation by widow, whether fresh alienation.

The terms of a lease ran as follows :—"You shall yourselves cultivate this land from this time forward until you yourselves give up the same. You shall plough the same and raise the crops which you intend to raise and yourselves shall enjoy both the *varams* in the produce got therefrom. You should deliver *gutha ragi* grain to me (by way of rent) in this manner until you deliver possession of the said land to me. If you do not act in the above said manner, if

you make any delay and if you fail to measure *gutha* grain to me on *Sivaratri* day in any year, I shall take possession of my land immediately without obtaining your consent and lease out the land for cultivation to persons to whom I am pleased to lease out the same:"

Held, that the intention of the parties was to create a permanent lease in favour of the lessees which could be put an end to only in one circumstance, *viz.*, the non-payment of rent by them and that the lease could not, therefore, be terminated by simply giving a notice to quit. [p. 966, col. 1.]

There is no implied surrender by the acceptance by the lessee of any lease which is void or which is voidable and is in fact avoided. The implied surrender is subject to an implied condition that the surrender is to be void if the new lease is made void. [p. 966, col. 2.]

Doe v. *Courtenay*, (1848) 116 E. R. 636 at p. 640; 11 Q. B. 702; 17 L. J. Q. B. 151; 12 Jur. 454; 75 R. R. 600, *Morris* v. *Baron & Co.*, (1919) A. C. 1 at p. 27; 87 L. J. K. B. 145; 118 L. T. 34, and *Zick* v. *London United Tramways*, (1903) 2 K. B. 126 at p. 132; 77 L. J. K. B. 942; 98 L. T. 841; 72 J. P. 257; 24 T. L. R. 577, relied on.

A confirmation by a Hindu widow of a past alienation by her husband cannot be regarded as a fresh act of alienation by her. [*ibid.*]

Second appeal against a decree of the District Court, Salem, in A. S. No. 37 of 1916, preferred against that of the Court of the District Munsif, Krishnagiri, in O. S. No. 451 of 1924.

Mr. *B. Somayya*, for the Appellant.

Mr. *T. M. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—The 3rd defendant, father of the 2nd defendant, and father of the plaintiff and defendants Nos. 4 and 5 were three brothers. Plaintiff's uncle, the 3rd defendant took a lease of the suit land in the year 1878. After the lessor's death the 3rd defendant and the 4th defendant took a lease of the same land from the lessor's widow in the year 1897. After the death of the widow, the reversioner who is the 1st defendant collected the rents for some years and then sold his rights as landlord of the suit land to the plaintiff. The plaintiff, then determined the tenancy as if it was a tenancy-at-will, but the lessees who were his own relations declined to quit. The plaintiff accordingly sued to recover the land together with mesne profits and damages. The suit was decreed to him but without damages by the District Munsif, but this decree was set aside and the suit was dismissed with costs by the District Judge. This second appeal has been filed by the plaintiff's legal representative against the decree of the District Judge dismissing the suit.

The District Judge held, (*a*) that the later lease Ex. I, dated 1897, was not merely a tenancy-at-will but one under which the lessees could hold on so long as they paid the rent, (*b*) that it was a mere confirmation of Ex. III the granting of which was within the powers of a Hindu widow, and (*c*) that the lease was forfeited by the lessees on account of non-payment of rent. He, however, held that in the circumstances of the case the lessees were entitled to be relieved against forfeiture. These various findings of the District Judge have been vigorously attaked here in second appeal.

It has been argued on behalf of the appellant that Ex. I is merely a tenancy-at-will which the landlord could put an end to at any time he likes, that, if it is construed as anything more than a tenancy-at-will, then the taking of it by defendants Nos. 3 and 4 implied a surrender of the old lease by the lessees and the creation of a new permanent lease which it is incompetent for a Hindu widow to grant, that at any rate the lease was forfeited by non-payment of rent and that the District Judge was wrong in relieving against forfeiture in the circumstances of the case. If any of these contentions are upheld in appellant's favour, he is entitled to succeed in second appeal. I will now proceed to deal with each one of these contentions.

Exhibit I runs in these terms: "*Patta* for *gutha* lease dated 13th March 1897 executed and given in favour of defendants Nos. 3 and 4 by Anantabattu's wife Achamma. * * * * * you shall yourselves cultivate this *inam* dry land from this time forwards until you yourselves give up the same, you shall plough the same and raise the crops which you intend to raise and yourselves shall enjoy both the *varams* in the produce therefrom. * * you should deliver *gutha ragi* grain to me (by way of rent) in this manner until you deliver possession of the said land to me. * * * If you do not act in the above said manner, if you make any delay and if you fail to measure *gutha* grain to me on *sivaratri* day in any year, I shall take possession of my land immediately without obtaining your consent and lease out the land for cultivation to persons to whom I am pleased to lease out the same. This is the *gutha* lease *patta* executed and given with my consent. Achamma." Reading

the document as a whole, it seems to me that Ex. I does not evidence a tenancy-at-will; but, on the other hand, the intention of the parties seems to have been to create what may be called a permanent lease in favour of the lessees which could be put an end to only in one circumstance, *viz.*, the non-payment of rent by them. If so, the lease cannot be said to have been terminated by simply giving a notice to quit.

The next argument that Ex. I implies a surrender of the old lease and the creation of a new one by the widow is a little more difficult to deal with. It is pointed out that the circumstances in which the new lease was taken show that Ex. I must be considered to be a new lease and this, partaking of the nature of a permanent lease, is one which a Hindu widow cannot grant. Even otherwise, it is argued that since Ex. III is inadmissible in evidence, Ex. I is the only lease we have to deal with and is, therefore, certainly a new one. In my opinion, the circumstances of the case do not show that Ex. I is a new lease granted by the widow. As regards the circumstances, what is emphasised is this, namely, that the original lease was taken by the 3rd defendant while Ex. I was taken by defendants Nos. 3 and 4 which fact, it is suggested, will show that the new lease must be considered to be a fresh one. It may be mentioned here that except in this one single circumstance both the leases are absolutely identical in their terms; and this circumstance which is now emphasised does not mean much in view of the fact that the 3rd defendant in whose name the first lease was taken was considered as the manager of the family. The 4th defendant who is D. W. No. 1 says that Kempe Gowdu, the 3rd defendant is Ejaman. There is an utter lack of evidence on the plaintiff's side to show that the lease was taken in favour of the lessees individually. In this view, the lessees must be considered to have been taken for the family on both the occasions, and the fact that the 4th defendant's name is added to the second lease cannot in any way support the argument that the second lease is a new one. In view of the decision in *Ramaswamy Ayyar* v. *Thirupathi Naik* (1), I must hold that Ex. III is admissible in evidence. It, therefore, follows that there is no substance in the argument that Ex. I is to be considered as a new lease granted by the widow.

Further, it appears to me that in a case of this kind, there can be no implied surrender at all. As regards the implied surrender, the law is thus stated in Halsbury's Laws of England Vol. 18, page 549, para. 1061: "There is no implied surrender by the acceptance by the lessees of any lease which is void or which is voidable and is in fact avoided.," and in the note it is stated that "the implied surrender is subject to an implied condition that the surrender is to be void if the new lease is made void." See *Doe* v. *Courtenay* (2) and also *Morris* v. *Baron & Co.* (3) and *Zick* v. *London United Tramways* (4). Accepting this view of law, if the lease by the widow is made void in this case, then certainly the prior lease will at once come into force. I, therefore, think that Ex. I does not imply a surrender of the old lease and a creation of a new one. On the other hand, the circumstances show that it is to be considered as a confirmation of the old lease. As observed by the District Judge, the parties might have thought that a registered document is always safer than an unregistered one. A confirmation by a widow of a past alienation by her husband is no alienation by her. The argument that Ex. I is a new lease which a widow is not competent to grant, therefore, cannot avail the appellant.

The next question to be considered is whether there has been a forfeiture of the lease on account of the non-payment of rent. The question is dealt with by the learned District Judge in para. 14 of his judgment. It is true that the respondents did not pay to the plaintiff rent due for 1913 and 1914, but they made a tender in November 1913 after the institution of of this suit. It seems to me that the reason for the non-payment of rent was the fact that the plaintiff himself purchased the landlord's rights in the year 1912; and there seems to have been trouble between the parties as to the amount of rent payable to the plaintiff who himself

(1) 27 M. 43

(2) (1848) 116 E. R. 636 at p. 640; 11 Q. B. 702; 17 L. J. Q. B. 151; 12 Jur. 454; 75 R. R. 600.

(3) (1918) A. C 1 at p. 27; 87 L. J. K. B. 145; 118 L. T. 34.

(4) (1908) 2 K. B 126 at p. 132; 77 L. J. K. B. 942; 98 L. T. 841; 72 J. . 257; 24 T. L. R. 577.

was a joint lessee prior to his purchase. The plea for non-payment in 1913 is that it was the plaintiff's duty to contribute his share of the rent to himself. The same plea is made for 1914 I agree with the District Judge that there was no justification for the non-payment of rent by the respondents; but, in the circumstances of the case, I agree with him that the forfeiture should be relieved against. The lease was held by the lessees on behalf of the joint family. While so, one of the members purchased the landlord's right. The first failure to pay rent was on account of the fight between the brothers as regards the contribution of the plaintiff's share. By the time the failure for the second time happened, the tenant's right had been denied by the landlord; and, as pointed out above, a tender also was made by the lessees. Under these circumstances, I cannot say that the relief against forfeiture was wrongly granted to the lessees in this case. The parties are all members of the same family and are related to each other. In this view it is not necessary to consider the argument of the respondent that there was no forfeiture.

I dismiss the second appeal with costs.

V. N. V.

Z. K. *appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 365 OF 1923.

December 16, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

Musammat SITALA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM BHUKHAN—PLAINTIFF—RESPONDENT.

Appeal, second—Inferences of fact from documentary evidence, whether can be questioned—Documents not mentioned in judgment of lower Appellate Court, whether ignored.

The mere fact that some of the documents which constitute the evidence in the case have not been specifically referred to in its judgment by the lower Appellate Court does not indicate that the documents have not been considered by that Court. [p. 968, col. 1.]

Inferences of fact drawn from documentary evidence on the record are not open to question in second appeal merely on the ground that if the Court of second appeal had considered the documents itself it would have arrived at conclusions different from those arrived at by the lower Appellate Court. [p. 968, col. 2.]

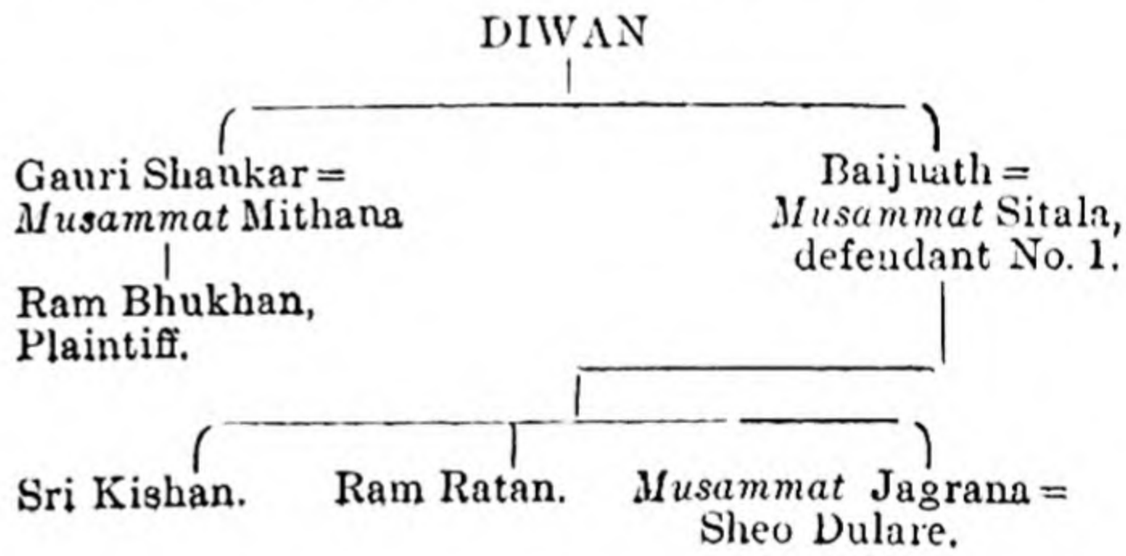
Bindeshri v. *Sheo Ratan Pande*, 74 Ind. Cas. 811; 9 O. & A. L. R. 443; (1924) A. I. R. (O.) 185, *Lachman Lal* v. *Kanhaya Lal*, 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind. Dec. (N. S.) 405 (P. C.) and *Jagdamba Kumari* v. *Wazir Narain Singh*, 77 Ind. Cas. 1041; 2 Pat. 319; (1923) A. I. R. (P. C.) 59; 44 M. L. J. 503; 37 C. L. J. 287; 32 M. L. T. 157; 4 P. L. T. 319; 25 Bom. L. R. 676; 18 L. W. 555; 28 C. W. N. 98; (1923) M. W. N. 460; 50 I. A. 1 (P. C.), followed.

Appeal against a decree of the Second Additional District Judge, Lucknow, dated the 8th September 1923, confirming that of the Subordinate Judge, Unao, dated the 28th March 1922.

Messrs. *Niamat Ullah* and *Ali Mohammad*, for the Appellants.

Mr. *Prag Narain*, for the Respondent.

JUDGMENT.—This is the defendants' appeal. It arises out of a suit for possession of several parcels of immoveable property, the details of which were given in a list attached to the plaint. To elucidate the facts of this case a short pedigree may be given at the outset of this judgment.



The substance of the plaintiff's case is that the property in suit is the joint family property of his and his cousin, Ram Ratan, that he succeeded to the whole of it on the death of Ram Ratan by survivorship and that the possession of *Musammat* Sitala, mother and *Musammat* Jagrana sister of Ram Ratan and their transferees was unlawful. The plaintiff is a minor and has brought this suit under the guardianship of his mother. Ram Ratan died on the 24th October 1924. On the 15th of the same month he had executed a Will, the genuineness of which is now accepted by both sides. By this Will Ram Ratan purported to dispose of the property in suit which he described as his in favour of his mother and sister. The only defence, with which I am now concerned, was that Baijnath, father of Ram Ratan, had separated from his brother, Gauri Shanker, father of the plaintiff, about 31 years ago. The issue which arose on the pleadings was

therefore, a simple one as to whether the alleged separation was proved or not. On a careful consideration of the entire evidence on the record both the Courts below have found that the plea of separation was not established. On the face of it the finding is one of fact but it was challenged on two grounds: 1. That the lower Appellate Court has failed to consider the evidential effect of certain important documents and drew wrong inferences from others; and (2) that certain events of the year 1899 and also the fact of Ram Ratan having made the Will of the 15th October 1914 constitute separation in the eyes of the law.

The second ground may be disposed of in a few words. The defendants definitely pleaded the case of separation in para. 9 of their written statement. The allegation made in that paragraph makes the alleged separation to have taken place 31 years ago. In para. 26 of the written statement it was admitted that when Diwan died his two sons, Baijnath and Gauri Shankar, constituted a joint family and were in possession of the ancestral property. No partition subsequent to the one set forth in para. 9 was ever relied upon by the defendants as a plea in defence. I agree with the respondent's learned Pleader's argument that the case of separation in 1899 or by the effect of the Will of 1914 was sprung upon them as a surprise, a case which they were never called upon to meet. On a careful perusal of the record I find no trace of it anywhere until we come to the grounds of appeal filed in this Court. I, therefore, decline to entertain the second ground directed against the decree of the Court below.

As regards the first ground, the only matter that I find is that some of the documents to which my attention was drawn by the learned Advocate for the appellants are not specifically mentioned in the judgment of the lower Appellate Court. But from that omission I am unable to draw the conclusion that they were not considered. Every one of the documents is categorically stated and discussed in the judgment of the Court of first instance and it is unlikely that the appellant's Counsel in the lower Appellate Court forgot to place any document on which he intended to rely in support of his client's case before that Court. Indeed the judgment of the Court has in it the following observation:—"The learned Pleader for the appellant took me through the whole of the documentary evidence and the important portions of the oral evidence. I also listened to the able arguments advanced on behalf of the plaintiff-respondent and after going through the whole of the evidence I am of opinion that the conclusions arrived at by the Court below were correct and its findings are not open to exception." As regards the inferences which the learned Advocate characterises as wrong it is not claimed that any of the documents upon which reliance is placed in support of the defendant's case constitute conclusive evidence of the fact of separation. All those documents are merely pieces of evidence. It may be that some of the inferences drawn by the lower Appellate Court from those documents or from some of them would not have been drawn by me if I were sitting as a Court of Trial or as a Court of First Appeal but that fact does not in the least derogate from the conclusive character of the finding of the lower Appellate Court. The decision of my learned brother, Mr. Dalal, J. C., in *Bindeshri* v. *Sheo Ratan Pande* (1) clearly supports the conclusion at which I have reached and that decision is based on the Privy Council judgment in the case of *Lachman Lal* v. *Kanhaya Lal* (2). It may further be observed that the inferences which the Court below has drawn from the documentary evidence on the record are inferences of facts and not of law. The finding is, therefore, binding on me in second appeal. In the course of the arguments the learned Counsel for the appellants drew my attention to the observation of Lord Buckmaster in the case of *Jagdamba Kumari* v. *Wazir Narain Singh* (3) to be found at page 324* of that report. "Now, the facts upon which this alleged separation is based have been concurrently found by the two Courts, and are no longer the subject of dispute. The argument, properly open to the appellant, is not upon the facts themselves, but that these facts, when accepted, do establish separation." His Lordship then proceeds

(1) 74 Ind. Cas. 811; 9 O & A. L. R. 443; (1924) A. I. R. (O.) 185.

(2) 22 C. 609; 22 I. A. 51; 6 Sar. P. C. J. 558; 11 Ind. Dec. (N. S.) 405 (P. C.).

(3) 77 Ind. Cas. 1041; 2 Pat. 319; (1923) A. I. R. (P. C.) 59; 44 M. L. J. 503; 37 C. L. J. 287; 32 M. L. T. 157; 4 P. L. T. 319; 25 Bom. L. R. 676; 18 L. W. 555; 28 C. W. N. 98; (1923) M. W. N. 460; 50 I. A. 1 (P. C.).

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to give a narrative of the facts found and lays down the principle embodying the conditions which effect separation in the Hindu Law and finally observes:—"In this case these conditions are lacking, and their Lordships are unable to think that there has been any misapplication of the principles of law which regulate this question, and the findings of fact are sufficient to defeat the appellant's claim." My answer to the appellants' argument in the present case is the same.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 61 OF 1923.

September 12, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

THE MADRAS & SOUTHERN MAHARATTA RAILWAY COMPANY, LIMITED—DEFENDANT—APPELLANT

versus

JAYAMMAL—PLAINTIFF—RESPONDENT.

Negligence—Accident—Child crossing railway line at unauthorised place—Proximate cause, what is—Invitation, allurement and trap—Suit for damages—Contributory negligence.

Plaintiff, a little girl of 7 years of age, was run over by a locomotive engine while she was crossing the railway line in broad daylight, and lost her right arm and right leg. There was no crossing at the point but it was found that people living in the neighbourhood were in the habit of crossing the railway line at the point where the accident happened. There was nothing to show that it was possible to bring the engine to a dead stop as soon as the child was noticed crossing the line. In a suit for damages against the Railway Company:

Held, that the proximate cause of the accident was that the plaintiff stepped on the Railway line in front of a moving engine and was guilty of negligence in not keeping a sharper lookout for passing trains when she was crossing the line at an unauthorised place of crossing and the accident being thus due to plaintiff's want of care, the suit must fail. [p. 970, col. 2.]

Per *Spencer, Offg. C. J.*—Persons who cross an open railway line at an unrecognised crossing do so at their own peril. The plainiff, if not a trespasser, was at the most a licensee, and, where a licensee is concerned, the owner of the premises is not liable for damage caused by the negligence of the licensee, provided that he does not place any trap in the way of those who come up on the premises. In the present case there was no trap, no allurement and no invitation. The existence of a short cut cannot itself be treated as an allurement, nor does the failure of the Railway Company to prevent passengers from crossing the line at the point of accident amount to an invitation or allurement either to adults or children to cross the railway line without proper circumspection. [p. 971, col. 1.]

It is the party who is last negligent who is made responsible for an accident arising from the negligence of both parties. [p. 972, col. 1.]

Per *Srinivasa Iyengar, J.*—Negligence is the failure to exercise proper care. But what is proper care depends on the time, place and circumstance. Whether any particular act or omission constitutes negligence would have to be decided having regard to the person injured, the manner in which the injury was occasioned and the time, place and circumstance in each case. [p. 974, col. 1.]

The theory of contributory negligence is not a special or separate branch of the law, nor is the theory which relates to what may be called the further or secondary negligence of the defendant. They are all but different aspects of the one sole question in the case "what was the proximate or effective cause of the accident?" If the defendant was negligent, still if the plaintiff could have by the use of ordinary prudence avoided the accident, the plaintiff is held not entitled to recover, not because he was also negligent but only because the proximate cause of the accident should be held in such cases to have been not the primary negligence of the defendant but really the negligence on the part of the plaintiff which was what largely contributed to the result. Similarly if in spite of the negligence of the plaintiff the defendant could, even then, by the exercise of ordinary care have avoided the accident and injury, the plaintiff is held entitled to recover not because he was not negligent but only because the negligence that proximately caused the injury was the negligence not of the plaintiff but of the defendant. [p. 976, col. 1.]

Appeal from the judgment of Mr. Justice Coutts-Trotter, in Civil Suit No. 465 of 1922, dated the 20th of April 1923, and printed as 76 Ind. Cas. 992.

Mr. *Vere Mockett* instructed by Messrs. *King* and *Patridge*, for the Appellants.

Messrs. *Nugent Grant* and *T. S. Ramasami Iyer*, for the Respondent.

JUDGMENT.

Spencer, Offg. C. J.—The plaintiff-respondent is a little girl of seven years of age who was run over by a locomotive engine at Wallajah Road Railway Station and lost her right arm and her right leg. She has been awarded Rs. 3,500 damages

and costs in the Court of first instance by Coutts-Trotter, J. The Railway Company has appealed.

The facts are clear, that the plaintiff, who lived with her father in the village of Ammur adjoining Wallajah Road Station, crossed the line in order to go to her grandmother's house and that she was returning with a basket full of grass when she was knocked down by the engine of the Ranipet train which had left its carriages standing by the platform after uncoupling and had gone up the line eastwards, tender foremost, to the points, then reversed and was running down, head foremost along the loop line towards the engine shed, where it had to water when the accident happened. The plaintiff herself states that on her way home she crossed by the way leading from the wicket gate near the Assistant Station Master's house, the Engine ran over her, and she was injured. Of her 4th and 5th witnesses, who are merchants professing to have been eye-witnesses of the accident, P. W. No. 4 states: "The girl came with a basket of grass on her head and entered the gate and was walking towards the west. She had to pass along the line a little to reach the Station platform and then go to her village. When she put her leg on the line the accident happened." P. W. No. 5 states: "The girl with a basket full of grass over her head entered the gate and turned towards the west. She went and then turned to the north, to go to the big platform which was sloping. The engine came and she was run over." The engine driver, D. W. No. 2, was standing on the right hand side of the engine and driving it. He, therefore, did not see the child before the accident happened. D. W. No. 4, a fireman on the engine, was standing on the left hand side and suddenly saw the child at a distance of four or five feet from the engine. The fact that the child's right arm and right leg were run over by the engine wheels makes it probable that she was knocked down just as she was stepping on to the line from the south and that she was hit on the right side of the engine. This accords with the statements of the eye-witnesses who profess to have seen the accident and with her own account. There is evidence that people living in the neighbourhood were in the habit of crossing the Railway line first over the overbridge and then from the platform crossing the station-yard in a direction which led to a wicket gate beside the Assistant Station Master's house. There is no evidence that there was a worn footpath in this direction, but there is no reason to doubt the statements of the witnesses that this short cut was being used. The driver of the engine and a fireman, (D. W. No. 4) stated that the whistle was blown when the engine was uncoupled from the train and again when it started down the loop line to go westwards. The plaintiff said that no whistle was blown. P. W. No. 3, the Branch Post Master, says that no warning was given. The next witness was not asked. The 5th witness says he did not hear any whistle. The Station Master D. W. No. 5 does not remember whether it was blown. The learned Judge rightly observed that the witnesses cannot be expected to be able to speak from memory as to whether the usual formality of blowing the whistle was observed on that day unless there was something to call their attention to the fact.

The existence of a wicket gate, close to the Assistant Station Master's house has been made much of. There is a notice board, warning persons not to use that crossing but whether it was in existence before the accident happened has been questioned. I do not consider that the existence of the wicket gate is a material circumstance in the case. Even if it had been kept locked, as suggested by the learned Judge in the Court below, it would have been easy for children like the plaintiff to have slipped through the wire fencing that enclosed the station yard.

On the evidence I find that the proximate cause, the *causa causans* as it is called, of the accident was that the plaintiff stepped on the Railway line in front of a moving engine and that she was guilty of negligence in not keeping a sharper lookout for passing trains, when she was crossing the line at an unauthorised place of crossing. As she was carrying a load of grass on her head, it is likely that she could not readily turn her head to the right and left and look up and down the line and see if anything was coming. Though she was capable of appreciating danger and was old enough to have a sense of circumspection, she did not use it, owing to the heedlessness of youth, or the burden on her head. The accident happened in broad daylight. The engine was an obvious danger capable of being perceived even by a child of tender years. She must have seen the

train, standing by the platform without its engine if she had looked in front of her. The fact that the engine had gone to the east was no guarantee that it would not return along the line which she was about to cross. The danger of being run over by a passing engine when crossing the Railway lines imposes a necessity for the utmost caution, on all persons walking on or near the track. Persons who cross an open railway line at an unrecognised crossing do so at their own peril. The plaintiff, if not a trespasser, was at the most a licensee, and, where a licensee is concerned, the owner of the premises is not liable for damage caused by the negligence of the licensee, provided that he does not place any trap in the way of those who come up on his premises. In the present case there was no trap, no allurement and no invitation. It has been suggested that leaving the wicket gate unlocked was an invitation to people wanting to go to the other side of the line, to take the short cut instead of crossing by the level crossing further down on the east and west. The learned Judge in the lower Court held that this short cut was not an "allurement" in the sense in which the phrase has been used in reported cases, where negligence has been alleged. I have no doubt that the existence of a short cut cannot itself be treated as an allurement. Otherwise, people might make short cut across the railway line at any point, and the Railway would always be liable for accidents occurring to persons using the short cuts, and no measure to prevent such accident would be effective, short of guarding the line at short intervals for its entire length, or putting up some impassable barrier. In *Cooke's case* [*Cooke* v. *Midland Great Western Railway of Ireland* (1)] it was not the gap into the hedge but the turntable which was the allurement, as it was used by the youth of Navan as a kind of glorified merry-go-round (*vide* Lord Macnaghten's judgment).

The decision of this case in favour of the plaintiff seems to be based upon two errors. In the first place, the learned Judge thought that, if a proper lookout had been kept on the left side of the engine, this accident could have been avoided, either by blowing the whistle again, or by stopping the engine as soon as it got near the child. Secondly, the learned Judge was of opinion that what would be merely negligence in the case of an adult, in the case of children might be regarded as a trap and that the conduct of the Railway Officials was negligent in inviting children to cross lines of Railway over which the Company's trains run.

On the first point there is no evidence in this case as to the distance within which an engine going at between five and ten miles an hour could have been brought to a standstill. The fireman, D. W. No. 3, first saw the child when she was four or five feet off. It is not likely that the engine could have been stopped within the distance. Unlike a motor car, the course of a train cannot be altered to avoid running over pedestrains. Nor has it been proved that a proper lookout was not kept by the engine driver who was on the right side of the engine.

The respondent's Pleader argues that the engine driver knowing that the track between the wicket gate and the platform was being used by the public, should have kept a special look-out when they came near that spot. In *Davy* v. *London and South Western Railway Co.* (2) (a most instructive case) Brett, M. R. laid down the law thus, in a case where the plaintiff claimed damages from a Railway Company for negligence. He said: "In such an action as this, the burden of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to show that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident,.....yet if the plaintiff also was guilty of negligence which contributed to the accident so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that, if the defendant's servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

(1) (1909) A. C. 229; 78 L. J. P. C. 76; 100 L. T. 626; 53 S. J. 319; 25 T. L. R. 375.

(2) (1883) 12 Q. B. D. 70; 53 L. J. Q. B 58; 49 L. T. 739.

This imposes a duty upon defendants to do all in their power, to avoid an accident in cases where one is imminent owing to the negligence of the plaintiff. This point is well brought out in the judgments of the Court of Appeal in *Gaffney* v. *Dublin United Tramways Co.* (3). In other words it is the party who is last negligent who is made responsible for an accident arising from the negligence of both parties.

In *Davy's case* (2) Bowen, L. J., observed:—"It was broad day—light, and as soon as he had entered the wicket gate—Had he been a sensible man, he would have looked up and down the line to see if there was a train coming either way. A train was, in fact, so close to him that he was only able to cross fifteen feet before he found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him?"

It seems to me that every reasonable mind, which has before it the facts of the present case must agree that it was the gross negligence of the plaintiff which led her to step on the permanent way in front of an approaching engine, without first assuring herself by looking to the right and the left that there was no possibility of being run over.

The facts of the present case do not support the inference that the Railway Company's servants were negligent. Supposing the driver had seen the plaintiff coming from the wicket gate, towards the line, there was no reason for him to anticipate that she would attempt the very rash act of crossing in front of the engine. Every day drivers of cars and carriages seeing foot passengers on the public road proceed on the assumption that they will act rationally and not commit the imprudence of running in front of a car or carriage. It would not be reasonable to compel drivers to form a mental estimate as to the age and capacity of taking care of themselves of every one of the pedestrains that they may meet in their way through traffic and to adjust their speed accordingly, though they would naturally proceed slowly past a school or play-ground where children are likely to congregate, as children are notoriously careless owing to their inexperience.

In *Burchell* v. *Hickisson* (4) an action was brought on account of damage sustained by a boy of four years of age who fell through a gap in railings leading up steps to a house. It was held that there was no invitation to a person of the plaintiff's age to use those steps unless he was in charge of some elder person who could take care of him, and if he was in charge of others, then there was no concealed danger. This gave rise to a dilemma. Coutts-Trotter, J., seems to have been of opinion that this case decided in 1880 no longer represented sound law and that it had been exploded by the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (1). That was a case of a turntable, which formed a great attraction to children living in the neighbourhood to play with. But it was a dangerous object when unlocked because, if used without care, it was liable to crush the user as it did to the boy Cooke. In *Jenkins* v. *Great Western Railway* (5) a child of two and a half years was run over by an express train having got on the main line and it was held by the learned Judges that there was no invitation to trespass on the main line of the Railway although the children had been allowed to play on a pile of sleepers close to dwelling houses on the side of the line. The sleepers had not been properly fenced off so as to prevent children coming and playing upon them, and therefore, it was held that they were licensees so far as the timber pile existed, but there was no invitation or leave to go on to the main line where the accident took place. It was considered that to hold that there was an invitation to cross the Railway line would be an undue extension of the doctrine in *Cooke's case* (1) the ground of that decision being that there was leave and license to play with a turntable which was a dangerous machine and that it was because the person injured availed himself of that leave and license he was injured. If the Railway staff had left an unattended locomotive with steam upstanding in the station yard for boys to play with, I have no doubt that that would have constituted an allurement and the Company would have been responsible for the

(3) (1916) 2 Ir. R. 472.

(4) (1881) 50 L. J. Q. B. 101.

(5) (1912) 1 K. B. 525; 81 L. J. K. B. 378; 105 L. T. 882.

consequences. But I cannot agree that the failure of the Railway Company to prevent passengers from crossing the line through the wicket gate, opposite to the platform at the Wallajah Road Station was an invitation or allurement either to adults or children, to cross the railway lines without proper circumspection. In *Fairman* v. *Perpetual Investment Building Society* (6) the House of Lords recently approved of the decision of the Court of Appeal in *Latham* v. *Johnson* (7) as containing a concise and accurate expression of well known principles of law. In the later decision *Burchell* v. *Hickisson* (4) and *Lowery* v. *Walker* (8) are referred to as still being good law. Latham was a child hurt by playing with paving stones on unfenced waste land. As there was no allurement, nor trap, nor invitation nor dangerous object, it was held that the defendants were not liable for the injuries caused to the plaintiff's hand.

The case of *Glasgow Corporation* v. *Taylor* (9) where a child of tender years was attracted by belladonna berries grown in a public garden which were a danger to young children unable to take care of themselves, within the knowledge of those who put such plants in a public place, and the case of *Lowery* v. *Walker* (8) where a savage horse was placed in a field over which the public had a license to walk are easily distinguishable both from the facts in the *Cooke's case* (1) and from the facts of the present case, the former being a case of a trap and allurement to children using a public right and the second being a dangerous thing placed in the way of licensees, who did not know it to be dangerous as horses in general are not dangerous animals. The distinction between those cases and the present is that the plaintiff in the present case was not using a right of way across the rails, when she was injured and that everybody knows an engine to be likely to hurt those who come in contact with it. In *Hughes* v. *Macfie* (10) where a boy of tender age meddled with the flap of a cellar which was placed so as to lean almost upright against a wall, judgment was given for the defendants although it was stated that, if an adult passer by had accidently and without carelessness pulled the flap over and been hurt, he might have successfully maintained an action for damages arising through neligence to which he did not contribute.

In *Singleton* v. *Eastern Counties Railway Co.* (11) where a child of three and a half years who got on to a parapet of a bridge and had his leg cut off by a passing train, the action was dismissed, in spite of the fact that the driver made no attempt to stop the train as it was held that the plaintiff was wrongfully upon the Railway, and though he was only a child of tender age, the accident must have been due to his negligence or the negligence of his parents and through no fault of the Railway Company.

On the finding that the accident was due to the plaintiff's want of care and that the Railway Company and their Officials were not guilty of negligence, the appeal must be allowed and the suit dismissed. Under the circumstances the parties will bear their own costs.

While absolving the Railway Company from all legal liability for this sad accident, I consider that the pitiable plight of this unfortunate girl, mutilated by collision with one of the Company's engines deserves the sympathetic consideration of the Agent of the Company and I rejoice to hear from the appellant's Counsel Mr. Mocket that the Company have decided to give her some form of compassionate pension or a gratuity of a substantial amount.

Srinivasa Iyengar, J.—This is a most unfortunate case, for the necessary result of the conclusions I have felt bound to arrive at, on the questions of fact and law argued before us in this appeal, would be to deprive a little girl aged about eight years of the benefit of the decree granted in her favour against the appellant Railway Company by Mr. Justice Coutts-Trotter as he then was. In the suit instituted on behalf of the

(6) (1923) A. C. 74 at p. 80; 92 L. J. K. B. 50; 128 L. T. 386; 87 J. P. 21; 39 T. L. R. 54.

(7) (1913) 1 K. B. 398 at p. 408; 82 L. J. K. B. 258; 108 L. T. 4; 77 J. P. 137; 57 S. J. 127; 29 T. L. R. 124.

(8) (1911) A. C. 10; 80 L. J. K. B. 138; 103 L. T. 674; 55 S. J. 62; 27 T. L. R. 83.

(9) (1922) 1 A. C. 44; 91 L. J. P. C. 49; (1922) S. C. 1; 126 L. T. 262; 86 J. P. 89; 20 L. G. R. 205; 38 T. L. R. 102.

(10) (1863) 2 H. & C. 744; 33 L. J. Ex. 177; 10 Jur. (N. S.) 682; 9 L. T. 513; 12 W. R. 315; 159 E. R. 308; 133 R. R. 774.

(11) (1859) 7 C. B. (N. S.) 287; 141 E. R. 827; 121 R. R. 496.

minor girl by her father as her next friend, the claim was for damages in respect of the injuries caused to her by an engine belonging to the appellant Railway Administration, running over her, as the result of which both her right hand and right leg had to be amputated. But however much one's heart may go out in sympathy for the suffering of the little plaintiff and more especially for the years of crippled and unhappy life awaiting her in the future, I do not see how I can fail to give effect to my conclusions. Lord Justice Farwell observed in the case of *Latham* v. *Johnson* (7). "We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment: sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles." Nevertheless, one cannot but regret such a consequence following on one's conclusions.

Except in cases where the injuries are caused as the result of a wanton attack on the person of the plaintiff, in cases of claims for damages for personal injuries the cause of action generally is negligence; that is to say, the charge against the defendant is to the effect that though the defendant was, at the time when the accident happened which caused the injury, doing something not in itself unlawful he was guilty of negligence in the doing of it, and that such negligence was the proximate cause of the injury. But what is negligence? Whether any particular act or omission constitutes negligence would have to be decided having regard to the person injured, the manner in which the injury was occasioned and the time, place and circumstances in each case. Negligence is the failure to exercise proper care. But what is proper care depends on the time, place and circumstance.

It is once over again the apotheosis of the law, the ideal man of ordinary prudence. What this ideal man of ordinary prudence would have done or omitted at the particular time and place and in the circumstances is the standard and measure of proper care and whenever and wherever the act or omission of the defendant falls short of this standard or measure then and there is negligence. It seems to me that the classification of the injured into trespassers, bare-licensees, licensees, invitees, servants and so on has no more fundamental basis than the repeated application of this standard or measure to the varying circumstances, under which the injured persons came to be at the particular place and at the particular time. Thus before the plaintiff in such an action can be entitled to a verdict in her favour it has to be proved that the appellant Railway Company in having the engine driven at the particular time and place and in the circumstances was guilty of negligence and that such negligence was the proximate cause of the injuries sustained by the plaintiff.

For the determination of these questions the first thing to be considered is whether the plaintiff was at the time and place a trespasser or a licensee. It is not however as if that a licensee as such has got any more rights, so to say, than a trespasser but the question becomes of importance only with regard to the other question, the main question in the case, whether or not the driving of the engine was negligent. For this purpose a trespasser is merely an unexpected visitor or, to put it a little more clearly, one whose visit to the place at the time and in the circumstances could not have been foreseen by a man of ordinary prudence. Similarly for this purpose the licensee is merely a person or a member of a class whose presence at the time and about the place should in the circumstances have been foreseen and provided for by a man of ordinary prudence. In this sense, then, was the plaintiff at the time and place a trespasser or a licensee? It seems to me that to this question there can on this evidence be only one answer. There is considerable independent testimony, which I have absolutely no reason to doubt or refuse to accept that the villagers of Amur have been for a long time allowed by the Railway Authorities, without any effective objection to cross the Ranipet line and pass through the wicket gate both on their way from the part of the main village on the northern side of the line to the part of the village on the southern side of the line and back again. The following extract from the evidence of Rupert Johnson examined as the 2nd witness for the defence puts it beyond all doubt.

Question:—You keep special look-out when you come near the wicket gate to see that the passengers do not cross the line?

Answer:—Yes.

This is conclusive evidence as regards the knowledge and consciousness on the part, at any rate, of the most important servant of the Railway Company, concern-

ed, namely, the engine driver. It is an admission that persons passing through the wicket gate were in the habit of crossing the line at that point. It is also an admission for the consequent necessity on the part of the Railway servants to keep a special lookout at the place. If, therefore, the presence of persons crossing the line at the place was or must have been anticipated, it follows that the plea of the Railway Company that the plaintiff was a trespasser fails or at any rate loses its point. The degree of prudence, therefore, incumbent on the Railway Company, namely, the need for special lookout at that point in the line having thus been admitted it becomes unnecessary to discuss further that aspect of the case. But it is one thing to say that generally persons were suffered by the Railway Authorities to cross and re-cross the line at the particular point and another thing to say that such sufferance amounted also to a similar permission by the Railway Company in favour of infants of tender years unable to take care of themselves or incapable of avoiding dangers necessarily incidental to the place. I cannot possibly suppose that any implied license by the Railway Company could extend to such infants. But on the evidence I am unable to hold that the plaintiff, though stated to be only seven years of age, was an infant unable to take care of herself or of avoiding dangers incidental to the place. It was not the first occasion on which she was there crossing and recrossing the line and as a fact it is clear she had been doing so alone by herself for quite a considerable time previously. Her parents would seem not only to have allowed her to do so but to have sent her on errands on which she was crossing and re-crossing the railway line at the point.

It follows necessarily from all this that the plaintiff had sufficiently developed in her the faculty of circumspection and the capacity of taking care of herself even in such somewhat dangerous surrounding. If on the other hand the contention on behalf of the plaintiff should be that she had not attained such faculty and such capacity the necessary result of it would obviously be that in such a case the Railway Company could not be deemed to have included in any such implied license a person of such tender years. This, in passing I may state, is the dilemma referred to by Lord Justice Hamilton at p. 414* in the course of his judgment in *Latham's case* (7). I must, therefore, find that the plaintiff was not a trespasser so called but was, as found by the learned Judge in the Trial Court, a person whose presence in or about the place was or must have been anticipated by those in charge of the engine.

I shall now proceed to the question whether or not the negligence charged has been established. I gather that four acts of negligence have been so charged against the Railway Company. In para. 6 of the plaint there seems to be in the words "had he slowly backed" a suggestion that the engine was at the time of the accident being driven not slowly but fast. This was not even sought to be proved. In the same paragraph the word "backed" would seem to indicate that the train was at the time of the accident tender foremost. I do not see how this matters. Further the evidence in the case undoubtedly points to this allegation being incorrect. In the same para. 6 of the plaint another charge made is that the whistle was not blown. This charge is not sufficiently particular. If the reference is to the practice of sounding the whistle of the engine when it is about to start from the east on its journey to the engine-shed towards the west, I must say that the evidence with regard thereto is discrepant and not by any means satisfactory. For one person that heard the whistle a hundred persons even in or about the place might not have attended to it and, therefore, not heard it and it requires very strong and cogent evidence to establish a negative. Further, I am unable to appreciate how a whistle by the engine some hundred yards off would have averted the accident.

The charge in para. 7 of the plaint is substantially to the effect that though the Railway Company had reason to know that the public was in the habit of crossing the line at the point, proper safeguards were not adopted. The extract from the evidence of the engine driver which I have already reproduced above goes to show the need for and the practice of "special look-out" by those in charge of the engine while passing near the wicket gate. There is absolutely no evidence whatever of such special look-out having been kept either by the driver or any other person in or in charge of the engine. No one says that a special look-out was kept by any

*Page of (1913) 1 K. B.—[*Ed.*]

person on the engine. The driver was on the right side, and if he was on the look-out from a place sufficiently far off on the east from the wicket gate, I fail to see how he could have failed to notice the plaintiff, and assuming he was unable to see who was passing on the left side, there is no evidence whatever as to what look-out was kept on the left side of the engine. I hold, therefore, agreeing entirely in this respect also with the learned Trial Judge, that the special lookout spoken to by the engine driver has not been proved and that, therefore, the appellant Company was guilty of negligence on the occasion.

Assuming however that there was this negligence on the part of those who were in charge of the engine at the time of the accident, it does not necessarily follow that such negligence was the sole or even the proximate cause of the accident.

The theory of contributory negligence is not a special or separate branch of the law nor is the theory which relates to what may be called the further or secondary negligence of the defendant. They are all but different aspects of the one sole question in the case "what was the proximate or effective cause of the accident?" If the defendant was negligent, still if the plaintiff could have by the use of ordinary prudence avoided the accident, the plaintiff is held not entitled to recover, not because he was also negligent but only because the proximate cause of the accident should be held in such cases to have been not the primary negligence of the defendant but really the negligence on the part of the plaintiff which was what largely contributed to the result. Similarly if in spite of the negligence or as it is called the contributory negligence of the plaintiff, the defendant could, even then, by the exercise of ordinary care have avoided the accident and injury, the plaintiff is held entitled to recover not because he was not negligent but only because the negligence that proximately caused the injury was the negligence not of the plaintiff but of the defendant. The whole thing, therefore, is a problem in causation and Courts of law are allowed and required to do their best to piece out the events and arrive at a conclusion with regard to the proximate or as it may be otherwise called the effective cause of accident or injury. It follows from this that assuming that the appellant Company was, through the persons in charge of the engine at the time and place of the accident, guilty of the negligence found against them, did that negligence alone cause the accident or was there anything that the plaintiff did or failed to do on the occasion which was really the proximate and effective cause of it. What happened then in this case? It may be that when the plaintiff entered through the wicket gate and was about to turn to the left to pass alongside the rails, she might not have noticed the engine which might have been still at some distance to the east. The plaintiff after going some distance alongside the line towards the west, turned to her right again with the object of crossing the line and either while she was so turning to cross the line or as she had taken just a step with a view to cross, she was according to the evidence knocked down by the engine. The fact that her right hand and right leg alone were injured would seem to show that the impact of the engine was on the right side and was such as to throw the whole of the left side and also the trunk of the body beyond the line of the left wheels of the engine. It seems to me that this could have happened only if the impact of the engine against the plaintiff was just as she was turning to cross, her left side still not quite turned. It is only in such a case that the impact of the engine would have served to throw the left side and the trunk outside the line of the wheels while the right leg and the right hand would fall just under the line of the wheels. From this it follows that while she was in the act of turning, the engine was not on the rails directly in front of her but must have been only abut 5 or 6 feet off. I take it that even in the case of an infant of about seven years, the ordinary instinct of self preservation would have impelled her to withdraw, if when about to turn she had noticed the engine. I have, therefore, to conclude that she did not look to the right before crossing. It seems to me that it was not even necessary to look to the right because such a huge thing as an engine at a distance of 5 or 6 feet could not possibly have failed to draw her attention to it. It is also strange that she should not have either heard the noise of the approaching engine or perceived the vibration caused by its nearer and nearer approach. I am, therefore, led to conclude that the plaintiff must have been on the

occasion either very absent-minded or her child-nature so wholly absorbed in something else as to leave no attention available for hearing the noise or perceiving the vibration or see the form of the approaching engine. This was not the conduct of a person of ordinary prudence. No person of ordinary prudence would especially while attempting to cross the Railway line fail to look about to see whether any train was approaching. But if she was not capable of circumspection or taking care of herself, she ought not to have trusted herself there or have been allowed by her reckless parents to cross and re-cross the line without some caretaker. If she was capable of circumspection or of taking care of herself she failed to exercise ordinary prudence before turning to cross the line. Her failure to realise that the engine was approaching could only be ascribed to carelessness on her part. If she had exercised such ordinary care the accident would have been averted or avoided in spite of the negligence of the Railway Company.

A further argument was advanced to us on behalf of the plaintiff, that assuming that she was negligent, even then when the fireman noticed her and cried out, the engine should have been stopped and the injury averted. This argument was based on the principle of what is called "*The Donkey Case*" *Davies* v. *Mann* (12). I do not think it could possibly have been managed. The engine must have been within a few feet of the plaintiff and in any case there is absolutely no evidence on which I could hold that it was possible to bring the engine to a dead-stop at such short notice and distance.

I have, therefore, come to the conclusion and feel constrained to hold that as the injury could have been avoided by the plaintiff herself by the exercise of ordinary care on her part and was brought about by her failure, and omission to exercise some circumspection, her own negligence was the proximate or effective cause of the accident.

Reviewing the facts of this case, I almost wish that the law were that in such a case the damages should be apportioned between both the parties held to have been negligent as they do in Admiralty cases, but as observed by Lord Birkenhead in a recent case *Admiralty Commissioners* v. *Volute* (13): "In a Court of Common Law the plaintiff has no remedy if his negligence in any degree contributed to the accident." In the result it follows that the plaintiff cannot recover.

It only remains for me briefly to examine the grounds on which the learned Judge who tried the case came to a different conclusion.

Summing up his findings the learned Judge observes as follows:—"I entertain no manner of doubt that if a proper look-out had been kept on the left-hand side of the foot plate, that is, on the side of the wicket-gate, this accident would almost certainly have been avoided. A second whistle might have been given to warn the child and if it were observed to be unheeded, the engine could have been stopped as soon as it got into dangerous proximity to the child." I entirely agree with this observation of the learned Judge. But he has not paused for a moment to consider what, assuming this negligence on the part of the Railway Company, was the conduct of the plaintiff and whether her negligence such as it was, was not the more proximate cause of the accident. He brushed aside that whole aspect of the case holding that a child of seven could not possibly be guilty of contributory negligence. It was however at the same time assumed by the learned Judge that children, including in that expression children unable to take care of themselves should also be presumed to be included in the implied license given by the Railway Company. Though there was evidence of the plaintiff having been crossing the line, there is absolutely no evidence of the fact that this at any time came to the notice of the servants of the Railway Company and that they nevertheless permitted the plaintiff to cross knowing that she was still so young as not to be able to take care of herself. In the case of an implied license, the circumstances have to be looked to for the purpose of determining the terms of such implied license. In the case of *Jenkins* v. *Great Western Railway* (5) the learned Judges of the Court of Appeal refused to infer from the circumstances a license from the Railway Company for a child of tender years to go upon the main line of a Railway,

(12) (1842) 10 M. & W. 546; 12 L. J. Ex. 10; 6 Jur. 954; 152 E. R. 588; 62 R. R. 698.

(13) (1922) 1 A. C. 129; 91 L. J. P. 38; 126 L. T. 425; 66 S. J. 156; 38 T. L. R. 225.

even though the Jury found a license for such a child to cross the fence and go and play on stacks of timber close by. And to the same effect is the judgment of the Court of Appeal in the case of *Latham* v. *Johnson* (7). There is really no ground for the supposition made by the learned Judge that such case as *Stiefsohn* v. *Brooke Bond & Co.* (14) was no longer good law. There was nothing in *Cooke's case* (1) or in any of the later cases to question the principle on which that case was decided. In that case Lord Justice Fry held that a child of seven even in England could be guilty of such negligence as to disentitle it to damages. The learned Judge says the danger was evident even to a child. I fail to see how it could be said that the danger of a running engine would not be obvious to a child even of seven years in this country.

The dilemma I referred to was that if a child should be too young to take care of itself, no license could be implied in its favour and if it were not too young to take care of itself, it would be capable of contributory negligence. It was in reference to this that the learned Judge observes as follows :—"That would seem to afford a complete dilemma but the later cases negative the soundness of such a view." The later cases referred to by the learned Judge are the *Cooke's case* (1) and *Taylor's case* (9). In another place referring to the doctrine of contributory negligence by a child on which Lord Justice Fry based his judgment in the case of *Stiefsohn* v. *Brooke Bond & Co.*, (14) the learned Judges observe that the later decisions of English Courts have left no room for such a doctrine. The learned Judge, therefore, it is clear proceeded on the assumption that *Cooke's case* (1) and *Taylor's case* (9) had the effect of reversing all the earlier decisions of the English Courts with regard to the possibility of a child being guilty of contributory negligence. If I may respectfully say so, it is this erreneous supposition that led the learned Judge after much hesitation, as he himself says, to arrive at the decision at which he did. It seems to me that these cases did nothing of the kind, but merely proceeded on a principle fairly established for long time in English Law of the responsibility in law of a person leaving unguarded something intrinsically dangerous, something intrinisically allurring or tempting to child-nature at a place, whereas a person of ordinary prudence must have had reason to believe that children were frequenting. In other words, those two cases proceeded and are clearly based on the doctrine of what is called allurement. Allurement is an irresistible call to the emotions which for the time if it does not paralyse at any rate overwhelms the faculty of reasoning. I for my part do not see why the doctrine of allurement should be confined only to dogs and children and not be capable of extention even to adults if on the facts a proper case should arrive at any time. In *Latham's case* (7) Lord Justice Hamilton as he then was at p. 418* says this. "Of *Cooke's case* (1) the following things are clear. (1) Their Lordships declared no new law and overruled no old cases." It is remarkable that in the case of *Fairman* v. *Perpetual Investment Building Society* (6) Lord Backmaster who dissented from a majority of the House of Lords in that case has stated as follows at p. 80* "Now the liability in tort of the owner of premises to those who use them is carefully discussed in the case of *Latham* v. *Johnson* (7) and the statement of law there is a concise and accurate expression of well-known principles." Thus it is clear that the decision in *Latham's case* (7) in which *Cooke's case* (1) was referred to as an extreme case, was approved of by the House of Lords. It, therefore, follows that the learned Judge was wrong in regarding that in *Cooke's case* (1) the House of Lords overruled all the earlier cases. If then it is clear that *Cooke's case* (1) and *Taylor's case* (9) proceeded on the doctrine of allurement and not on any princple of law which had the effect of overruling all the earlier cases in English Reports which recognised the possibility of contributory negligence on the part of the children, it is significant that the learned Judge himself considers that the doctrine of allurement could not possibly apply to the present case. He says: "The only thing that could possibly be described as an allurement here is the mere invitation to take the short-cut by leaving the wicket gate unlocked which gave access to the Company's premises. A short-cut is in a sense an allurement to every one, but I doubt if it is so in the sense in which that phrase is

(14) (1868) 5 T. L. R. 684.

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used in the cases." The learned Judge was obviously disinclined to regard the engine as a trap and finally concludes by formulating what he considers to be the law in the following words: "To invite children to cross lines of Railway over which trains run is to expose them to the danger of being run over by a passing train or engine which must be apparent to the Railway Authorities and is not apparent to a child." I am unable to understand how from regarding the girl who is the plaintiff in this action as a mere licensee, the learned Judge insensibly passed on to regard her and refer to her as an invitee. By no stretch of English language could the plaintiff in this case be regarded as an invitee, and when the learned Judge speaks of an engine as a danger and not apparent to a child; I must take it that he means in the present case he regards the plaintiff as a child to whom a running engine was not an obvious danger. I regret it is not possible to agree with the learned Judge when he says that. But if indeed the plaintiff was so young as not to realise that a running engine was an obvious danger, we are only relegated to the dilemma and compelled to hold that the plaintiff had no right whatever to be there and that her parents had no right whatever to allow her to be there. For, adopting words which were used by the learned Judge himself in another place we might say that the appellant Railway Administration while allowing persons of ordinary intelligence to cross a line of rails cannot be supposed to have licensed them not to look and see whether there was an approaching engine or train before they stepped on the track.

For these reasons I have reluctantly come to the conclusion that the decree in favour of the plaintiff-respondent could not be supported and I, therefore, agree with my Lord the Chief Justice that the appeal should be allowed. As I have also found negligence on the part of the Railway Administration, I agree the more readily that there should be no costs allowed to either party.

In conclusion I feel bound to state that though I have felt compelled to uphold the law as I understand it and find it and allow the appeal, I agree entirely with the learned Officiating Chief Justice that it is eminently a case in which the appellant Railway Administration, in consideration of the infant plaintiff crippled and maimed for life by the accident, would, now that their legal liability has been declared against, see their way out of common humanity to make suitable provision for her. In the case of *Stiefshon* v. *Brooke Bond & Co.* (14), the Counsel on behalf of the defendant Company stated that irrespective of the decision of the Court the defendants would compensate the child for the injuries sustained, and I only trust that the learned Counsel in this case for the Railway Company would be in a position to make a similar announcement.

V. N. V. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 16 OF 1921.

March 17, 1924.

Present:—Mr. Justice Mukerji.

CHHADEK KARIKAR—DEFENDANT—APPELLANT

versus

SAYAD ALI KAVIRAJ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Specific Relief Act (I of 1877), s. 9—Possessory suit, decision in, whether operates as* res judicata—*Relevancy of decision—Evidence Act (I of 1872), ss. 13, 40, 41, 42, 43.*

Where the contention is that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question must be determined with reference to the provisions of s. 11 of the C. P. C. and it is not open to either party to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from the provisions of s. 11. [p. 980, cols. 1 & 2.]

A judgment in a case under s. 9 of the Specific Relief Act does not come either under s. 41 or under s. 42 of the Evidence Act and it is relevant only under ss. 13, 40 and 43 of the Act, that is to say, as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree in order either to found a further claim or to determine whether cognizance should or should not be taken of a suit or whether a trial should or should not be held. The use to which a decree passed in such a suit may be put in a subsequent suit between the parties is only to show that a right to possession was asserted and it was denied and a suit was instituted and was either decreed or dismissed. [p. 980, col. 2; p. 981, col. 1.]

Proceedings under s. 9 of the Specific Relief Act do not possess the character of finality which is essential to invest a decision with a character which will make it operative as *res judicata*. [p. 982, col. 1.]

(Case-law discussed.)

Appeal against a decree of the Subordinate Judge, Fourth Court, 24-Perganahs, dated the 30th of August 1920, reversing that of the Munsif, First Court, Basirhat, dated the 16th of April 1919.

Babu *Sitaram Bannerji*, for the Appellant.

Babu *Probodh Kumar Das*, for the Respondent.

JUDGMENT.—The two contentions urged on behalf of the appellant in this appeal are:—1st, that the finding in the suit under s. 9 of the Specific Relief Act to the effect that the plaintiffs were not in possession within six months before the institution thereof should have been held to operate as *res judicata*; and 2nd, that at any rate the judgment in that suit should have been considered as a piece of relevant evidence in the present suit.

With reference to the aforesaid contentions reliance has been placed upon the case of *Lillu* v. *Annaji* (1) and the case of *Jiaullah Sheikh* v. *Inu Khan* (2) and the principles laid down in the case of the *Duchess of Kingston* (3).

Now as to the case of the *Duchess of Kingston* (3) it was observed by the Judicial Committee in the case of *Gokul Mandar* v. *Pudmanund Singh* (4) while dealing with the provisions of s. 13 of Act XIV of 1882 (which so far as the present question is concerned has remained unaltered in s. 11 of Act V of 1908) that in certain respects the nature of which need not be referred to here "the enactment goes beyond s. 13 of the previous Act X of 1877 and also appears to their Lordships beyond the law laid down by the Judges in the *Duchess of Kingston's case* (3); they will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction". As the contention in the present case is substantially to the effect that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question has to be determined upon the provisions of s. 11 of the C. P. C., and it is not open to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from those provisions and which principle has been recognised by the Judicial Committee in a series of cases [*Krishna Behari Roy* v. *Bunwari Lall Roy* (5), *Soorjomonee Dayee* v. *Suddanund Mohapatter* (6), *Ram Kripal* v. *Rup Kuari* (7) and *George Henry Hook* v. *Administrator-General of Bengal* (8). Referring to the other cases cited, the case of *Lillu* v. *Annaji* (1)] is no authority for the proposition for which it was cited. It is no authority for the proposition that the finding of a Magistrate in a case under s. 530 of Act X of 1872 (corresponding to s. 145 of Act V of 1898) is conclusive in the sense that it will operate as *res judicata* in a subsequent civil litigation. All that was done was while contrasting an order as to possession made under that Act with the finding of a *Mamlatdar* in a possessory suit, West, J., held that the latter was of no value while the former was binding between the parties. That decision is of no assistance to the appellant in the present case. In considering to what extent if at all the decision in the possessory suit is admissible, one has to distinguish between the judgment or decree in the said suit and the findings on the issues on which it is based. So far as the decree is concerned it is admissible only if it is relevant under some particular section or other of the Evidence Act. As a rule judgments, orders or decrees are admissible if they are admissible under the provisions of s. 13, 40, 41, 42 or 43 of the Evidence Act. So far as a judgment in a case under s. 9 of the Specific Relief Act is concerned it does not come under s. 41, nor under s. 42, and it is relevant only under s. 13 and ss. 40 and 43, that is to say as evidence of a transaction or instance where the right to possession was claimed or disputed, and also as evidence to show that there was such a judgment or decree, or

(1) 5 B. 387; 3 Ind Dec. (N. s.) 255.
(2) 23 C. 693; 12 Ind. Dec. (N. s.) 461.
(3) (1776) 2 Sm. L. C (6th Ed.) 679, (10th Ed.) 713, (11th Ed.) 731; 34 H. L. J. 655; 20 Howell St. Tr. 37.
(4) 29 C. 707 at p. 709; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).
(5) 1 C. 144; 25 W. R. 1; 2 I. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213, 1 Ind. Dec. (N. s.) 93 (P. C.).
(6) 12 B. L. R. 304; 20 W. R. 377; I. A. Sup. Vol. 212; 3 Sar. P. C. J. 285 (P. C.).
(7) 11 I. A. 37 at p. 41; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. s.) 718 (P. C.).
(8) 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 121; 48 I. A. 187 (P. C.).

in order either to found a further claim or to determine whether cognisance should or should not be taken of a suit or whether a trial should or should not be held. In the case of *Radha Churn Ghutluck* v. *Zumuroonissa Khatoon* (9) prior to the passing of the Evidence Act where after recovering possession against a defendant in a suit brought under s. 15 of Act XIV of 1859, plaintiff sued to recover mesne profits collected by the defendant while in possession, it was held that the decree in the first suit was sufficient *prima facie* evidence of plaintiff's title to warrant a decree in his favour for mesne profits, unless defendant could prove a better title. It will be seen that all that was held in that case was that it was some evidence of the plaintiff's title; nothing about conclusive evidence. In the case of *Jiaullah Sheikh* v. *Inu Khan* (2) a decree for possession made under s. 9 of the Specific Relief Act was held to be some evidence of dispossession by the defendants in a subsequent suit against the same defendants to recover mesne profits. The decree was held not to operate as *res judicata*, in that case, on the ground that the Munsif who had tried the suit was not competent to try the subsequent suit. It is true that the decision of this Court in that case rested on that ground, but the observations of Macpherson, J., in that case are worth quoting :—"The decree in the former suit is not conclusive on the matter for this (if for no other) reason that the Munsif who passed it was not competent to try this suit which is beyond the pecuniary limit of his jurisdiction." Again,—"A decree under s. 9 of the Specific Relief Act is final to the extent to which it goes, and the effect of it is, rightly or wrongly, to put the plaintiff in possession, and to put upon the defendant, in any proceedings which he took, the burden of proving his title. The plaintiff in the present case is not, however, satisfied with what the decree gave him. He wants something more, and something which the Court...could not have given him. *It would certainly be very unfair, if the decree against which no appeal lay prevented the defendants, in their defence to the subsequent suit, from questioning the correctness of the grounds on which it was made,* although they could not question the decree itself to which full effect had already been given. The decree by putting the plaintiff in possession, puts him in a position to maintain a suit for damages for the alleged trespass; but, if the Court which made the decree had no jurisdiction to entertain the suit for damages, the decree could not be conclusive on the question of trespass, otherwise the superior Court dealing with the subsequent suit would in many cases merely have to determine the amount of the damages, and *an effect would be given to the* possessory decree which it was never intended to have. It is unnecessary to consider what the effect of the decree would be, if the Courts were the same or of concurrent jurisdiction". Although this precise question was left open, the character of a decree under s. 9 of the Specific Relief Act was very aptly described. That however was a case in which the decree obtained by the plaintiff was sought to be used against the defendant as evidence of the plaintiffs' possession and dispossession In the present case the decree sought to be used is one dismissing the plaintiff's suit. Section 9 of the Specific Relief Act itself provides that "Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof". The use to which the decree may be made in the subsequent suit is only to show that a right to possession was assered, and it was denied, and a suit was instituted and it failed.

Turning now to the finding in the judgment on the question as to when the plaintiff was dispossessed; in the first place the statements in the judgment as to the respective claims which the parties put forward are not evidence at all. If the defendant wanted to contradict the plaintiff with regard to his statement as to the date of dispossession, the plaint should have been put in and proved as containing an admission or a previous statement by which the plaintiff's statement in present suit could be contradicted. The finding of the Court on the date of dispossession is only admissible in evidence if it can operate as *res judicata*, because the only section applicable is s. 40 of the Evidence Act. For no other purpose would the finding be admissible. Having regard to the summary character of the proceedings and the fact that in the very section itself it is stated that nothing stated therein should bar any person from suing to establish his title and recovering possession, even if he fails to recover possession in the said proceedings,

(9) 11 W. R. 83; 23 B. L. R. (A. C. J.) 67; 1 Ind. Dec. (N. s.) 693.

it is evident that the Legislature did not intend to give the proceedings the character of finality which is essential to invest the decision with a character which will make it operative as *res judicata*.

The next question is as to whether it should be taken into consideration as evidence. As I have already said, I am of opinion that if it cannot operate as *res judicata* the said finding is of no evidentiary value in the determination of the question as to when the dispossession took place.

The contentions failing, the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 117 OF 1924.

August 18, 1924.

Present:—Mr. Justice Madhavan Nair.

CHINNAMMAL—RESPONDENT—PETITIONER

versus

PAPATHI AMMAL—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 8, 9, O. XXXIII, r. 15—Application for leave to sue in forma pauperis—*Dismissal for default—Fresh application, maintainability of.*

The dismissal of an application for leave to sue in *forma pauperis* for default of appearance does not amount to an "order refusing to allow the applicant to sue as a pauper" within the meaning of O. XXXIII, r. 15, C. P. C., and does not operate as a bar to a fresh application. [p. 983, cols. 1 & 2.]

Ranchod Morar v. *Bezanji Edulji*, 20 B. 86; 10 Ind. Dec. (N. S.) 616, *Baroda Dasi* v. *Upendranath Mandal*, 52 Ind. Cas. 562 at p. 563, *Atul Chandra Sen* v. *Raja Peary Mohan Mookerjee*, 33 Ind. Cas. 812; 20 C. W. N. 669 and *Howa* v. *Sit Shein*, 42 Ind. Cas. 803; 9 L. B. R. 93; 11 Bur. L. T. 77, distinguished.

Assuming that O. IX, C. P. C., is applicable to an application under O. XXXIII, where it is not proved that the dismissal of the previous application was not under r. 3 but under r. 8, r. 9 of the Order cannot be invoked as a bar to the maintenance of a later application. [p. 983, col. 2.]

It is incumbent on the party who relies on the bar of O. IX, r. 9, C. P. C., to show that the dismissal of the previous suit or application was under r. 8 of the Order. [*ibid.*]

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the order, dated the 6th November 1923, of the Court of the Subordinate Judge of Ootacamund Nilgiris, in O. P. No. 28 of 1923.

Mr. *S. Panchapakesa Iyer*, for the Petitioner.

Mr. *S. E. Sankara Iyer*, for the Respondent.

JUDGMENT.—This is an application under s. 115 of the C. P. C. to revise an order made by the Subordinate Judge at Ootacamund granting permission to the respondent to sue in *forma pauperis*.

The respondent Papathi Ammal claimed certain properties with mesne profits on the ground that they belonged to her mother, Maruthayi (who died on 1904) as her *stridhanam* and that the decree in O. S. No. 91 of 1907 on the file of the Sub-Court at Ootacamund which the present petitioner obtained against Maruthayi's son in respect of the said properties and the purchase thereunder are not valid and binding on her. With a view to enforce her claim, she filed O. P. No. 19 of 1919 on the file of the Sub-Court for permission to sue as a pauper. The present petitioner Chinnammal opposed this application (Ex. II). On the 30th of March 1920 when the petition came on for hearing Papathi Ammal, the respondent was absent and her Counsel stated that he had no instructions. The application was accordingly dismissed on the ground of her absence (Ex. III). It is not clear from the records before me if Chinnammal or her Counsel was present on the occasion.

After the lapse of more than three years, from the dismissal of the previous application, Papathi Ammal filed O. P. No. 28 of 1923, out of which the present civil revision petition has arisen, for permission to sue as a pauper in respect of the same cause of action. Chinnammal filed an objection statement denying the alleged pauperism and contending that the dismissal of O. P. No. 19 of 1914 precluded her from maintaining this second petition. At the hearing, however, the only ground on which the petition was resisted was that the dismissal of the previous petition operated as a bar to the present petition under O. XXXIII, r. 15, C. P. C. The Subordinate Judge overruled this contention and granted leave as prayed for.

In this Court the order of the learned Subordinate Judge is attacked by the petitioner, Chinnammal, on three main grounds, namely, (1) that the present petition is barred under O. XXXIII, r. 15, C. P. C., (2) that it is barred under O. IX, C. P. C., and (3) that it should have been rejected, as the

cause of action was obviously barred on the face of the petition itself.

Several decisions have been cited to me in support of the contention that the dismissal of an application in *forma pauperis* for default of appearance amounts to an "order refusing to allow the applicant to sue as a pauper" within the meaning of O. XXXIII, r. 15, C. P. C. but they have no direct bearing on the question at issue as none of them dealt with a case of dismissal for default of appearance. In one set of cases the facts show that the first application was dismissed as the applicant did not wish to proceed with the application [*vide* the decisions in *Ranchod Morar* v. *Bezanji Edulji* (1), *Baroda Dasi* v. *Upendranath Mandal* (2) and *Begum* v. *Jafar Hassan* (3); the question was whether the rejection of a petition under O. XXXIII, r. 5 (*a*) operated as a bar under O. XXXIII, r. 16, C. P. C.— see the decision in *Atul Chandra Sen* v. *Raja Peary Mohan Mookerjee* (4) and *Howa* v. *Sit Shein* (5). In both the sets of cases the petitioner was present at the hearing and there was, in consequence, no question about dismissal for default of appearance and the legal effect thereof.

The question remains whether a dismissal for default of appearance amounts to a refusal to allow the applicant to sue as a pauper. *Prima facie* refusal would indicate an enquiry and a dismissal of the application on the merits; at any rate, it cannot be said that there was a refusal where the applicant did not appear on the date of the hearing of the application and invite the Court to take it into consideration or deal with it in any manner. The observation of Chitty, J. in *Baroda Dasi* v. *Upendranath Mandal* (2) to the effect that "This is not a case of an application being dismissed for want of appearance" suggests that there is a difference between dismissal based upon refusal to proceed and that based upon default of appearance and that in his view the latter would not amount to a refusal to grant leave under O. XXXIII, r. 15, C. P. C. The decision in *Maung Aung Tun* v. *Ma E Kin* (6) appears to be to some extent in point. In that case it is true that the dismissal was for the absence of both parties— a point which is not clear, as already stated, in the present case; but so far as the question whether a dismissal for default of appearance would amount to an order refusing permission is concerned, the presence or absence of the respondent can have obviously no material bearing. Reference may also be made to the decision in *Rajah Bhoj Singh* v. *Ranee Maha Koonwer* (7) which held that the striking off of a pauper application for the absence of the applicant did not amount to a refusal under s. 310 of Act XIV of 1859.

In the result, I am of opinion that the dismissal of a prior application for default of appearance does not operate as a bar under O. XXXIII, r. 15, C. P. C. and that, therefore, there is no force in the first ground taken before me by the petitioner.

The second contention on behalf of the petitioner is that O. IX, C. P. C., governs proceedings under O. XXXIII, C. P. C., and that, consequently, the present application has been misconceived. The argument is that the respondent should have taken proceedings for setting aside the dismissal for default of the first application and not filed a second application in respect of the same matter. Assuming that the provisions of O. IX, C. P. C., are applicable to these proceedings it does not necessarily follow that the dismissal of one application for default of appearance bars a similar application [see the decision in *Maung Aung Tun* v. *Ma E Kin* (6)]. Order IX, C. P. C., contemplates two cases of dismissal for default of appearance with distinct legal consequences attaching to each dismissal. Where the dismissal is under r. 3, O. IX, there is no bar to a fresh suit, while a dismissal under r. 8 of O. IX, precludes a second suit. Hence in seeking to apply O. IX, C. P. C. it is essential to ascertain under what rule was the dismissal of the first application made. In the present case, as I have already stated, it is not clear from the records whether the present petitioner, Chinnammal, was or was not present when O. P. No. 19 of 1919 was dismissed for default on the 30th of March 1920. It is incumbent on the party who relies on the bar of O. IX to show that the dismissal of the previous application was under r. 8. This the petitioner has failed to do. She did not resist the present application in the lower Court on any such ground

(1) 20 B. 86; 10 Ind. Dec. (N. S.) 616.
(2) 52 Ind. Cas. 562 at p. 563.
(3) 73 Ind. Cas. 897; (1824) A. I. R. (L.) 312.
(4) 33 Ind. Cas. 812; 20 C. W. N. 669.
(5) 42 Ind. Cas. 803; 9 L. B. R. 93; 11 Bur. L. T. 77.
(6) 76 Ind. Cas. 785; 2 Bur. L. J. 217; (1924) A. I. R. (R.) 161.
(7) 3 Agra H. C. R. Misc. 1.

and did not care to specifically allege or prove that she was present at the dismissal of O. P. No. 19 of 1919. In her objection statement after the dismissal of O. P. No. 19 of 1919 she vaguely stated that the petitioner was not entitled to present the petition, but at the hearing before the Subordinate Judge she took her stand exclusively on the bar under O. XXXIII, r. 15, C. P. C., and did not make the faintest reference to O. IX, or to the disability arising thereunder. In the absence of proof that she was present at the dismissal of O. P. No. 19 of 1919, she cannot invoke the aid of rr. 8 and 9 of O. IX, C. P. C. The argument has been in fact advanced for the first time in this Court and the material fact to support it has not been established. I do not see any valid reason to give a further opportunity to allege or prove fresh facts or to entertain arguments which require the elucidation of fresh facts. Hence the argument based upon O. IX, C.P. C., must fall to the ground.

In the above view it is unnecessary to examine whether O. IX, C. P. C., applies to proceedings connected with pauper applications. In *Kanagammal* v. *Panchapakesa Odayar* (8), Sadasiva Iyer, J., has expressed the opinion that s. 141, C. P. C., governs proceedings connected with pauper applications and it follows therefrom that O. IX, would also apply to such proceedings; but the decision in that case was mainly rested on the ground that the Court had inherent powers to direct the amendment of applications. However, in the view that the petitioner cannot be permitted to argue the question for the first time in this Court it is not necessary to enlarge on this aspect of the case.

The third ground also must fail for the reason that it was not taken in the lower Court. Papathi Ammal says that she attained majority in October 1917 and that the cause of action for possession arose since 1917 when she attained majority and for mesne profits in and since 1920. This has not been denied by the petitioner and there is no allegation in the objection petition, that there was no subsisting cause of action. The respondent does not say in her petition that her suit is to set aside a transfer of property made by her guardian; and, if she attained majority in 1917 *prima facie* her suit is not barred by limitation. An investigation of further facts may be necessary for a satisfactory disposal of this petition on the question of limitation. I am not inclined to allow this new question of limitation to be raised for the first time in the hearing of this Civil Revision Petition.

This Civil Revision Petition, therefore, is dismissed with costs.

V. N. V.

Z. K. *Petition dismissed.*

(8) 23 Ind. Cas. 82; 26 M. L. J. 343; (1914) M. W. N. 327.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION No. 36 OF 1922.

February 20, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Richardson.

MADHORAM RAGHUMULL AND ANOTHER —APPELLANTS

versus

THE OFFICIAL ASSIGNEE AND ANOTHER —RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 36, 56—Fraudulent preference—Assignment to creditor before insolvency—Consideration and good faith—Burden of proof—Official Assignee, application by—Jurisdiction of Court—Examination of assignee under s. 36—Statement, admissibility of.

Where a person makes an assignment of property at a time when he is unable to pay his debts when they become due, and within a few days of the assignment he is adjudicated insolvent, the assignment, as between the insolvent and the assignee, is fraudulent and void as against the Official Assignee. [p. 988, col. 2.]

If, after it has been established that an assignment is fraudulent and void as against the Official Assignee, the assignee desires to bring himself within the provisions of sub-s. (2) of s. 56 of the Presidency Towns Insolvency Act, the onus lies upon him to show that not only did he give valuable consideration for the assignment, but also that he acted in good faith. [*ibid.*]

A firm, *SM*, was, on the application of one of its creditors, adjudicated insolvent. About two weeks before the adjudication order, *SM* assigned to *RD* another of its creditors, certain outstanding debts due to the firm. Later, *RD* assigned these debts to *MR*. The adjudicating creditor of *SM* challenged the assignment by *SM* to *RD*, and the latter was called upon by the Official Assignee for inspection of the assignment to him. *RD* and *MR* were examined, under s. 36 of the Presidency Towns Insolvency Act, by the Registrar in Insolvency. Thereafter the Official Assignee applied to the Court to declare both assignments void as against him, and both assignments were set aside as fraudulent and void under s. 56 of the Presidency Towns Insolvency Act. On appeal by *MR*:

Held, that the Court had jurisdiction to deal with the application of the Official Assignee, and the depositions of *RD* and *MR* taken before the Registrar in Insolvency were admissible in evidence against

the deponents for the purpose of showing the circumstances in which they took their assignments, and for the purpose of ascertaining all the facts which were material to that question.

Appeal against an order of Mr. Justice Greaves, dated the 13th June 1922.

Messrs. *A. N. Chaudhuri*, *K. P. Khaitan* and *J. M. Majumdar*, for the Appellants.

Messrs. *W. Gregory* and *Ashraf Ali*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Madhoram Raghumull against an order which was made by my learned brother Mr. Justice Greaves on the 13th of June 1922, by which he declared that two assignments dated respectively the 2nd of March 1921 and the 29th of June 1921 were void as against the Official Assignee under the provisions of s. 56 of the Presidency Towns Insolvency Act. The appellants have appealed against that order, and it is necessary to state a few facts, about which there is no dispute.

The insolvents were Surajmull and Mongalchand. They traded under the name of Puran Chand Hurruck Chand. They were adjudicated insolvents at the instance of a creditor on the 15th of March 1921. On the 2nd March 1921, thirteen days before the adjudication, Surajmull and Mongalchand by a deed of assignment assigned to Raghunath Das Sewlal, a firm of traders in Calcutta who were creditors of the insolvents, certain outstanding debts which were alleged to be owing to the insolvent firm of Puran Chand Hurruck Chand. The debts are set out in the schedule to the deed, and amounted roughly speaking to about Rs. 60,800. The proprietors of the firm of Raghunath Das Sewlal is Ramlal Pachisia. On the 29th of June 1921, Ramlal Pachisia assigned the outstanding debts, which had been assigned to him by the insolvent firm, to the appellants for the consideration of Rs. 30,000. A creditor, one Kissen Chand Banthia, who was the adjudicating creditor, had taken steps challenging the assignment from the insolvent firm to Ramlal Pachisia: and, on the 3rd May 1921 the Official Assignee wrote to Ramlal Pachisia for inspection of the assignment to him. On the 20th of June, according to the affidavit which was before the learned Judge, Ramlal Pachisia appeared before the Registrar in Insolvency and applied for a week's adjournment to enable him to produce the deed of assignment as the same was with the *munim gomastha* who was then in his native village and absent from Calcutta. The result was that a week's time was granted to him. That week's time expired on the 27th of June, and, on the 27th of June he appeared again and asked for further time until the 29th of June, and that time was granted by the Registrar in Insolvency. On the 1st of July Ramlal Pachisia appeared before the Registrar in Insolvency and said that he was unable to produce the deed of assignment to him, inasmuch as he had on the 29th of June assigned his right, title and interest under the assignment of the 2nd of March to the appellants for the sum of Rs. 30,000. Then certain parties were examined under s. 36 of the Presidency Towns Insolvency Act before the Registrar in Insolvency and, in order of date, Ramlal Pachisia was examined on the 1st of July 1921, Mongalchand, who was one of the insolvents, was examined on the 8th of August 1921; then one of the partners in the appellants' firm, Raghumull, was examined on the 1st of September; then Gopaldas Modi, another partner in the appellants' firm, was examined on the 19th of January 1922, and Nathmull, another partner in the appellants' firm, was examined on the 20th of February 1922; and, on the 4th of April, the Official Assignee made the application to the learned Judge, who was taking insolvency matters on the Original Side, in respect of which my learned brother's judgment was passed.

The application was as follows: "Take notice that on the 1st day of May 1922 .....an application will be made..... for an order that the original deed of assignment of all debts due to the insolvents.....and executed by them in favour of.....Raghunath Das Sewlal on the 2nd day of March 1921 as also the original deed of assignment executed by..... Raghunath Das Sewlal by which they purported to assign their right, title and interest under the aforesaid deed of assignment, dated the 2nd day of March 1921, may be declared fraudulent and void as against the Official Assignee and the same may be delivered over to him or such other order may be made as to this.....Court may seem fit." The grounds were stated to be, "Affidavit of Mulchand solemnly affirmed on the the 4th day of April 1922

and the proceedings in this matter." Mulchand was a *gomastha* employed by Kissen Chand Banthia, the adjudicating creditor. We were informed by the learned Counsel for the Official Assignee that when this application was made to the learned Judge he directed that the Official Assignee should have control of the application. The result of the learned Judge's judgment was, as I have already stated, to set aside both these assignments as being fraudulent and void within the meaning of s. 56 of the Presidency Towns Insolvency Act.

In the first place it was stated that there was some doubt as to whether the learned Judge had jurisdiction to deal with the application when it was made in the form which I have described. The learned Counsel appearing for the appellants stated that he did not wish to argue that the learned Judge had no jurisdiction, on this occasion. Inasmuch as the learned Counsel stated that there was some doubt about it, in my judgment it is advisable to set that doubt at rest. In my judgment the learned Judge clearly had jurisdiction to deal with this application under s. 56 of the Presidency Towns Insolvency Act: and, the only further question upon this part of the case, is whether the learned Judge was entitled to act upon the evidence which was before him.

Now, as to this, the first point raised was that the learned Judge ought not to have admitted or considered the deposition of the insolvent Mongalchand (the deposition which the insolvent made before the Registrar in Insolvency) as against the appellants: and, the same point was taken by the learned Counsel who appeared for Raghunath Das Sewlal the firm of which Ramlal Pachisia is the proprietor, and who are respondents to this appeal.

I do not think it necessary to give any decision upon that part of the case, because I am of opinion that it is clear from the learned Judge's judgment that in arriving at the decision at which he did, he relied upon evidence which was independent of the deposition of the insolvent and, further because I personally do not intend to rely upon the evidence of the insolvent in my judgment when I deal with the facts of this case. As at present advised, however, I am of the opinion that the deposition of the insolvent was not admissible as evidence against the appellants or Pachisia, but I do not decide this point and I leave that question open if it ever becomes necessary to decide it on another occasion.

The next point, which was urged by the learned Counsel for Ramlal Pachisia, was that the deposition of Ramlal Pachisia before the Registrar in Insolvency was not admissible against his client Ramlal Pachisia. I think he was constrained to admit in the end that that was admissible if it amounted to an admission by his client Ramlal Pachisia. In my opinion it was admissible: in the first place, because his evidence in my judgment, taking it altogether, practically amounted to an admission that he knew he was obtaining a fraudulent preference in his favour over the other creditors of the insolvent; in the second place in any event it was admissible for the purpose of showing the circumstances in which he took the assignment from the insolvent.

The learned Counsel said that it was desirable that the practice of this Court should be laid down clearly. In my judgment the practice, which is adopted in England with regard to an application of this kind, should be followed. If the Official Assignee has to apply to the learned Judge for the purpose of setting aside an assignment, as in this case, on the ground that it was fraudulent and void within the meaning of s. 56 and he intends to rely upon depositions which have been made by parties before the Registrar in Insolvency at an enquiry held under s. 36 of the Presidency Towns Insolvency Act, he should give notice to the opposite perties of his intention so to do. It will then be open to the opposite parties, if they so desire, to get copies of the depositions of which notice has been given. It is to be noted that in effect such notice was given in this case, inasmuch as the grounds of the application included not only the affidavit of Mulchand but also "the proceedings in this matter." In my judgment, however, the notice should be in a more definite form, and the applicant should specify in such notice the depositions taken before the Registrar in Insolvency, on which he intends to rely.

I have dealt with the question of the learned Judge's jurisdiction and of the procedure to be followed upon such an application as this; I now propose to deal with the merits of the case.

The first question that arises is whether the learned Judge's judgment as to the transaction between the insolvent and Ramlal Pachisia is correct. The learned Judge said : "I think it is clear on the evidence of Ramlal Pachisia that the object of the assignment of 2nd March was to obtain a preference over other creditors which is clearly bad and void as against the Official Assignee under the provisions of s. 56." This matter obviously goes to the root of the case, because if that finding is not correct, then, of course, the appellants have no case to answer, because, if the assignment from the insolvents to Ramlal Pachisia stands, it follows that the assignment from Ramlal Pachisia to the appellants also stands.

I am of opinion that the learned Judge was fully justified in coming to the conclusion that the assignment of the 2nd March was made with a view and for the purpose of giving Pachisia a preference over the other creditors, and was fraudulent and void within the meaning of s. 56. The material part of that section is as follows:— "Every transfer of property, every payment made . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

Now, there cannot be the smallest doubt on the evidence of Ramlal Pachisia that on the 2nd March 1921 the insolvents were unable to pay their debts as they became due from their own money. Nor is there any doubt that the insolvents were adjudged insolvents within three months after the date of the 2nd of March, and the only question is whether the assignment in this case was made by the insolvent with a view to give the creditor Pachisia preference over the other creditors.

The learned Judge referred to certain parts of Ramlal Pachisia's evidence. I desire to refer to the same parts and other pars of his evidence as well :

"*Q.*—When did you first look into your books and find this out?

A.—I do not remember the date. When I heard that the business of the insolvents was about to fail and when I found that they would not pay me my dues in spite of repeated demands I looked into my books."

Then later on he was asked,

"*Q.*—Did you ascertain at the time that they were in insolvent circumstances?

A.—I found that out when I demanded the money.

Q.—You satisfied yourself that they were in insolvent circumstances?

A.—When I was demanding money they did not pay me. So my suspicion about their insolvency was aroused and I put pressure on them to re-pay my money but no payment was made and I came to the conclusion that they were unable to pay. Thereupon the question of assignment of the insolvents' outstanding to me was broached by them. They said to me : 'We have no money to pay. We have outstandings due to us ; you may take an assignment of them.' "

Further he was asked.

"*Q.*—You also made enquiries from people in the market that Surajmull and Mongalchand were unable to pay their debts.

A.—There was no occasion for me to enquire. I got tired of sending for my money. There would be rumours in the market if a dealer fails to meet his liabilities.

Q.—You ascertained that the insolvents were unable to pay their debts when they became due.

A.—Yes."

Then later on,

"*Q.*—Did you look into their books?

A.—No.

Q.—How was the list prepared which was annexed to the assignment?

A.—The insolvents prepared the list. I never checked it. I was only too glad to get an assignment for what it was worth before other creditors came down.

Q.—Everything was put through as hurriedly as possible?

A.—Yes."

I think those are all the passages to which I need refer.

Now, first, with regard to the question of pressure : It is to be noticed that Ramlal Pachisia did not specify in so many words what was the nature of the pressure which he alleged he put upon the insolvents. I take it from his evidence to have been no more than a constant demand for his money. He said that inspite of his repeated demands he could not get any money. In the second place, it is to be noticed that such pressure, whatever it was, was useless

and failed. He says: "When I was demanding money, they did not pay me. So my suspicion about their insolvency was aroused and I put pressure on them to repay my money, but no payment was made and I came to the conclusion that they were unable to pay." In my opinion it is clear that there was no further pressure than mere demands, and when those demands were not complied with, Pachisia came to the conclusion that there was no use pressing any further, and he took an assignment of all the outstanding debts of the insolvents.

My learned brother during the course of the argument drew the attention of the learned Counsel to a passage in Sir George Jessel, M. R.'s judgment in *Ex parte Hall, In re Cooper* (1) to which I refer for the purpose of illustrating what I mean with regard to pressure. The learned Master of the Rolls said at page 585* : "Can that delivery of the bills to Brown be said to have been made in consequence of *bona fide* pressure on the part of the appellant? It is plain that it was the voluntary act of the bankrupt. It appears to me that it would be absurd to call it pressure. A man says to his creditor, 'I am about to become bankrupt, or I shall stop payment in a week.' The creditor says, 'Pay me my debt, or I will sue you for it.' Can that be called *bona fide* pressure by the creditor? When you consider the matter, it seems to me that it would be absurd so to call it. And that is exactly what occurred in the present case. Of course it would be an entirely different matter if the creditor did not know of the state of his debtor's affairs." In the present case, there was an admission of Ramlal Pachisia that he satisfied himself that the assignors were in insolvent circumstances, that their business was about to fail and that his repeated demands were of no avail: and, I adopt what was said by the learned Master of the Rolls in the abovementioned case, which in some respects has a considerable likeness to this, that it would be absurd to call what Pachsia did "*bona fide* pressure."

Having regard to these facts and to the reasoning adopted by the learned Judge, in my judgment it is clear that the assignment of the 2nd March 1921 was made with a view to give Ramlal Pachisia a preference over the other creditors. Consequently, inasmuch as the assignment was made at a time when the insolvents were unable to pay their debts when they became due, and inasmuch as they were adjudicated insolvents within 13 or 14 days of the assignment, as between the insolvents and Ramlal Pachisia the assignment of the 2nd of March 1921 must be deemed to be fraudulent and void as against the Official Assignee.

Then arises the question as to whether the assignment of the 29th June 1921 by Ramlal Pachisia to the appellants can stand.

In the first place, in my judgment, there can be no doubt that if the appellants, after it has been established that the assignment by the insolvents to Ramlal Pachisia was fraudulent and void as against the Official Assignee, desired to bring themselves within the provisions of sub-s. (2) of s. 56, the onus lay upon them, the appellants, to show that not only did they give valuable consideration for the assignment but also that they acted in good faith. I rely upon the terms of sub-s. (2) of s. 56, which, in my opinion, make it plain that the onus is upon the appellants: the reason why the onus is laid upon the appellants in the circumstances of this case may be found in the judgment of the Court of Appeal in the case of *Ex parte Tate* (2).

The next question which arises is whether the appellants have discharged that onus. The learned Counsel Mr. Khaitan for the appellants has urged that the onus has been discharged by reason of the affidavit of Gopaldas Modi, a partner of the appellant firm, which was filed in these proceedings; and he relied principally upon paras. 3 and 6. I will not read both the paragraphs in detail. The main allegations are contained in para. 3 which is as follows:—"That with reference to para. 7 of the said affidavit I say that my firm wanted to start a business of Commission Agency and for that purpose purchased the outstandings from Raghunath Das Sewlal for the sum of Rs. 30,000. The said amount has been paid by cheque and the *factum* of payment duly appears in the firm's Cash Book and Bank Pass Book." The learned Counsel argued that that was the only evidence which the learned Judge was entitled to entertain with regard to this

(1) (1876) 19 Ch. D. 580; 51 L.J. Ch. 556; 46 L.T. 549.

*Page of 19 Ch. D.—[*Ed.*]

(2) (1876) 35 L. T. 531; 25 W. R. 52.

point. In my judgment that argument ought not to be adopted. In my judgment it was open to the Court to consider the depositions of the partners of the appellants' firm for the purpose of ascertaining the circumstances relating to the assignment which they took on the 29th of June 1921, and for the purpose of ascertaining all the facts which are material to that question.

With regard to the payment of the Rs. 30,000, the learned Judge has found as fact that that was made. There is evidence that a cheque was drawn by one of the partners of the appellants' firm and that that cheque was debited to the appellants' firm's account in the Central Bank of India. The date of this cheque was the 29th June 1921 and was debited to the appellants' firm's account in the Bank on the 2nd of July. There was some question raised during the examination of Nathmull, one of the partners of the appellants' firm, whether there was sufficient money in the Bank to meet that cheque, and it was suggested in the examination by Mr. Chatterjee that there was only Rs. 12,756 to their credit on the 29th June. The answer was, "No, the balance was Rs. 44,668. We had the Pass Book before us. It was exhibited at the hearing before the learned Judge. It is obvious from the record of the examination that the above-mentioned question related to the Pass Book. On looking at the Pass Book it appears that there was on the 29th of June 1921, a debit balance of something like Rs. 33,000. Both the learned Counsels are agreed that that is what is shown by the Pass Book itself. How these two sums of Rs. 12,756 and Rs. 44,668 were arrived at by the persons who respectively mentioned these figures, no one was able to explain. The fact remains, however, that a sum of Rs. 30,000 was debited to the appellants' account on the 2nd of July. Though I have some doubt on the matter I assume that the payment by the cheque was a *bona fide* payment, there still remains the question whether the assignment was taken in good faith. The learned Judge came to the conclusion that it was not. In my judgment, in the evidence of the partners of the appellants' firm, there is ample justification for that finding. Some of the evidence which justifies that finding may be referred to shortly: in the first place, it appears that when Gopaldas Modi was approached by a man called Gungadas Bhutter who was a *gomastha* of Raghunath Sewlal, Gungadas Bhutter informed him that the outstanding debts would amount to about 65 or 66 thousand rupees, that Puran Chand Hurruck Chand had closed their business, had left Calcutta and had sold their outstanding debts to Raghunath Sewlal. He, Gopaldas Modi, admitted that that statement was made to him. He further admitted that when his firm took the assignment on the 29th of June, they got no papers, nothing but the assignment and 4 or 5 letters received by Raghunath Das Sewlal in reply to the letters of demand sent by them to the debtors. Beyond that they got no papers at all. He further admitted that he did not know the names of the partners of this firm but that he was told that they had closed their business. He further stated that he had enquired whether they were insolvents.

"*Q.*—You were told that they had closed their business.

A.—Yes.

Q.—Did you not enquire whether they were insolvents?

A.—I enquired and I was told that they had closed their business and left Calcutta."

What can that mean? When the enquiry was whether they were insolvents, and the answer was that they had closed their business and left Calcutta and sold their outstandings to one creditor, the conclusion to which any one would naturally come under the circumstances would be that the firm was insolvent.

Then he was asked again,

'*Q.*—What did you enquire?

A.—I enquired why Puran Chand Hurruck Chand had closed their business and sold the outstandings.

Q.—Why had they closed?

A.—I did not enquire.

Q.—What did you enquire about?

A.—I enquired about the insolvency of the debtors and came to know from two or three commission agents that I would be able to realise the amount from them.

Q.—Did you enquire who the persons were who represented the firm of Puran Chand Hurruck Chand?

A.—No."

Again he was asked,

"*Q.*—Did you make any enquiries for the books of account of Puran Chand Hurruck Chand?

A.—No."

He was asked again whether he examined the books. He said, "I did not examine the books. I was busy and I did not think it necessary either to examine the books."

"*Q.*—You were going to buy the outstandings, why did you not think it necessary to see how much was due?

A.—I looked into the assignment in favour of Raghunath Das Sewlal and I believed that everything was correct.

Q.—Then I take it that you made no enquiries as to whether the assets were realisable or not?

A.—I simply asked Raghunath Das Sewlal's man as to how much would be realised and what profit I would be able to make.

Q.—Who was the man of whom you made the enquiry?

A.—Gungadas Bhutter.

* * * * *

Q.—What step did you take to get possession of the account books for the purpose of realising the outstandings?

A.—Up-to-date I have taken no steps.

Q.—Where are the books?

A.—I have now come to know that they are in the possession of the insolvents."

Therefore, it appears that he admitted that he had made certain enquiries but he got no satisfactory answers and that these enquiries were made sometime about April or May 1921. Puran Chand Hurruck Chand were adjudicated insolvents on the 15th of March 1921, and this assignment of the 29th of June 1921 was taken by the appellants under the circumstances abovementioned. It seems to me that it is impossible to say that this assignment of the 29th of June 1921 was an assignment taken by the appellants in good faith.

There are other matters in the evidence of the appellants which were relied upon by the learned Counsel for the Official Assignee; but, in my judgment, it is not necessary for me to deal with them in detail. It is sufficient for me to say that in view of the admission made by the appellants in their depositions before the Registrar in Insolvency, which, in my opinion, were certainly admissible for the purpose of refuting the statements contained in the affidavit which was put in by one of the appellants, in my judgment, the appellants have not discharged the onus of showing that the assignment of the 29th June 1921 was taken by them in good faith.

It was urged on behalf of the appellants on the question of procedure that injustice or hardship might be experienced by the respondents to an application, if the procedure, which was adopted in this case is followed. I was not impressed by that argument because it appears that the learned Judge gave the learned Counsel who was appearing for the appellants an opportunity of calling evidence if he so desired The evidence in this case on which the judgment was founded, consisted of the depositions of Ramlal Pachisia and the members of the appellant firm. If any of the parties had desired to make any explanation or to give any further evidence in respect of the matters as to which they had been examined before the Registrar in Insolvency they had ample opportunity of so doing.

Consequently, in my judgment, the learned Judge's judgment was correct and that this appeal ought to be dismissed.

The learned Counsel for the Official Assignee drew our attention to the order which the learned Judge made as regards costs. In the last line of his judgment will be found this direction, "The Official Assignee is entitled to the costs of this application including the costs of the examination under s. 36." The learned Counsel pointed out that the Official Assignee did not conduct the proceedings under s. 36, but that the adjudicating creditor did. In my judgment that order, therefore, ought to be altered, and should run as follows:—"The Official Assignee is entitled to the costs of this application, and in his capacity of Official Assignee on behalf of the adjudicating creditor to the costs of the examination under s. 36." With that variation, in my judgment, the learned Judge's judgment and order should be sustained and this appeal dismissed.

The appellants must pay the Official Assignee his costs of this appeal. The other respondents, the firm of Raghunath Das Sewlal will pay their own costs of this appeal.

Richardson, J.—I agree. These proceedings under s. 56 of the Presidency Towns Insolvency Act were commenced by notice of motion in bankruptcy served on the firm of Raghunath Das Sewlal of which the sole proprietor was Ramlal Pachisia, and on the appellants' firm of Madhoram Raghumull.

The relief prayed for was that the assignment by the insolvent firm of Suraj-

mull Mongalchand, dated 2nd March 1921, in favour of Ramlal Pachisia and the transfer by the latter on the 29th June 1921, of his right, title and interest under the assignment to the appellants' firm should be declared fraudulent and void as against the Official Assignee.

The questions of procedure which have been raised have been dealt with by my Lord and I have nothing to add.

As against Ramlal Pachisia his own deposition taken under s. 36 of the Presidency Towns Insolvency Act is clearly admissible in evidence on these proceedings and no other evidence need be considered.

It was said that the assignment of 2nd March in his favour was not a preference within the meaning of s. 56 of the Act because it was induced by pressure put upon the insolvent so that he was not a free agent in the matter. The authorities such as *Sharp* v. *Jackson* (3) show that the word "preference" imports and involves freedom of choice and that no transfer which is not voluntary in the sense that it is a free act of the insolvent, is a preference which under the Act is to be deemed fraudulent and void as against the Official Assignee. But what did the pressure amount to, which is said to have been exercised in the present case? On his own showing Ramlal Pachisia knew at the time that the insolvent firm could not pay their debts. He admits that he was told what the position of the firm was. Though the exact form which the suggested pressure took is not stated, I may assume that it took the form of a threat of legal proceedings. But in such circumstances such a threat is meaningless and I will not again quote the language of the Master of the Rolls, Sir George Jessel, in *Ex parte Hall, In re Cooper* (1). I agree with my Lord that there is no pressure shown here which can be described as *bona fide* pressure by which the members of the insolvent firm were prevented from acting as free agents. In the result, therefore, I agree with the learned Judge that the assignment in favour of the respondent firm by Ramlal Pachisia must be deemed to be fraudulent and void.

As to the appellants' firm, I will not deal with the facts again in detail. We have an assignment by the insolvent firm in favour of a creditor which is found to be a fraudulent preference. Here again, no evidence need be considered as against the members of the appellant firm except their own depositions taken under s. 36. Confining myself to those depositions as they stand, I cannot imagine that any honest business man would have entered into a serious transaction, involving the payment of a sum of Rs. 30,000, without making enquiries which, as the learned Judge observed, these gentlemen deliberately abstained from making. The learned Judge has found, and I am willing to concede, that the sum of Rs. 30,000 was, in fact, paid by a cheque which was cashed at Ramlal Pachisia's Bank. But like the learned Judge, even though this cheque was handed over the counter of the Bank and cashed, I am still far from being convinced that the appellant firm have brought themselves within the protection of sub-s. (2) of s. 56 as persons making title in good faith and for valuable consideration through or under a creditor of the insolvent. We were referred by the learned Counsel to the definition of "good faith" which appears in cl. (20) of s. 3 of the General Clauses Act of 1897. It is there said that "A thing shall be deemed to be done in goodfaith where it is in fact done honestly, whether it is done negligently or not." But clearly an appeal to that definition begs the whole question which is here in issue. It is thus assumed that the thing here was done honestly. In my opinion, the appellant firm, in the transaction with which we are concerned, did not act honestly or in good faith within the meaning of s. 56, sub-s. (2).

The result, therefore, is that I agree with my Lord that this appeal should be dismissed.

N. H. *Appeal dismissed.*

(3) (1899) A. C. 419, 68 L. J. Q. B. 860; 80 L. T. 841; 6 Manson 264.

MADRAS HIGH COURT.

CIVIL APPEAL No. 136 OF 1922.

October 1, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Jackson.

RAMASAMI *alias* PALUNNA NATHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

M. P. M. MUTHIAH CHETTIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Suit to

enforce obligation created by decree, whether maintainable—Suit to recover money from partner—Limitation.

In India no action lies on an executable judgment, the only remedy of the decree-holder being by way of execution. This principle is embodied in s. 47 of the C. P. C. [p. 992, col. 2; p. 993, col. 1.]

Ordinarily the Courts in India pass judgments which are to be enforced in execution, and even when they create a new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it, but when they do so; a suit to enforce the obligation is maintainable. [p. 993, col. 2.]

A claim to recover a sum of money due from one of the partners in a firm must form part of the enquiry in the action for winding up the partnership, and no separate suit will lie for such relief after a suit for an account is barred by limitation. [p. 992, col. 2.]

(Case-law discussed.)

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in O. S. No. 13 of 1920.

Messrs. *A. Krishnaswami Iyer* and *M. Patanjali Sastri*, for the Appellants.

Mr. *K. Bashyam Iyengar*, for the Respondent.

JUDGMENT.—The facts of this appeal may be briefly stated.

The plaintiff, the first defendant's father and two others carried on a partnership business at Zanzibar. Original Suit No. 143 of 1909 was filed in the Subordinate Court of Madura East for its dissolution. In that suit, the present plaintiff was the 5th plaintiff and the father of the present 1st defendant was the 1st defendant. A preliminary decree was passed on 27th October 1909 and a Commissioner was oppointed. The temporary Subordinate Court of Ramnad to whose file the suit was then transferred confirmed the report of the Commissioner. Paragraph 6 of the order confirming the report runs as follows:—"It is, therefore, ordered that 1st defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that in default of such payment, the 5th plaintiff is appointed Receiver to realise and collect the said amount with power to bring and defend suits in his own name, etc., (see Ex. D.) The final decree (Ex. E) of the Subordinate Court was passed on 14th October 1911. It says "that out of the amount collected by the 5th plaintiff as Receiver in realising the only item of assets of Rs. 2,611-6 3 due from the 1st defendant, he (the 5th plaintiff) do take etc." There was an appeal to the District Court and the High Court and the Subordinate Court's decree was finally confirmed by the High Court on 5th February 1917. Meanwhile there was an attempt to execute the decree of the Subordinate Court in Execution Petition No. 309 of 1914. The Subordinate Court of Ramnad held that the decree was unexecutable and that it contemplated that the 5th plaintiff as Receiver should sue 1st defendant to recover the amount (Ex. G, dated 26th October 1914). There was no appeal against this order and the order is now binding on all the parties. The result is that the decree must be construed, in the light of that order, to be a decree declaring or creating rights which are unenforceable in execution and can be enforced only by suit.

The present suit is presented on 4th February 1920 for recovering the said amount. The plaintiff obtained a decree and defendant appeals.

He contends that the suit is not maintainable and is barred by limitation. It is true, as he points out, that a claim to recover a sum of money due from one of the partners must form part of the enquiry in the action for winding up the partnership and no separate suit will lie after a suit for an account is barred by limitation. *Gopala Chetty* v. *Vijayaraghavachariar* (1).

But the respondent contends that the judgment (as construed by the order of 26th October 1914, Ex. G) creates fresh rights in the place of the older rights and this suit is an action on the judgment. This is obvious and, provided, there is no obstacle in India to a suit on a judgment, when there is no other remedy to enforce the right, the contention ought to prevail.

At common law, actions on judgment lie whether the remedy by execution is available or not. [See *William* v. *Jones* (2), *Hutchinson* v. *Gillespie* (3) and *Marbella Iron Ore Co.* v. *Allen* (4) and Black on Judgments. Vol. II, s. 958]. This is admitted by the appellant. In India it is settled that no action lies on an executable judg-

(1) 74 Ind. Cas. 621; 45 M. 378; 30 M. L. T. 283; (1922) A. I. R. (P. C.) 115; (1922) M. W. N. 3[illegible]6; 16 L. W. 200; 26 C. W. N. 977; 43 M. L. J. 305; 24 Bom. L. R. 1197; 20 A. L. J. 862; 36 C. L. J. 308; 49 I. A. 181 (P. C.).

(2) (1845) 13 M. & W. 628 at p. 633; 2 D. & L. 680; 14 L. J. Ex. 145; 67 R. R. 767; 153 E. R. 262.

(3) (1856) 11 Ex. 798; 25 L. J. Ex. 103; 2 Jur. (N. S.) 403; 4 W. R. 302; 156 E. R. 1055; 105 R. R. 799.

(4) (1878) 47 L. J. C. P. 601; 38 L. T. 815.

ment and the only remedy being execution the principle being embodied in s. 47, C. P. C., (s. 244 of the Code of 1882). An exception was at one time recognised by which suits were permitted to be brought on the High Court on judgments of a Court of Small Causes in order to obtain execution against immoveable property: *Bhavanishankar Shevakram* v. *Pursadri Kalidas* (5). On the ground that, 'Where an action on the judgment will give a higher or better remedy, the case is different' [see *Manchharam Kalliandas* v. *Bakshe Sahib Mir Mainuddin Khan* (6)]. The exception is now absolute (s. 94 of the Act XV of 1882.) But Couch, C. J., also says in the case last cited "There are cases in which an action may be the only mode of enforcing a judgment or decree." The present case is such a case. In *Muhammad Gouse Cooroosee* v. *Mustan Ally* (7), Scotland, C. J., and Bittelston, J., recognising that such a suit would lie proceeded to discuss the question of limitation. The further remarks in *Bhavanishankar Shevakram* v. *Pursadri Kalidas* (5) were intended to apply only to executable judgments. The decision in *Merwanji Nowroji* v. *Ashabai* (8) is also based on the policy of the C. P. C. and applies only to judgments capable of execution. So also are the remarks in *Periasami Mudaliar* v. *Seetharama Chettiar* (9): "As against the judgment-debtor himself or against his legal representative it has long been held that under the Indian Processual Law the remedy is only by way of execution of the decree and that no suit could be brought upon the judgment." The decision in *Annoda Prasad Banerjee* v. *Nobo Kissore Roy* (10) shows a suit is maintainable on a judgment where no mode of execution (other than proceedings in contempt) is available. Sale, J, says that that was the practice of the Court, referring to *Attermoney Dossee* v. *Hurry Doss Dutt* (11). The case in *Kali Charan Nath* v. *Sukhada Sundari Debi* (12), those cited in it: *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (13) and *Ashi Bhusan Dasi* v. *Pelaram Mandal* (14) are not strictly relevant as they are cases where execution against the judgment-debtor on record was useless and it was sought to obtain on a judgment against another person substantially the same relief. The remarks in *Ramanand* v. *Jai Ram* (15) apply only where there is another mode of enforcing the judgment.

In our opinion there is nothing in all the Indian authorities cited before us against the maintainability of the suit. Such a case can occur only very rarely. Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create a new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in this case, the suit is maintainable.

We accordingly hold that the suit is maintainable. If so, the only period of limitation that is applicable to it is Art 122. There was no old cause of action on which such a suit would be maintained nor does it subsist if it ever existed. The judgments created a new obligation in lieu of the old. The suit is, therefore, within time.

The appeal fails and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(5) 6 B. 292 at p. 297; 6 Ind. Jur. 424; 3 Ind. Dec. (N. S.) 652.
(6) 6 B. H. C. R. 231.
(7) 4 Mad. Jur. 127.
(8) 8 B. 1; 4 Ind. Dec. (N. S.) 375.
(9) 27 M. 243 at p. 249; 14 M. L. J. 84 (F. B.).
(10) 9 C. W. N. 952; 33 C. 560.
(11) 7 C. 74; 4 Shome. L. R. 192; 9 C. L. R. 357; 3 Ind. Dec. (N. S.) 597.
(12) 30 Ind. Cas. 824; 20 C. W. N. 58; 22 C. L. J. 272.
(13) 4 C. 342; 3 C. L. R. 154; 2 Ind. Dec. (N. S.) 217.
(14) 21 Ind Cas. 519; 18 C. L. J. 362; 18 C. W. N. 173.
(15) 59 Ind. Cas. 632; 43 A. 170; 18 A. L. J. 1001; 2 U. P. L. R. (A.) 379.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 364 OF 1921.
April 23, 1924.

Present:—Mr. Justice Madhavan Nair.

NAGARAJA IYER AND OTHERS—DEFENDANTS Nos. 6 TO 10—APPELLANTS

versus

NATESA IYER *alias* NATARAJA IYER—PLAINTIFF—RESPONDENT.

Construction of document—Gift—Estate taken—Principles applicable.

Where the question arises as to the *quantum* of estate conferred upon the donee by a deed of gift, the

construction of the document essentially depends on the words used therein and the special circumstances under which it came into existence. The true guide in all cases is the intention of the donor to be discovered from the language used by him. If the words employed are clear and unambiguous, whether the donee is a male or a female, effect must be given to their plain meaning. [p. 994, col. 2.]

When the operative words of a document are clear and unambiguous, the fact that in the later part of the document there are additions or omissions cannot warrant the deed being construed in such a way as to render the operative words ineffective. [p. 995, cols. 1 & 2.]

(Case-law referred to.)

A deed of gift ran as follows:—"Deed of gift executed in favour of *M.* daughter of *R*..... .....As we have this day gifted away to you and put you in possession of the following..... .....you and your male issue shall enjoy the said lands with all kinds of rights.....you shall yourself pay the *Sircar kist* due for the lands. To this effect we have executed this deed of gift in favour of *M*:"

Held, (1) that *M.* took an absolute estate in the property gifted and the deed did not operate to convey any interest in favour of any one else; [p. 995, col. 2.]

(2) that the provision about enjoyment with regard to the male issue must be regarded as an idle attempt to derogate from the grant and did not vest any interest in the male issue. [*ibid.*]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Tanjore, in A. S. No. 64 of 1920, (A. S. No. 12 of 1920 on the file of the District Court, Tanjore), preferred against that of the Court of the District Munsif, Negapatam, in O. S. No. 249 of 1918.

Mr. *A. V. Viswanatha Sastry*, for the Appellants.

Mr. *E. Vinasaka Rao*, for the Respondent.

JUDGMENT.—Defendants Nos. 6 to 10 are the appellants in this second appeal. Their predecessor-in-interest, the 1st defendant purchased the suit properties under a sale-deed executed by one Mangalathammal since deceased and her sons defendants Nos. 2 to 4. The present plaintiff who is also her son, was a minor at the time of execution of the said sale-deed, and the 2nd defendant his eldest brother purported to execute the sale-deed for himself and in his capacity as the guardian of his minor brothers, the present plaintiff. Mangalathammal obtained the properties under a deed of gift, Ex. I, executed in her favour by her father. After he attained his majority, the plaintiff has instituted the present suit to set aside the sale so far as it concerned his one-fourth share. The plaintiff's case is that, under the deed of gift, Mangalathammal had only a life-estate and that he and his brothers had a vested remainder after her death, and consequently the sale was not valid and binding on his share. The suit was resisted mainly on the ground that the properties belonged to Mangalathammal absolutely under the deed of gift from her father. It was also contended that, in any event, the title under the deed of gift vested in Mangalathammal and defendants Nos. 2 to 4 who were the only sons then alive, and not with the plaintiff who was not born at the time of the deed of gift.

The District Munsif upheld the contention of the defendants while the lower Appellate Court took the view that Mangalathammal had only a life-estate under the deed of gift and that the sale did not consequently bind the plaintiff's share in the suit properties.

Thus the important question for consideration is, what is the nature of the estate taken by Mangalathammal under the deed of gift. The material terms of the deed of gift are as follows: "Deed of gift executed on 16th June 1891 in favour of Mangalathammal daughter of Ramasamy Iyer..... ..... As we have this day gifted away to you and put you in possession of the following, *viz.*,.....so, you and your male issue shall enjoy the said lands with all kinds of rights as per the terms contained in the said registered document as aforesaid. We have delivered to you in support of this document the two registered deeds referred to herein and the other documents relating to the said lands. You shall yourself pay the *sirkar kist* due for the lands.....To this effect we.....executed this deed of gift in favour of Mangalathammal."

Numerous decisions have been cited on either side as tending to throw light on the proper construction of instruments of this description executed in favour of females; but I think it would serve no useful purpose to examine each case separately, or to attempt to reconcile one decision with the other. The proper construction of each document to my mind, essentially depends on the words used therein and the special circumstances under which it came into existence." The true guide in all cases is the intention of the donor to be gathered from the language used by him. If the words employed are clear and unambiguous, whether the donee is a male or a female, effect must be given to their plain meaning, and it may be

taken that the rule of construction in *Moulvie Mohamed Shumsool Hooda* v. *Shewakram* (1) is only to be applied where there is some uncertainty in the terms of the instrument—[*vide* Mayne's Hindu Law, 9th Edition, s. 396 and *Ramachandra Rao* v. *Ramchandra Rao* (2).]

In the present case the deed begins and ends by saying that it is "executed in favour of Mangalathammal." There are no words as such limiting her estate. It contains recitals to the effect that possession had been transferred to her and that she was to pay the *kist*. These unmistakably point to the grant of an absolute estate in favour of Mangalathammal. In the body of the deed, it is true, there are words to the effect that she and her male issue were to enjoy the properties. The question is, do these words operate to derogate from the grant of an absolute estate in her favour? I do not think so. These are not the operative words of the grant. These are merely concerned with what may be regarded as a non-essential point of detail. The operative words are at the commencement, *viz.*, "As we have this day gifted to you and put you in possession.....". Further, if the provision as to the enjoyment were considered vital and so important as to invest the male issue with the character of joint grantees or holders of vested remainder, why were they not mentioned in connection with the delivery of the deeds, possession of the properties and the payment of the *kist*? Defendants Nos. 2 to 4 were admittedly majors then, and, if it was intended to convey any manner of interest in their favour, I think mention would have been made of them as joint donees, or at least as joint transferees of possession. The inference is irresistible that the donor did not regard them in that light. As observed by the District Munsif, the provision as to enjoyment of male issue, coming as it did after a complete disposition of the properties in favour of Mangalathammal, can only be treated as a mere recommendation and nothing more. When the operative words of a document are clear and unambiguous, the fact that in the later parts of the document there are additions or omissions cannot warrant the deed being construed in such a way as to render the operative words ineffective. *Muthumeenakshi Ammal* v. *Chendra Sekhara Ayyar* (3). In the words of the Privy Council in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (4), the provision about enjoyment with male issue in the present deed of gift may be rejected at most as an idle attempt, if at all, to derogate from the grant.

In the result, after a careful consideration of the actual words used in Ex. I, I am of opinion that the donors intended that Mangalathammal should take an absolute estate and that she did, in fact, take an absolute estate under Ex. I. In this view, the second question raised on behalf of the appellants that, in any event, Ex. I operated to convey an estate only in favour of Mangalathammal and defendants Nos. 2 to 4, and not in favour of the plaintiff who was not born at the time of the gift, does not require investigation. If, however, I should be inclined to hold that the Madras Act I of 1914, applied which would necessitate a finding as to whether the first defendant under whom the plaintiff claimed was a *bona fide* transferee, this aspect of the case need not be investigated further, in view of the conclusion arrived at by me to the effect that Mangalathammal took an absolute estate under Ex. I and that it did not operate to convey any interest in favour of any one else.

The plaintiff did not thus, in my view, ever derive any interest in the properties involved in the suit under Ex. I. They vested with Mangalathammal absolutely and the appellants who claim through her have a perfect and indefeasible title which is not open to attack by the plaintiff. The second appeal is, therefore, allowed and the plaintiff's suit is dismissed. The respondent must pay the costs of the appellants in this and in the lower Courts.

V. N. V.
Z. K. *Appeal dismissed.*

(1) 2 I. A. 7; 22 W. R. 409; 11 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.).

(2) 52 Ind. Cas. 94; 24 M. 283; 36 M. L. J. 306.

(3) 27 M. 498 at p. 502.

(4) 76 Ind. Cas. 922; 45 A. 536; (1923) M. W. N. 591; (1923) A. I. R. (P. C.) 169; 9 O. & A. L. R. 746; 21 A. L. J. 717; 26 O. C. 257; 33 M. L. T. 355; 10 O. L. J. 513; 50 I. A. 265; 47 M. L. J. 260; 29 C. W. N. 86 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 27 (S) OF 1924.
July 1, 1924.
Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

KRISHNADAS ACHARJEE CHOUDHURY AND OTHERS—PLAINTIFFS—PETITIONERS
versus
RAHIMANNESSA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Extension of time, application for—Review application, time spent in, whether can be deducted—Due diligence.

An application to extend the time limited for filing an appeal by deducting therefrom the time spent by the appellant in presenting and prosecuting a review application in respect of the judgment appealed against, may be granted on a consideration of the case under s. 5 of the Limitation Act, provided the appellant shows due diligence in making the application for extension.

Rule against an order of the Sub-Judge, Second Court, at Barisal (Backergunj), in Rent Appeal No. 39 of 1921.

Babu *Prokas Chandra Majumdar*, for the Petitioners.

Dr. *Sarat Chandra Bysak* and Babu *Sures Chandra Talukdar*, for the Opposite Party.

JUDGMENT.—This Rule was obtained calling upon the opposite party to show cause why the appeal should not be registered though filed out of time. The decree in this case was prepared and signed on the 22nd March 1922. The application for review was presented to the lower Appellate Court on the 16th June 1922. That application was dismissed on the 11th September 1923. The present appeal was filed on the 12th November 1923. On the 21st November the Stamp Reporter reported that the appeal was out of time and on the 22nd November directed the matter to be laid before the Registrar. On the 7th December 1923 the Registrar allowed two weeks' time to the appellant to make the necessary application before the Division Court. On the 2nd January 1924 the present application was filed on which this Rule was issued. The petitioner wants us to deduct the time employed in presenting and prosecuting the review application before the lower Appellate Court from the time allowed for presenting an appeal to this Court. His prayer might have been granted on a consideration of the case under s. 5 of the Limitation Act; but he has not shown due diligence in prosecuting the matter in this Court. He filed the appeal in this Court on the 12th November 1920 against a decree prepared and signed on the 22nd March 1923. He must have known at the time he filed the appeal that it was barred and he should have been prepared to get an order from this Court on a proper application explaining the delay in presenting the memorandum of appeal directing the registration of the appeal. Instead of that, he takes no further steps in the matter and not even within the time allowed by the Registrar. This application was filed more than a month and a half after the filing of the memorandum of appeal. It seems to us that the petitioner has failed to give sufficient explanation for the delay and we do not think that in the circumstances of this case we should be justified in exercising our discretion under s. 5 of the Limitation Act and extend the time for presentation of the memorandum of appeal. This Rule is accordingly discharged with costs. We assess the hearing-fee at two gold *mohurs*.

Z.K. *Rule discharged.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 942 OF 1921.
April 17, 1924.
Present:—Mr. Justice Madhavan Nair.

UDAMANTHALA NALUPURATATIL IBRAINE—DEFENDANT No. 1—APPELLANT
versus
PARAMESWARA BAVANNAVAR AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 3, 4, 6 AND 7—RESPONDENTS.

Res judicata—*Mortgage—Redemption, suit for, beyond time—Acknowledgment document—Remand for decision as to authority of person making acknowledgment—Admissibility of document, question of, whether decided—Evidence Act (I of 1872), s. 35—Judgment containing recital of pleadings—Admissibility in evidence to prove acknowledgment.*

In a suit for redemption of a mortgage the plaintiff relied upon a certain document as amounting to an acknowledgment of his right to redeem within the meaning of s. 19 of the Limitation Act. The High Court remanded the case for a decision on the question whether the person who acknowledged the mortgage was the *karnavan* of the defendant *tarwad* at the time the acknowledgment was made:

Held, that the High Court, by its order of remand, must be presumed to have decided that the document relied on by the plaintiff was admissible in evidence. [p. 997, cols. 1 & 2.]

Obiter:—A judgment *inter partes* which contains a recital of the pleadings is admissible in a subsequent suit to prove an acknowledgment contained in the pleadings in the previous suit. [p. 997, col. 2.]

Seethapati Rao Dora v. *Venkanna Dora*, 66 Ind. Cas. 280; 45 M. 332; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; 42 M L. J. 324; (1922) A. I. R. (M.) 71, distinguished.

Fatimatul Nissa Begum v. *Sundar Das*, 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565; 7 Sar P. C. J. 718; 14 Ind. Dec. (N. S.) 657 (P. C.), relied on.

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 56 of 1920 (A. S. No. 483 of 1919 on the file of the District Court), preferred against that of the Court of the District Munsif, Kasargode, in O. P. No. 504 of 1914.

Mr. *R. Kesava Iyengar*, for the Appellant.

Mr. *C. V. Anantakrishna Iyer*, for the Respondents.

JUDGMENT.—The only question for discussion in this second appeal is whether the plaintiff's suit is barred by limitation. The suit is for the redemption of a mortgage of the year 1837. It would admittedly be barred at the time when the suit was instituted, if there was no valid acknowledgment admitting the mortgage, by the defendants. The acknowledgment relied upon is contained in Ex. C, which is a certified copy of the judgment in a suit to which the original mortgagees and the mortgagors were parties. The pleadings set forth in that judgment do refer to the mortgage of the year 1837. It it argued by Mr. Adiga for the appellant that Ex. C is not admissible in evidence on the strength of the Full Bench decision in *Seethapati Rao Dora* v. *Venkanna Dora* (1). With reference to this argument, it is relevant to point out that this case came on a prior occasion before the High Court when it was remanded for a decision whether the original mortgagee was the *karnavan* or only a junior member of the first defendants' *tarwad* and whether the person who acknowledged the mortgage was its *karnavan* at the time the acknowledment was made. Unless the High Court held that Ex. C was admissible in evidence, it would never have remanded the case for a decision on the question just mentioned. A perusal of the remand order makes this point clear. In the appellate judgment now before me I find a statement by the learned Subordinate Judge that "it has not been argued before me that abstracts of pleadings contained in judgments are not admissible in evidence," probably because the point must have been decided by the High Court against the plaintiff-appellant at the time of the remand order. I, therefore, do not think that it is open to the plaintiff-appellant now to raise that question once again in this second appeal. The reason why he raises that question now is because in *Seethapati Rao Dora* v. *Venkanna Dora* (1), a decision which held that a recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under s. 35 of the Indian Evidence Act, there are certain observations in the concluding portion of the judgment which may make it appear that a recital in a judgment *inter partes* of a relevant fact may not be admissible in evidence. But this uncertain expression of opinion is a mere *obiter dictum*, and the learned Judges themselves say that it is unnecessary to consider the point in the reference before them. The decision in *Fatimatul Nissa Begum*, v. *Sundar Das* (2) would seem to show that decrees that recite the pleadings might be admitted in evidence. But, as I have said, the question was not considered by the learned Judges who decided the Full Bench case as it was not before them; and as it is not now open to the appellant's Counsel to raise that question afresh in this second appeal, I dismiss it with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 66 Ind. Cas 280; 45 M. 332; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; 42 M. L. J. 324; (1922) A. I. R. (M.) 71.

(2) 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565; 7 Sar. P. C. J. 718; 14 Ind. Dec. (N. S.) 657 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 40 OF 1924.

October 24, 1924.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

LACHMAN PRASAD AND ANOTHER—OBJECTORS—JUDGMENT-DEBTORS—APPELLANTS

versus

Srimati MIRNALUNI DEBI—DECREE-HOLDER AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 61, 63, O. XXXIV, r. 6—Mortgage decree—Execution fo decree—Objection by judgment-debtor that

that property not liable to sale, dismissal of—Appeal whether lies—Procedure.

In the course of the execution of a decree under O. XXXIV, r. 6 of the C. P. C. certain items of property were attached and proclaimed for sale. The judgment-debtor objected to the sale of some of the items of the property on the ground that he did not possess any saleable interest in them. The objection was dismissed on the ground that it was not *bona fide* and was made very late. On appeal:

Held, (1) that the order of the Executing Court dismissing the objection was open to appeal;

(2) that the Executing Court should have inquired into the merits of the objection and should not have dismissed it on the ground of its having been preferred at a late stage and not being *bona fide*.

Basti Ram v. *Fattu*, 8 A. 146; A. W. N. (1886) 37; 4 Ind. Dec. (N. S.) 1117 (F. B.), relied on.

Raghubar v. *Umed*, 1 O. C. Supp. 11, distinguished.

Appeal against an order of the Sub-Judge, Partabgarh, dated the 12th July 1914.

Messrs *J. P. C. Bhattaacharji* and *Radha Krishna*, for Appellants.

Mr. *H. K. Ghose*, for Respondent No. 1.

ORDER.—The decree-holder respondent obtained a decree against the appellants and others in the year 1919 under O. XXXIV, r. 6 of the C. P. C. In execution of that decree she attached several items of property as belonging to the judgment-debtors. These properties were duly entered in the sale proclamation and a date for sale thereof was fixed. On the 9th July 1924 the judgment-debtors made an application to the Court executing the decree that out of several properties attached an area of 28 *bighas* 5 *biswas* 4 *biswansis* situate in village Parab Doem, Pargana and District Partabgarh, was not liable to be sold for the reason that the judment-debtors did not possess saleable interest in that property. On the 12th of the same month the application was presented before the Court below with an office report. On that date the order under appeal was passed and it is as follows:—"The execution is pending since 29th November 1922. After 20 months this objection is filed. The objection is very late. I dismiss it, it is not *bona fide*".

At the hearing of this appeal the learned Counsel for the respondent raised a preliminary objection that it was not maintainable. The objector's objection should be treated to have been made under the provisions of O. XXI, r. 58 of the C. P. C. and an adjudication thereof under r. 61 of the same Order. The remedy of the judgment-debtors, therefore, lay in suit under r. 63. To this objection we have given our anxious consideration but have come to the conclusion that it should be overruled. Our decision is supported by a Full Bench judgment of the High Court at Allahabad in the case of *Basti Ram* v. *Fattu* (1). A decision of a Single Judge of this Court in the case of *Raghubar* v. *Umed* (2) was cited by the learned Counsel for the respondents in support of his contention.

We, however, think that that case is clearly distinguishable. In that case the judgment-debtors claimed to hold the property under attachment in the character of a trustee. This is not the case here.

On the merits of the appeal, we may say at once that the decree-holder has our sympathy but the course of law should not be allowed to be interrupted in the manner in which it has been done in the present case and it was the duty of the Court below to have inquired into the merits of it. This the Court below has failed to do. The learned Counsel for the respondent also argued that when the Court below settled the terms of the entries in the sale proclamation by its proceedings of the 26th May 1924 it virtually decided the objection now being considered as against the judgment-debtors. We, however, think to the contrary. The Court never directed its mind to this aspect of the question in the proceedings of that date.

We, therefore, allow this appeal, set aside the order of the Court below and remand the case to that Court with directions that the application shall be entered in its proper register and disposed of according to law. We make no order as to costs.

Z. K. *Case remanded.*

(1) 8 A 146; A. W. N. (1886) 37; 4 Ind. Dec. (N.S.) 1117 (F. B.)

(2) 1 O. C. Supp. 11.

LAHORE HIGH COURT.

REFERRED CASE No. 379 OF 1922.

November 11, 1922.

Present:—Mr. Justice Martineau.

RAM KALA AND OTHERS—PETITIONERS

versus

HIRA AND OTHERS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s. 21-A—Alienation by agriculturist in favour of non-agriculturist—Suit by reversioners—Compromise, validity of—Revision of decree.

The widow of an agriculturist sold her occupancy rights in certain land to some non-agriculturists. After her death her reversioners sued for possession of the land and the suit resulted in a compromise by which the plaintiffs were given half of the land, the other half being left with the vendees on their paying a certain sum of money. In consequence of the compromise the suit was dismissed. The Deputy Commissioner applied for revision of the decree under section 21-A of the Punjab Alienation of Land Act, as offending against the provisions of the Act:

Held, that even if the alienation by the widow was contrary to the provisions of the Punjab Alienation of Land Act, the decree dismissing the reversioner's suit did not, in any way, contravene those provisions.

Application under s. 21-A of the Punjab Alienation of Land Act, by the Deputy Comissioner, Karnal, for the revision of the decree of Civil Court.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This is an application under s 21-A of the Alienation of Land Act by the Deputy Commissioner of Karnal for the revision of the decree of Civil Court.

The widow of a Gaur Brahman had sold her occupancy rights in land to some Rors, and after her death her reversioners sued for possession of the land. The suit resulted in a compromise by which the plaintiffs were given half of the land, the other half being left with the Rors on their paying Rs. 200. The Court then dismissed the suit.

The decree of the Civil Court was passed in 1919, and the Deputy Commissioner has not stated that he became aware of it only within two months of his making the application for revision, so that presumably the application, which was not made till the 12th April 1922, is time-barred. Moreover it fails on the merits, as, even if the alienation by the widow contravened the provisions of the Land Alienation Act, it is not explained in what way they are contravened by the decree by which the suit of the reversioners was dismissed.

I dismiss the application. No order as to costs.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 831 OF 1922.

October 8, 1924.

Present:—Mr. Justice Devadoss.

GONDU RAMASUBBU IYER—PLAINTIFF—APPELLANT

versus

MUTHIAH KONE AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Sale-deed—Recital of no encumbrance—Parol evidence of vendor's knowledge of existence of encumbrance, admissibility of—Transfer of Property Act (IV of 1882), s. 55—Material defect, whether includes encumbrance.

A declaration or recital in a sale-deed that there is no encumbrance on the property or that the vendor has a good title to convey is not one of the terms of the contract of sale, and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract and is not inadmissible in evidence under s. 92 of the Evidence Act. [p. 1001, col. 1.]

Adityam Iyer v. *Ramkrishna Iyer*, 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602 and *Rajaram Rao* v. *Tuljaram Rao*, 17 Ind. Cas. 43, referred to.

The expression "material defect" in s. 55 of the Transfer of Property Act includes a defect of title and an encumbrance on the property. [p. 1000, col. 2.]

The existence of an encumbrance undisclosed to the vendee which he could not have discovered by the exercise of reasonable care would make the sale voidable; where, however, the vendee is aware of the existence of an encumbrance, no duty is cast on the vendor to inform him of its existence. [p. 1000, col. 2; p. 1001, col. 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Madura, in Appeal Suit No. 12 of 1921, (A. S. No. 368 of 1920, District Court, Madura) preferred against that of the Court of the District Munsif, Melur at Madura, in Original Suit No. 87 of 1919.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *S. R. Muthuswamy Iyer*, for the Respondents.

JUDGMENT.—The plaintiff sues for the recovery of money due under a hypothecation bond executed by the 1st defendant. The defence is that the debt due under the hypothecation bond was discharged by the sale of property belonging to the 1st defendant. The plaintiff's case is that a fraud was perpetrated on him by the 1st defendant which makes the sale-deed void and he is, therefore, entitled to sue for the recovery of the debt due under the hypothecation bond. Both the lower Courts have found that there was no fraud committed by the 1st defendant, that the plaintiff purchased with full knowledge of all the circumstances and that he is not entitled to sue on the

hypothecation bond. The plaintiff has preferred this second appeal.

The first point raised by Mr. Venkatachariar, is that the evidence to vary the terms of the sale-deed, Ex. A., should not have been admitted. Though this point was not taken in the Courts below, I allowed him to raise the point as it went into the root of the case. The evidence complained of is the defendant's written statement that the plaintiff was aware of an encumbrance in favour of one Karuppan Ambalam not mentioned in the sale-deed. In the sale-deed the recital is: "I declare so as to make you believe that excepting the emcumbrance on the said property which has been discharged hereby and this sale which has been effected, I have not effected, any kind of encumbrance in favour of any one else." It is admitted that at the time of the sale there was an encumbrance in favour of one Karuppan Ambalam.

The defendant's case is that the plaintiff was aware of that encumbrance, that he agreed to discharge it and that, it should not be mentioned in the document. The argument of Mr. Venkatacharier is that the evidence to the effect that the plaintiff was aware of the existence of an encumbrance is opposed to the clear recital in the document and such evidence should not have been admitted as it was inadmissible under s. 92 of the Evidence Act. His argument is that the declaration that there was no other encumbrance on the property than the one mentioned in it is an important term of the sale-deed and any agreement to vary the terms of the sale-deed could not be proved under s. 92. Section 92 says: "When the terms of any such contract grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms." The defendant's plea that there was an oral agreement whereby the plaintiff undertook to discharge the debt in favour of Karuppan Ambalam cannot be proved by parol evidence. Mr. Venkatachariar addressed an elaborate argument on the point. He mainly relied upon *Adityam Iyer* v. *Ramakrishna Iyer* (1). In that case it was held that if the consideration for sale is recited as Rs. 35,000 it could not be proved that the real consideration was Rs. 36,000. The facts in that case were that there were two sale-deeds for Rs. 35,000. The vendor wanted to prove that the real amount of consideration was Rs. 36,000 and Rs. 1,000 went in discharge of a debt. It was held that parol evidence to prove that the amount of consideration was Rs. 36,000 and not Rs. 35,000 was inadmissible as the amount of the consideration was an important term of the contract and it could not be varied by an oral agreement. In that case the learned Judges held if a certain amount is mentioned in a document as the consideration it was not open to the parties to show that the amount of consideration was something different from that which is mentioned in the document. That does not prevent a vendor from showing that the vendee was aware of an encumbrance which he did not want to be mentioned in the sale-deed. The existence of an encumbrance undisclosed to the vendee which he could not have discovered by the exercise of reasonable care would no doubt make the sale voidable. Under s. 55 of the Transfer of Property Act, in the absence of a contract to the contrary, the seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover. It has been held that *the material* defect in the property would also include a defect of title and encumbrance in the property. Mr. Justice Shephard and Mr. Brown in their Commentary on the Transfer of Property Act, 6th Edition, page 202 make the following observation: "It is apprehended, however, that the term "any material defect" in the property is not to be so restricted and that omission to disclose flaws in the title or encumbrance which the purchaser has no apparent means of discovering may equally be fraudulent under the section." This passage was quoted with approval in *Haji Essa Sulleman* v. *Dayabhai Parmanandas* (2). The question here is whether the vendor could prove that the plaintiff was aware of a defect in the title. Where the vendee buys property with the full knowledge that the vendor has not got a good title he cannot be said to have been defrauded by the vendor. The 1st clause of s. 55

(1) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602.

(2) 20 B. 522 at p. 529; Chitty's S. C. C. R. 460; 10 Ind. Dec. (N. S.) 913.

makes only omissions to make such disclosures as are mentioned in the section, para. 1, cl. (*a*) and para. 5, cl. (*a*) fraudulent. Paragraph 1 (*a*) casts the duty on the seller to disclose material defects in the property of which the buyer could not with ordinary care discover, but where the vendee is perfectly aware of the defect in title or existence of an encumbrance, there is no duty on the part of the seller to inform the buyer of that which the latter is perfectly aware. What is contended before me is that no evidence can be adduced to show that the buyer was aware of the defect in title when there is a definite recital in the sale-deed that there is no encumbrance. The evidence to prove the knowledge of the buyer of the existence of an encumbrance not disclosed in the sale-deed does not offend against s. 92, for such evidence does not contradict, vary, add to or subtract from its terms. A declaration as to title or the absence of an encumbrance is not one of the terms of the contract of sale. The existence of an undisclosed encumbrance might vitiate the transaction. A declaration that there is no encumbrance or that the vendor has a good title to convey is not one of the terms of the contract and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract. The decision in *Rajaram Rao* v. *Tuljaram Rao* (3) does not help the appellant. It was held in the case that where the parties specifically state that all the disputes between them have been settled it was not open to any of the parties to show that some matters were not settled. If a person sells all the pictures in his house he cannot be allowed to prove that Millais was excepted. But there is no fraud if a vendor sells a picture which he describes as Millais which in fact is not by the famous painter but by somebody else, and if the buyer knowing that the picture was not by Millais but by somebody else buys it, it cannot be said that the vendor has defrauded the vendee. It might be that both of them with the object of defrauding third persons have consented to enter a recital in the document which is false to the knowledge of both. In this case the evidence is that the plaintiff was aware of the existence of the encumbrance in favour of Karuppan Ambalam and his knowledge of that fact and that he consented to omit all reference to that encumbrance in the document, can be proved by parole evidence, and such evidence is not against the terms of s. 92 of the Evidence Act. I disallow this contention.

The second contention is that the defendant is not solely entitled to Survey No. 27/2 and there are other persons entitled to the property. Here again the plaintiff's knowledge is important. Two of the Pangalis of the 1st defendant attested the sale-deed and the plaintiff himself presented it for registration. The plaintiff wanted to make out that he was not aware of the terms of the sale-deed, Ex. I and that it was sent to him after registration. This allegation was found to be false. Both the lower Courts have found that the plaintiff was not defrauded with regard to this item of property and it is a finding of fact which is supported by evidence on record, and such a finding should not be disturbed in second appeal.

The third point urged is that the plaintiff should have been allowed to amend his plaint so as to include a prayer for cancellation of the sale-deed, Ex. I. The plaintiff's Vakil applied for amendment at a very late stage of the case and the District Munsif refused to allow the plaintiff to amend his plaint, by inserting a prayer for the cancellation of Ex. I. The suit is for recovery of money due under a hypothecation bond. The plea is that it was discharged by the sale of the 1st defendant's property. It was open to the plaintiff to have sued for cancellation of the sale-deed in which case he could have asked for the return of the consideration for the sale. But he has chosen to sue on the hypothecation bond. Though the question of discharge would depend upon the question whether the sale-deed is voidable or not, yet I think the reliefs are so different that it cannot be said that the District Munsif did not exercise his discretion in a judicial manner. The District Munsif having exercised his discretion which in the circumstances cannot be said to be an improper exercise of discretion, I do not think the plaintiff could be allowed to amend his plaint at this late stage when on the evidence on record he has failed to make out his case that Ex. I was vitiated by the fraud of the 1st defendant.

(3) 17 Ind. Cas. 43.

In the result the second apppeal fails and is dismissed with costs.

V. N. V.
Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 538 OF 1924.
July 29, 1924.
Present:—Mr. Justice B. B. Ghose.
HARA MOHAN SAHA—PETITIONER
versus
SUDHANSHU BHUSAN PAL
AND ANOTHER—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 23—Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XLIII, r. 1 (a)—Return of plaint by Small Cause Court for presentation to ordinary Civil Court—Return of plaint by Civil Court—Order, whether appealable—Revision—Question of title—Procedure in Civil Court.

Where a plaint has been returned under s. 23 of the Provincial Small Cause Courts Act to be presented to another Court and it is presented to an ordinary Civil Court, an order passed by the latter Court directing the return of the plaint for presentation to the proper Court is not an order passed under O. VII, r. 10 of the C. P. C. and is not, therefore, appealable under O. XLIII, r. 1 (*a*) of the Code. Such an order is consequently open to revision. [P. 1003, col. 1.]

Chander Badan Koer v. *Sheodhar Prasad*, 18 Ind. Cas. 325; 18 C. W. N. 380, followed.

When a plaint is presented to a Civil Court under an order made under s. 23 of the Provincial Small Cause Courts Act, the case should be tried as framed, and the question of title should be gone into only incidentally in order to decide the merits of the case. The nature of the suit is not altered and it remains a suit of the nature triable by a Small Cause Court. [*ibid.*]

Kali Krishna Tagore v. *Izzataunissa Khatun*, 24 C. 557; 12 Ind. Dec. (N. S.) 1040, followed.

Rule against an order of the Munsif, First Court, Dacca, in Small Cause Court Suit No. 1521 of 1923, exercising the powers of a Court of Small Causes, dated the 15th February 1924 and 24th March 1924.

Babus *Gopal Chandra Das* and *Satyendra Kishore Ghose*, for the Petitioner.

Babus *Mohendra Nath Roy* and *Hemendra Kumar Das*, for the Opposite Party.

JUDGMENT.—This Rule was obtained by the plaintiff in the Court below and the questions involved in this are of a somewhat peculiar nature. The plaintiff brought a suit against the defendants in the Court of Small Causes at Dacca, claiming Rs. 120 as damages against the defendants for use and occupation of a certain piece of land which the plaintiff claimed to be his property. The defendant disputed the plaintiff's title and claimed title to half of the property in himself. The learned Small Cause Court Judge was of opinion that the relief claimed by the plaintiff depended upon questions of title to immoveable property which the Small Cause Court Judge could not finally determine and he, therefore, made an order for the return of the plaint to be presented to a Court having jurisdiction to determine title. The order of the Small Cause Court Judge runs as follows:—"It is accordingly ordered that the plaint be returned to be presented to a Court having jurisdiction to determine the plaintiff's claimed title to the immoveable property mentioned in the plaint." This is in accordance with the provisions of s. 23 of the Provincial Small Cause Courts Act. What happened afterwards was that the plaintiff in pursuance of that order presented the plaint to the Civil Side of the same Court, the Presiding Officer being a Munsif having jurisdiction to try a suit for the money claimed in the plaint. The learned Munsif, however, thought that the value of the entire property which the plaintiff claimed was Rs. 11,500 and as a suit of that value was beyond his jurisdiction he was of opinion that he could not entertain the suit and he made an order "that the plaint should be returned to the filing Pleader for presentation to the proper Court according to the former return order under s. 23 of the Provincial Small Cause Courts Act." This order is dated the 24th March 1924. The learned Vakil for the petitioner contends that the true meaning of the order made under s. 23 was that he should present his plaint to a Civil Court having jurisdiction only to try his suit as he valued it, that is to say, to give him relief to the extent of Rs. 120 and he had so presented the plaint to the Court having jurisdiction to try that suit and the order made by the Munsif on the 24th March 1924 was, therefore, without jurisdiction.

A preliminary objection has been taken on behalf of the opposite party that as the order for return of the plaint is appealable, as it must have been passed under O. VII, r. 10, C. P. C. from which an appeal is allowed under O. XLIII, r. (*a*), his application for revision is incompetent. The learned Vakil for the petitioner, however,

relies on the case of *Chander Badan Koer* v. *Sheodhar Prosad* (1), where it was held by a Division Bench of this Court that if a plaint has been returned under s. 23 of the Provincial Small Cause Courts Act to be presented to another Court and it is presented to an ordinary Civil Court, any order for return of the plaint by the Civil Court afterwards is not an order under O. VII, r. 10, C. P. C. and, therefore, no appeal lay from such an order. I am bound by the decision and I must hold that there was no appeal against the order of the Munsif dated the 24th March 1924.

The question then simply turns upon this as to whether the order of the Small Cause Court Judge dated 15th February 1924 returning the plaint should be so construed that it should be presented to a Court having jurisdiction to try a question of title relating to immoveable property worth Rs. 11,000 odd or whether it was an order simply that the plaint as framed should be presented to a Civil Court for decision. The question depends upon a consideration of the nature of the relief claimed by the plaintiff in the suit. It has been decided in a number of cases, of which I need only mention the case of *Kali Krishna Tagore* v. *Izzatannissa Khatun* (2), that when a suit is presented to a Civil Court in pursuance of an order made by a Small Cause Court Judge under s. 23 of the Provincial Small Cause Courts Act, the nature of the suit is not altered. It remains a suit of the nature triable by a Small Cause Court, and although an appeal is allowed from the judgment passed by a Munsif in such a case, a second appeal is incompetent on the ground that the suit is of a nature triable by a Small Cause Court. It seems to me, therefore, to be reasonably clear that when a plaint is presented to the Civil Court under an order made under s. 23 of the Provincial Small Cause Courts Act the case should be tried as framed and the question of title may be gone into only incidentally in order to decide the merits of the case. This is also apparent from the concluding words of s. 23 of the Provincial Small Cause Courts Act which are:—"Return the plaint to be presented to a Court having jurisdiction to determine the title." It does not say, "determine the title finally." The only object as it seems to me of this section is to relieve the Small Cause Court from going into complicated questions of title. It does not mean that where the claim is one coming within the jurisdiction of the Provincial Small Cause Court it should be converted into a claim for title to immeveable property when the plaint is directed to be returned under s. 23 of the Act.

On these grounds I am of opinion that the order of the learned Munsif dated the 23rd March 1924 is without jurisdiction and must be set aside. The Rule is absolute. The learned Munsif is directed to entertain the plaint and try the suit according to law.

The petitioner is entitled to his costs in this Court. I assess the hearing-fee at three gold *mohurs*.

Z. K. *Rule made absolute.*

(1) 13 Ind. Cas. 325; 18 C. W. N. 380.
(2) 24 C. 557; 12 Ind. Dec. (N. S.) 1040.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 751 OF 1922.
September 25, 1924.

Present:—Mr. Justice Madhavan Nair.

THE MADRAS & SOUTHERN MAHARATTA RAILWAY Co., LTD.—DEFENDANTS—APPELLANTS

versus

GUNDAPU GOPALAKRISHNAMMA—PLAINTIFF—RESPONDENT.

Carriage of goods—Risk Note Form "B"—Suit for damages for non-delivery—Wilful neglect—Burden of proof.

In a suit for damages against a Railway Company for non-delivery of goods consigned under Risk Note Form "B," the burden lies on the plaintiff to prove that the loss was due to the wilful neglect of the Railway Company or its servants. [p. 1001, col 1.]

Bombay Baroda & Central India Railway Co. v. *Ranchhodlal Chotalal & Co.*, 52 Ind. Cas. 516; 43 B. 759; 21 Bom. L. R. 779 and *Smith, Ltd.* v. *Great Western Railway*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 217; 38 T. L. R. 354, followed.

Where thers is no evidence to prove that the loss of goods was caused by the wilful neglect of the Company or its servants, the plaintiff must fail. [*ibid.*]

Second appeal against a decree of the Court of the Subordinate Judge, Baptla, in A. S. No. 121 of 1921, preferred against that of the Court of the Additional District Munsif, Baptla, in O. S. No. 762 of 1920.

Messrs. *Brighwell* and *Moresly*, for the Appellants.

Mr. *V. Ramdoss*, for the Respondent.

JUDGMENT.—The defendants, the M. & S. M. Co., Ltd., are the appellants. The second appeal arises out of a suit instituted by the plaintiff for the recovery of Rs. 597 and odd being the price of a bale of yarn entrusted to the defendants and the amount of loss sustained by him on account of the non-delivery of the bale at Chirala. The bale in question was sent from Salt Cotaurs to Chirala under Risk Note, Form "B." The bale was loaded in a closed waggon which was sealed on both sides and its loss was discovered after the arrival of the train at Bitragunta Railway Station. The District Munsif, holding that the loss of the bale was not due to the wilful neglect of the defendant Company, or its servants, dismissed the plaintiff's suit. The Subordinate Judge held that the wilful neglect of the defendant Company, was proved and reversed the decree of the District Munsif.

It is clear from the authorities brought to my notice that the consignment having been made under a Risk Note Form "B" (Ex. II), the burden lies on the plaintiff to prove that the loss was due to the wilful neglect of the Railway Company or its servants. [see *Bombay Baroda & Central India Railway Co.* v. *Ranchhodlal & Chhotalal & Co.* (1) and *Smith, Ltd.* v. *Great Western Railway* (2)]. It was faintly argued by Mr. Ramdoss for the respondent that the defendant must prove that there was no wilful neglect on the part of the Railway Administration or its servants; or no theft by the Railway servants, and reliance was placed on s. 76 of the Indian Railways Act, but no authority directly supporting the argument was placed before me.

The only question, therefore, for determination in this case is whether the plaintiff has succeeded in proving that the loss of the suit bale was caused by the wilful neglect of the Railway Company, or its servants. It has been argued by the appellant's learned Counsel that there is no evidence to prove that there was any wilful neglect on the part of the defendants. The two witnesses for the plaintiff do not refer to any wilful neglect, and in my opinion, the evidence of D. W. No. 3 relied upon by the plaintiff also does not show that the loss was caused by the wilful neglect of the defendant Company. The Subordinate Judge is wrong in saying that it was the duty of the guard to check the seals of the waggon immediately after the arrival of the train at every station. According to the evidence, the seals ought to be checked at every station where the train halts, and the guard D. W. No. 3 says that he had done so. He says that he checked the seals of the suit waggon at Allwin Railway Station and when train reached Bitragunta the seals-checking watcher reported to him that the seal of one side of the suit waggon was broken and the door on that side was open. D. W. No. 3 then went and inspected the wagon. As he suggests, the bale of the yarn might have been lost after he checked the waggon at Allwin Railway Station during its stay there for eight minutes; after checking, D. W. No. 3 had done whatever he was bound to do and, before he proceeded to check the seals at Bitragunta he was informed by the seal-checking watcher of the fact that one of the seals was broken. I do not think there is any evidence to support the finding of the Subordinate Judge that it was the wilful neglect of the Railway Company that caused the loss of the plaintiff's bale of yarn. Since there is no evidence to support the finding, I set aside the decree of the lower Appellate Court and dismiss the plaintiff's suit with costs throughout.

V. N. V.
Z. K. *Suit dismissed.*

(1) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

(2) (1922) 1 A. C. 178; 91 L. J. K B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

CALCUTTA HIGH COURT.

CIVIL RULE No. 540 OF 1924.

July 28, 1924.

Present:—Mr. Justice B. B. Ghose.

GOLAM NABI CHAPAWALA—PETITIONER

versus

F. W. NEEDHAM AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908) s 47, O. XXI, rr. 35, 98—Transfer of Property Act (IV of 1882), s. 53—Execution of decree—Scope of decree, determination of—Duty of Court—Purchaser pendente lite, *position of—Delivery of possession—Resistance—Procedure.*

Where a question arises in execution proceedings as to what is included in the decree, the Execution Court must go into the question and decide it. [p. 1005, cols. 1 & 2]

A purchaser *pendente lite* is bound by the decree passed in the suit and his purchase cannot affect any rights obtained by the decree-holder under the decree. If such a purchaser refuses to vacate the property after a decree has been passed, delivery of possession may be made to the decree-holder by removing the purchaser under O. XXI, r. 35 of the C. P. C., and in case of his resistance to the execution of the decree an order may be passed under r. 98 of Order XXI. [p. 1005, col. 2; p. 1006, col. 1.]

Rule against an order of the Munsif, Fourth Court, Dacca, in Miscellaneous Case No. 133 of 1923.

Babus *Sarat Chandra Roy Chaudhury* and *Santi Kumar Roy Chaudhury*, for the Petitioner.

Babu *Surendra Nath Guha* and Moulvi *Nuruddin Ahmed*, for the Opposite Party.

JUDGMENT.—This is a case in which the petitioner applies under s. 115, C. P. C. for the revision of an order passed by the Munsif, Fourth Court at Dacca. The case raises a question of some nicety. An order has been made against the petitioner under O. XXI, r. 98, C. P. C., under which the learned Munsif has directed that the decree-holders be put into *khas* possession of the decretal land including the land which the petitioner before this Court occupies as his *bari* and that his possession be removed if he refuses to vacate the same. The contention on behalf of the petitioner is that r. 98 of O. XXI does not apply to his case, firstly, because in fact he was not the judgment-debtor in the case and secondly, that it has not been found that he has been resisting the delivery of possession to the decree-holder at the instigation of the judgment-debtor. The second question that has been raised is that the decree which was one for possession of a certain piece of land does not include the portion in dispute in these proceedings on which the petitioner before this Court has his *bari*.

With regard to the second question it is contended on behalf of the petitioner that the learned Munsif ought not, in a summary proceeding like this, to have gone into the question by reference to the boundaries given in the decree and upon the oral evidence adduced in the case, but ought to have left the matter for decision in a separate suit. It is contended on behalf of the opposite party that the petitioner himself invited the Court below to decide this question because he objected to the delivery of possession on the allegation that this plot of land was outside the decretal land. In my judgment, when the question arises as to what is included in a decree in execution proceedings the Execution Court has got to go into the question as to what was decreed, and the lower Court has followed the proper procedure in deciding the question. The finding of the learned Munsif is that this disputed portion was included in the decree and I do not think that I can in revision interfere with that decision. Besides it seems to me that he has duly considered the question from all points of view in coming to his conclusion.

The question there is whether a proper order was made by the learned Munsif under r. 98 of O. XXI, C. P. C. The petitioner in this Court, as I have already said, was not the judgment-debtor, but it has been found by the Court below that one Ibrahim Haji was one of the judgment-debtors against whom, along with other persons, a suit for possession was brought in the year 1916. During the pendency of the suit Ibrahim Haji transferred this parcel of land to one Fayzzannessa Bibi in the year 1917 and the petitioner purchased it again from Fayzzannessa Bibi in the year 1919. The learned Munsif, therefore, considers that the petitioner having been a purchaser *pendente lite* is the representative of the judgment-debtor, and so an order may be passed as against him under r. 98 of O. XXI, C. P. C. It is contended on behalf of the petitioner that although Ibrahim Haji was one of the judgment-debtors he claimed this portion of the disputed land under a different title and, therefore, the petitioner could not be in the position of a judgment-debtor because Ibrahim Haji was not the judgment-debtor with regard to this disputed portion. The question then turns upon this as to whether Ibrahim himself could have resisted delivery of possession of this bit of land in execution of the decree obtained against him. Assuming that the finding of the learned Munsif is correct that this disputed plot of land was included in the decree, it seems to be obvious that Ibrahim Haji could not have resisted the delivery of possession of this portion of land in execution of that decree. If that is so, the question then remains whether the petitioner is a person who is entitled to offer such resistance. It is a general principle of law that the purchaser *pendente lite* is bound by the decree and such purchase cannot affect any rights obtained by the decree-holder under the decree of the Court. This princi-

ple has been codified in s. 52 of the Transfer of Property Act and it is also recognised in r. 102 of O. XXI, C. P. C. The position, therefore, is that the petitioner being a purchaser *pendente lite* is bound by the decree, and O. XXI, r. 35 lays down that delivery of possession of immoveable property may be made by removing any person bound by the decree who refuses to vacate the property. The petitioner before this Court is a person who might be removed by the Court in order to deliver possession to the decree-holder. Therefore the petitioner comes within the definition of a judgment-debtor as mentioned in r. 98 of O. XXI, C. P. C. and it was competent for the Munsif to pass the order made against him.

On these grounds the Rule will be discharged with costs one gold *mohur*.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 329 OF 1923.

December 16, 1924.

Present:—Mr. Ashworth, A. J. C.

MATHURA DASS—DEFENDANT No. 1—APPELLANT

versus

RAMJI MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—New case, whether can be made—Admission, party whether can go behind—Hindu Law—Property acquired by father before birth of sons—Interest taken by sons, nature of.

New cases cannot, except in exceptional circumstances, be made out in appeal. [p. 1007, col. 1]

An alienee from a Hindu resisted a suit by the brothers of the alienor for a declaration that the alienation was invalid by reason of the fact that there had been no partition among the brothers and that the property in dispute was enjoyed by them in co-parcenary right, on the ground that the brothers had separated before the date of alienation. The alienee admitted in his pleas that the property in dispute was originally ancestral property. It was found that there had been no partition among the brothers:

Held, that in appeal the defendant could not be permitted to go behind his admission that the property was ancestral and to question the ancestral character of the property.

Obiter dictum.—Property acquired by a Hindu father before the birth of any of his sons descends to his sons as separate property and each of the sons is entitled to sell his undivided share in the property and his power of alienation in respect of such share is not subject to any restraint by his brothers.

Second appeal against a decree of the District Judge, Lucknow, dated the 6th August 1923, dismissing the appeal against that of the Additional Munsif, Lucknow, dated the 8th September 1922.

Mr. *Makund Behari Lal*, for the Appellant.

Messrs. *G. N. Mukerji* and *Moti Lal*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff respondents for a declaration that an alienation made by Raja Ram defendant No. 2, their brother, of his one-fourth share in a certain house was invalid by reason of the fact that there had been no partition among the four brothers and that the house was enjoyed by them in co-parcenary right. Defendant No. 1 is the vendee under the sale-deed of Raja Ram dated the 23rd September 1921. The Court of first instance held that the only question that arose, apart from the incapacity of the vendor-defendant No. 2 by reason of lunacy, was whether the property (by which it must have meant the property in suit) had been divided. He held that there had been no separation or partition between the brothers and, therefore, there had been no division of the house or of their interests therein between them. On appeal, the District Judge of Lucknow stated in his judgment "it is admitted that the house in suit was purchased by the father of the plaintiffs and defendant No. 2 and that since his death they are in possession." From this he concluded as follows:—"In the hands of plaintiffs and defendant No. 3 the house in suit is ancestral property."

In this appeal it is shown that the house was purchased by the father of the four brothers on the 25th of September 1891. The eldest of the four brothers, in February 1922 when this suit was brought, was aged 22. He could not have been born at the date when his father bought the house. The house was thus, it is contended, the self-acquired property of the father. When it came into the hands of the sons it descended to them as separate property: [see *Katama Natchiar* v. *Raja of Shivagunga* (1).] None of these sons have any children. The four brothers, therefore, held the house not as co-parceners and any one of them could sell his undivided share. The possibility of the defendant No. 2 being entitl-

(1) 9 M. I. A. 539 at p. 613; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843 (P. C.)

ed to sell his share in the house, even in the absence of separation between the brothers, on the ground that the house was not ancestral joint property, was considered by neither of the lower Courts. It is urged by the respondents' Counsel that if, the Court of the first instance had framed an issue on this subject, they might have been able to prove that the father of the four sons bought the house out of funds left him by his father, and if a person buys property out of funds left him by his father, then the property is not his self-acquired property. It is stated that the reason why the defendant did not tender evidence on this point was that in the Court of first instance the defendants admitted that the property was ancestral. This admission is recorded in the proceedings of 3rd May 1922. The passage is as follows:—"The 1st defendant does not contest the suit on the ground that the sale-deed was executed by the 2nd defendant for the benefit of joint family, for there was no joint family when the sale-deed was executed. The house in question is ancestral property of the family." The appellant's Counsel's contention in reply is that by admitting the house to be ancestral they merely meant that it came to the sons from the father and not necessarily from the grandfather. This contention must be rejected on two grounds. The first is that the ordinary meaning of ancestral is not that in which it is contended that the term may have been used. The second is that, in the proceedings referred to, the appellants clearly took their stand on an alleged separation between the sons and on nothing else. The case has been very ably argued by the appellant's Counsel in this Court and if he had appeared for the appellant in the First Court the appellant would very probably have been successful. But new cases cannot, except in exceptional circumstances and I do not hold such to exist in this case, be made out in appeal.

An attempt is made to uphold the finding of the lower Courts on the ground that the First Court found that Raja Ram was a lunatic and incompetent to transfer the house. This question of the capacity of Raja Ram was not considered by the lower Appellate Court as it felt that it could decree the suit on other grounds. The plaintiff-respondent could only get a declaratory decree that the sale should not affect them in the event of Raja Ram dying without issue or any heir with a better title to succeed than the three plaintiffs. This is not what they claimed. What they claimed is a declaration that the sale was void *ab initio*. They cannot get this relief. If they think fit they presumably could sue for the declaratory decree of the kind indicated and this judgment would not stand in the way of such a suit.

For the above reasons I dismiss this appeal with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 457 OF 1922.

May, 14, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

HON'BLE SIR BIJOY CHAND MAHATAB—PLAINTIFF—APPELLANT

versus

NILMONI LAHIRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation, operation of—Cause of action, accrual of—Putni taluk, *sale of—Sale set aside—Restoration of possession—Rent, suit for—Limitation.*

The period of limitation is extended where there has been a suspension of the cause of action or where the cause of action has accrued not on the date indicated in column 3 of the Schedule to the Limitation Act but on a subsequent date for no fault of the plaintiff. [p 1009, col. 1.]

Ranee Surno Moyee v. *Shooshee Mokhee Burmonia*, 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 331; 1 Ind. Dec. (N. S.) 489 (P. C.), followed.

Huro Pershad Roy v. *Gopal Das Dutt*, 9 C. 255; 12 C. L. R. 129; 9 I. A. 82; 6 Ind. Jur. 546; 4 Sar. P C. J. 363; 4 Ind. Dec. (N. S.) 820 (P. C.) and *Janaki Nath Sinha Roy* v. *Bejoy Chand Mahatab*, 64 Ind. Cas. 315; 33 C. L. J. 366, referred to.

Time runs from the date on which the rights of the party suing are finally settled, giving birth to his cause of action, and once it starts running it cannot be stopped by any act which does not bring about any change in those rights. [p. 1010, col. 1.]

The operation of an original decree is not suspended by the presentation of an appeal nor is it interrupted where the decree of appeal is one of dismissal. [p. 1010, col. 2.]

Hukum Chand Boid [*Juscurn Boid*] v. *Pirthi Chand Lal*, 50 Ind. Cas. 444; 46 C. 670; 23 C. W. N. 721; 17 A. L. J. 514; 36 M. L. J. 557; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.), followed.

Where the sale of a *putni taluk* is subsequently set aside and the *patnidars* are put in possession of the

taluk the suspension of the *zemindar's* right to recover rent is put an end to on the date of such restoration, and limitation for the recovery of rent commences from the date of such restoration of possession to the *putnidars*. The mere fact that an appeal is preferred from the order setting aside the sale, which is subsequently dismissed, does not affect the question of limitation. [p. 1008, col. 2.]

Appeal against the decree of the Additional District Judge, Hooghly, dated the 31st of August 1921, modifying that of the Subordinate Judge, 3rd Court of that District, dated the 28th of May 1920.

Dr. *Dwarka Nath Mitter* and Babu *Sarat Kumar Mitter*, for the Appellant.

Babus *Sib Chandra Palit*, *Mani Lall Bhuttacharji*, *Charu Chandra Biswas*, *Bhupendra Kumar Ghose* and *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This appeal involves an important question of limitation, though, in my judgment, not one of great difficulty. The appellant Maharaja had brought a *putni* held by defendants Nos. 1 to 4 to sale under Regulation VIII of 1819 for arrears of rent for the first six months of 1321 (*B. S.*). The *putni* was sold on the 17th November 1914, and purchased by defendant No. 5. It was again put up to sale on the 16th November 1916 and purchased by defendant No. 6. There was a subsequent sale under the Regulation and the *putni* was again sold on the 16th November 1918 and purchased by defendant No. 7. In the meantime the defendants Nos. 1 to 4 brought a suit for setting aside the sale of the *putni* on the 17th November, 1914. The sale was set aside by the Subordinate Judge on the 23rd December, 1915. Against that decree the Maharaja preferred an appeal which was dismissed by the District Judge on the 5th December, 1918. Though the sale was set aside, the defendants Nos. 1 to 4 were not put in possession of the *putni* on account of the subsequent sale of the *putni*. On the 12th November, 1919, the present suit was brought by the plaintiff for recovery of arrears of rent from the defendants Nos. 1 to 4 and the other purchasers of the *putni*. The claim as against the defendants Nos. 1 to 4 consisted of rent for the years 1321 and 1322. Both the Courts below have decreed the plaintiff's claim in so far as it relates to 1322 but have dismissed the suit for rent for the year 1321 on the ground of limitation. They have held that time should be computed from the date of the decision of the First Court in the suit for setting aside the sale, namely, the 23rd December, 1915.

It is argued before us that the view taken by the Courts below is wrong and that time should run from 5th December, 1918, the date of the decree of the District Judge on appeal. In support of this view reliance has been placed on the case of *Rance Surno Moyee* v. *Shooshee Mokhee Burmonia* (1). That case, in my opinion, does not materially help the appellant. The scope of that decision has been explained by the Judicial Committee in the case of *Huro Pershad Roy* v. *Gopal Das Dutt* (2). In *Rance Surno Moyee's case* (1), the question that is now before us did not arise as the suit was within time whether the period was calculated from the date of the decree of the First Court or from the date of the decree of the Appellate Court. But there are valuable observations—in that case which have been the subject of consideration in numerous cases before the Judicial Committee and the High Courts of India and which are of great assistance in the determination of the question before us. The sale in that case was that of a *putni* under Regulation VIII of 1819. It was subsequently set aside in a suit by the *putnidar* who was put in possession by virtue of that decree. The *zemindar* subsequently brought a suit for arrears of rent. The defence was that time ought to be reckoned from the date on which the rent accrued due and as it was more than three years the suit was barred by limitation. Their Lordships held that the cause of action remained in suspense till the *putni* sale was set aside; and further, that when the tenant took possession of the *putni* he did so with all the obligations to pay rent. He took back the estate subject to the obligation to pay rent and the particular arrears of rent claimed in that case must be taken to have become due in the year in which the restoration was alleged to have taken place. Applying this principle to the facts of this case, it appears that after 1915 there was no suspension of the cause of

(1) 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 331; 1 Ind. Dec. (N. S.) 489 (P. C.).

(2) 9 C. 255; 12 C. L. R. 129; 9 I. A. 82; 6 Ind. Jur. 546; 4 Sar. P. C. J. 363 4 Ind .Dec. (N. S.) 820 (P. C.).

action and there was no bar to the plaintiffs bringing a suit for rent. The principle which in the cases beginning with the case of *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1) has been followed is that the period of limitation has been extended where there has been a suspension of the cause of action or where the cause of action has accrued not on the date indicated in column 3 of the Schedule to the Indian Limitation Act, but at a subsequent date for no fault of the plaintiff. This view has been clearly expounded by Mookerjee, J., in the case of *Janaki Nath Sinha Roy* v. *Bejoy Chand Mahatab* (3). The facts of that case are almost indistinguishable from those of the present one. There the sale of the *putni* was set aside on the 28th May, 1910 by the decree of the First Court of that date. The *zemindar* took it to the Appeal Court and the appeal was dismissed on the 2nd May 1912. In the interval, on the 4th October, 1910, the plaintiff paid rent to the defendant landlord to prevent further sale under the Regulation. He subsequently brought a suit for the refund of the money thus paid to the landlord. The learned Judges held: "Nor can it be suggested that there was since the 14th October 1910 (the date of the decree of the First Court) any period of time when the right of the plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control, so as to entitle him to invoke the aid of the rule laid down by the Judicial Committee." A point, very similar to the present one, was decided in the case of *Bejoy Chand Mahatab* v. *Tinkari Bannerjee* (4). There the sale of the *putni* was set aside under s. 14 of Regulation VIII of 1819. The suit was brought by the auction-purchaser at the sale for recovery of money paid to the *zemindar* as rent. The learned Judges held that such a suit brought more than three years after the date of the decree of the First Court setting aside the *putni* sale and the last of the payments made on account of rent is barred by limitation. In my opinion, the principle laid down in that suit which was one for recovery of rent from the landlord by the purchaser will equally apply in the suit where the landlord is seeking to recover rent. The question, as to whether time should be counted from the date of the decree of the First Court or of the Appellate Court, is to my mind set at rest by the judgment of the Judicial Committee in the case of *Hukum Chand Boid* [*Juscurn Boid*] v. *Pirthichand Lal* (5). Sir Lawrence Jenkins, in delivering the judgment of the Court, made the following observations: "Whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal." In that case the plaintiff brought a suit against the *zemindar* to recover a certain sum he had paid as purchaser of a *putni taluk*. The sale of the *putni* was set aside on the 24th August 1905 by the District Judge. That decree was affirmed by the High Court on the 3rd August 1906. The Judicial Committee, in these circumstances, held that time should run from the 24th August, 1905, the date of the decree of the District Judge. The facts may be different but in principle there is hardly any difference between that case and the present one. The view, I have adopted, seems to be in consonance with common sense. The appellant should not be allowed to get extension of time by his own act which did not succeed. After the decree of the Subordinate Judge on the 23rd December 1915, he was entitled to bring a suit for rent. Instead of doing that he preferred an appeal to the District Judge which proved unsuccessful. It is argued that by preferring this appeal to the District Judge the plaintiff's right to bring a suit was suspended and that if he had brought one he would have been met by the defence that the matter was pending litigation. I do not think that this contention is sound. The defendant having himself brought a suit for the setting aside of the sale could not have been heard to say that he was not liable to pay rent till the decision of the Appellate Court. In this connection reference may be made to s. 9 of the Limitation Act which enacts that where time once begins to run it cannot be interrupted.

It has been finally argued on the use of the expression "final decree" in some

(3) 64 Ind. Cas. 315; 33 C. L. J. 366.
(4) 58 Ind. Cas. 741; 24 C. W. N. 617.

(5) 50 Ind. Cas. 414; 46 C. 670; 23 C. W. N. 721; 17 A. L. J. 514; 36 M. L. J. 557; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

of the judgments of the Judicial Committee that time ought to run from the last decree in the litigation. We have come across the expression in *Ranee Surno Moyee's case* (1). There the question whether time should run from the first decree or the final decree was not, as I have observed, before the Judicial Committee. That expression was used in the sense in which I understand it, namely, the decree that settles the rights of the parties and puts the plaintiff in a position to bring a suit. This seems to be the view of their Lordships. In *Rangayya Appa Rao* v. *Bobba Sriramulu* (6), the suit was one for rent. The Courts in India held that time should be counted from the end of each *fasli* year. Under some Madras Regulation it was necessary for the plaintiff to have the rent ascertained. The plaintiff thereupon brought a suit before the Head Assistant Collector for the purpose. An appeal was taken from him to the District Judge who made some modifications in the decree and finally the High Court made further variations in the terms of the *pottahs* to be tendered; and thus by the decree of the High Court, dated the 29th October 1889 the conditions of the tenancies, including the rates of rent, were finally determined. On these facts, their Lordships observed that they were of opinion that in such cases no arrears were due till the rates of rent were ascertained by the decree of the High Court of the 29th October 1889 and that limitation ran from that date. The true view of the matter is that time runs from the date on which the rights of the party suing are finally settled giving birth to his cause of action and that once it starts running it cannot be stopped by any act which does not bring about any change in those rights. I have no doubt, in my mind, that in the present case limitation ran from the date of the Subordinate Judge's decree, namely, the 23rd December, 1915. The view taken by the lower Courts is correct and this appeal must be dismissed with costs. The defendants Nos. 1 to 4 will get full costs while the defendants Nos. 5, 6 and 7 will get half costs each.

Duval, J.—I agree.

Z. K. *Appeal dismissed.*

(6) 27 M. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 31 I. A. 17; 8 Sar. P. C J. 617 (P. C.).

PATNA HIGH COURT.

CIVIL APPEAL No. 244 OF 1923.

August 1, 1924.

Present:—Sir Jwala Prasad, KT. Acting Chief Justice, and Mr. Justice Kulwant Sahay.

HARI SARAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Syed MOHAMMAD ERADAT HUSSAIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9, O. XLIII, r. 1 (k)—Appeal—Death of respondent—Application for substitution not filed within limitation—Procedure—Order refusing application filed after expiry of period—Appeal, whether lies—Ignorance of death—Negligence and delay, absence of.

When during the pendency of an appeal a respondent dies and no application for substitution of his legal representatives is made within the period prescribed by law, the appeal abates automatically under the provisions of O. XXII, r. 4 of the C. P. C., and an application which is thereafter made for substitution of the legal representatives of the deceased must be treated as an application for setting aside the abatement and then for substitution. An order rejecting such an application is open to appeal under the provisions of O. XLIII, r. 1 (*k*) of the Code, which is applicable to the abatement or dismissal of an appeal as well as to the abatement or dismissal of a suit. [p. 1011, col. 2.]

Once the respondents to an appeal are served with notice of the appeal it is not the duty of the appellant to be on the lookout and to be always enquiring as to whether the respondents are alive or dead. [p. 1012, col. 2.]

One of the respondents to an appeal who was a *pardanashin* lady residing in the interior of a district other than that in which the appellant lived and who had been served with notice of the appeal, died before the appeal came on for hearing, and an application for substitution of her legal representatives was made after the expiry of the period prescribed for such an application. The appellant alleged that he had become aware of the death of the respondent only a week before the application was made:

Held, (1) that the application must be treated as an application to set aside the abatement under O. XXII, r. 9 of the C. P. C., as the appeal had abated automatically on the expiry of the period prescribed for making an application for substitution; [p. 1011, col. 2.]

(2) that under the circumstances of the case the abatement should be set aside as the appellant had not been guilty of any negligence or delay. [p. 1012, col. 2.]

Appeal from an order of the Additional District Judge, Patna, dated the 26th September 1923.

Messrs. *Janak Kishore, Bindhyachal Prasad* and *Rajeshwari Prasad*, for the Appellants.

Messrs. *Khurshaid Husnain* and *B. C. Mittra*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal

against an order of the Additional District Judge of Patna dismissing the appellant's appeal pending before him on the ground that no application for substitution had been made within time as regards respondent No. 2 who had died during the pendency of the appeal. He further ordered that as the appeal could not proceed in the absence of the heirs of the deceased respondent, the appeal be dismissed as against the other respondents also.

A preliminary objection has been taken by the learned Vakil for the respondent that no appeal lies against this order to this Court. His contention is that the application filed by the appellant before the lower Appellate Court was an application for substitution under O. XXII, r. 4 of the C. P. C. and the prayer in that application was for substitution of the legal representatives of the deceased respondents. This application had been refused by the District Judge and there is no provision in the C. P. C. giving a right of appeal to the appellant against an order refusing an application for substitution.

The ground taken may be correct in so far as the form of the application is concerned but we have to look to the substance of the application and not merely to the form of it. What happened was that the respondent No. 2, *Musammat* Bibi Amna, died on the 22nd March 1923. On the 20th July 1923 the Vakil for the deceased respondent informed the Court that his client was dead. This was after the service of the notice of the appeal upon the respondent and after she had entered appearance in the appeal. Thereupon the learned Judge made an order to the effect that the appellants be informed and they do take necessary steps at once. On the 10th September 1923 the appellants filed an application before the District Judge in which they stated in para. 2 that although an order had been made to the effect that the appellants be informed about the death of the respondent no such information had been given to them and in para. 3 they stated that they had come to know of the death of the deceased respondent for the first time on the 10th September 1923 and by this application they applied that the respondent No. 1 who was a relative of the deceased respondent may be directed to disclose the name of the heir of the respondent No. 2. As I have said this application was filed on the 10th September 1923. On the 18th September 1923 the appellants filed an application for substitution stating that *Musammat* Bibi Amna the deceased respondent had died leaving certain heirs whose names were set out, that the appellants had come to know of the death of the respondent on the 10th September 1923 on seeing the order of the Court dated the 20th July 1923, and that the deceased respondent was a *pardanashin* Muhammadan lady and had died at Yusufpur, in the District of Muzafferpur and that the appellants were residents of Jalalpur, *Pargana* Phulwari, District Patna and, therefore, the appellants could not ascertain the actual date of the death of the said respondent No. 2. This application was headed as one under O. XXII, r. 4 and the prayer was that the legal representatives named in the petition may be made respondents in place of the respondent No. 2. Now it has been argued that this was an application for substitution under O. XXII, r. 4 and not an application for setting aside the abatement of the appeal under O. XXII, r. 9 of the C. P. C. Order XLIII, r. 1 (*k*) of the C. P. C. provides for an appeal against an order under O. XXII, r. 9 refusing to set aside the abatement or dismissal of a suit and it has been argued by the learned Vakil for the respondent that the present order which was passed on the application for substitution was not an order refusing to set aside the abatement or dismissal of the appeal. Having regard to the circumstances of the case I am of opinion that the application filed on the 18th September 1923 must be treated as an application for setting aside the abatement and dismissal of the suit. When a respondent dies and no application for substitution is made within the period prescribed by law, the appeal abates automatically under the provisions of O. XXII, r. 4 and the application which is filed after the abatement of the appeal must be an application for setting aside the abatement and then for substitution. No doubt there is no prayer in the application filed on the 18th September 1923 asking the Court to set aside the abatement but having regard to the nature of the application it must be treated as if the appellants wanted substitution to be made which substitution could only be made after the setting aside of the abatement and, therefore, in substance this application was an application for setting aside the abatement and then for substitution. This was the

view taken under similar circumstances in the cases of *Lachmi Narain* v. *Muhammad Yusuf* (1) and *Badul* v. *Naraini* (2). The preliminary objection, therefore, fails and it must be held that the appeal is an appeal as contemplated by O. XLIII, r. 1 (*k*) of the C. P. C.

It has next been argued that O. XLIII, r. 1 (*k*) refers to an order refusing to set aside the abatement or dismissal of the suit, and not of an appeal, in the present case the order relates to an appeal and, therefore, O. XLIII, r. 1 (*k*) has no application to the present case; but O. XXII, r. 11 provides that in the application of this Order (that is O. XXII) to appeals so far as may be the word "suit" should include appeal and I am clearly of opinion that O. XLIII, r. 1 (*k*) would apply to the abatement or dismissal of an appeal also.

It has next been argued that if this application be treated as an application for setting aside the abatement and the order of the District Judge be treated as an order refusing to set aside the abatement then the matter should be sent back to the learned Judge for consideration of the application as an application for setting aside the abatement and that an opportunity be given to the respondent to adduce evidence to show that the appellant was aware of the death before the date alleged by him. Now we have got before us the petition for substitution and for setting aside the abatement filed by the appellant supported by an affidavit. We have also got before us the petition of objection filed by the respondent in the Court below supported by an affidavit. In the application filed by the appellant an explanation was given why the application could not be filed within the period limited by law. In the petition of objection filed by the respondent there is no allegation made to show that the appellant was aware or could be aware of the death of the respondent at any time before the date as stated by the appellant. The respondents had full opportunity to take any objection they liked to the grounds of the application filed on the 18th September 1923. They contended themselves with the objection contained in their petition of the 24th September 1923 and they did not choose to take any other objections and I see no reason to allow them a further opportunity for adducing evidence. As regards the merits of the case I am clearly of opinion that this is a fit case in which the abatement should be set aside. The deceased respondent was a *pardanashin* lady residing in the interior of a different district and there is no reason to suppose that the appellant was aware of her death at any time prior to the 10th September 1923. As I have already said notice of the appeal had already been served on the deceased respondent and she had entered appearance as is evident from the order dated the 30th January 1923. After that it was not the duty of the appellant to be on the lookout and to be always enquiring as to whether the respondents in the appeal were alive or dead and if the appellant had done all that was necessary to bring the appeal to hearing it was not incumbent upon him to go on enquiring every now and then as to whether the respondents were alive or dead. When the appellant came to know of the death he was very prompt and within 8 days of his knowledge he filed an application for setting aside the abatament. There is nothing to show that there were any laches on the part of the appellant or that by the use of reasonable diligence he could have come to know earlier of the death of the respondent No. 2. In the circumstances I am of opinion that the abatement should be set aside and the appeal restored and the case remitted to the learned District Judge so that he might make the substitution of the heirs of the deceased respondent and proceed to dispose of the appeal in accordance with law. The costs of this appeal will abide the result of the appeal in the lower Court.

Jwala Prasad, A. C. J.—I agree.

Z. K. *Appeal accepted.*

(1) 59 Ind. Cas. 903; 42 A. 540; 18 A. L. J. 688.
(2) 74 Ind. Cas. 17; (1924) A. I. R. (L.) 424.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 927 OF 1922.

July 15, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SUJJAD AHAMMAD CHOWDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SACHINDRANATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Survey Act (V of 1875), ss. 41, 62—Order

under s. 41, operation of—Civil Court, whether can adjudicate on question of title.

Under s. 41 of the Bengal Survey Act the Collector must determine the boundaries according to actual possession and cause them to be secured by boundary marks. If the order of the Collector is not challenged it must be regarded as an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector, and the order must be regarded as final so far as the question of possession is concerned. Such an order, however, does not bind the Civil Court upon the question of title, and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession. [p. 1013, col. 2.]

Kala Charan Tea Co. v. *Sukul Singh*, 13 C. 280; 6 Ind. Dec. (N. S.) 686, *William Graham* v. *Phanindra Nath Mitter*, 31 Ind. Cas 41; 19 C. W. N. 1038 and *Babu Kasturi Singh* v. *Rajkumar Babu*, 8 C. W. N. 876, followed.

Appeal against a decree of the Additional District Judge, Murshidabad, dated the 17th of January 1922, affirming that of the Munsif, Second Court at Jangipur, dated the 28th of February 1920.

Babu *Bankim Chandra Mukherjee*, for the Appellants.

Babus *Mahendra Nath Roy* and *Anilendra Nath Roy Chowdhury*, for the Respondents.

JUDGMENT.—This appeal is by the plaintiffs against the decree of the District Judge of Murshidabad affirming the decree of the Munsif of Jangipur dismissing the plaintiffs' suit for recovery of possession or in the alternative for assessment of rent. The facts are that the plaintiffs and the defendants are landlords of contiguous *mouzahs*. There was a dispute between them with regard to the boundary between the two *mouzahs* There was a Survey under the Bengal Survey Act, 1875, in 1911 which fixed the boundary line between the two *mouzahs*. The tank which is the subject-matter of the present suit was found to be within *Mouzah* Lalpore belonging to the plaintiffs. In the Record of Rights which was published in 1916 this tank was recorded as belonging to the plaintiffs' *Mouzah* Lalpore but in the possession of the defendants who held it without payment of rent but it was subject to assessment of rent. Thereafter the plaintiffs brought the present suit for correction of the Record of Rights and for *khas* possession of the tank as belonging to them being situated within their *mouzah* and in the alternative for assessment of rent. Both the Courts below have found that the plaintiffs' case was barred by the defendants' 12 years adverse possession and dismissed the plaintiffs' suit.

In appeal it is argued that under s. 41 of the Bengal Survey Act the plaintiffs must be presumed to be in possession in 1914 and hence the suit is wrongly held to be barred on the ground that the defendants were in adverse possession for more than 12 years before the institution of the suit. There is considerable force in this contention. Under s. 41 of the Bengal Survey Act, 1875, the Collector shall determine the boundaries according to actual possession and cause it to be secured by boundary marks. If no further steps are taken challenging the order of the Collector, it shall under that section be regarded as an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. In this case no appeal was preferred under ss. 59 and 60 of the Bengal Survey Act and we must take it that the boundary fixed by the Collector under s. 41 placing the tank within the plaintiffs' *mouzah* was final so far as the question of possession is concerned. This view of the effect of the Bengal Survey Act has been held in *Kala Charan Tea Co.* v. *Sukul Singh* (1). The learned Judges there observed that "the duty of the Collector under the Act is to determine in a proper proceeding the fact of possession; he is to lay down the boundary line according to actual possession." They further observed that "if there had been the most regular proceeding and the most formal decision on the question of boundary in a boundary dispute, though that would have been conclusive as to possession, under s. 62 it would have been no bar to a suit based upon title." That case as well as the other cases that followed it took the view that though the question as to who were in actual possession at the date of the Survey was not open to be agitated in the Civil Court, the question of title remaind open for determination by the Civil Court. In the case of *William Graham* v. *Phanindra Nath Mitter* (2) it is laid down that an order under s. 41 of the Bengal Survey Act does not bind the Civil Court upon the question of title and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession A similar view has been expressed in the case of *Babu Kasturi Singh*

(1) 13 C. 280; 6 Ind. Dec. (N. S.) 686.
(2) 31 Ind. Cas. 41; 19 C. W. N. 1038.

v. *Raj Kumar Babu* (3). It being thus settled law that the question of title may be determined by a Civil Court and that s. 41 of the Act does not preclude it from finding as to who was in possession of the disputed land anterior to the order passed by the Survey Authorities, it is open to the Court below to find title in the defendants on the basis of their possession prior to 1914. No doubt the case was not tried on that basis. The issue on which the parties went to trial was whether the plaintiff's suit was barred by limitation. The findings arrived at by the First Court are that possession of defendants for above 30 years was proved and that regard being had to actual evidence and the circumstances and probabilities of the case, the defendants have been freely and openly exercising acts of possession in respect of the tank and its banks to the exclusion of others for a period for more than 12 years. If the defendants were the plaintiffs in this suit and had brought the suit for a declaration of their title on the basis of adverse possession for more than 12 years before the Survey in 1914, according to the authorities that we have cited, that would have been maintainable. Here, the position is reversed and the plaintiffs have brought the present suit for recovery of possession on declaration of their title. We think that the defendants are entitled to take up the same position in defence which they could have successfully maintained had they been plaintiffs. There is no doubt a legitimate grievance by the plaintiffs that the case was not tried in the Courts below on that footing, namely, whether the defendants acquired a title by adverse possession prior to 1914. The defendants' case is that they have been in possession since 1861 under a certain exchange between their predecessors and one Mr. Andrew who was the then *putnidar* of Lalpore. Both the Courts have believed the story and found that the defendants have been in possession since 1861, the date of the exchange or *hebanama*. We are asked to remand the case to the Court below to determine the question of defendants' title by adverse possession before 1914. We think that this will serve no useful purpose on the findings as they stand. In our judgment the Courts below have come to a correct decision though upon a ground which is erroneous. In this view of the case this appeal stands dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 8 C. W. N. 876.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 82 OF 1920.

January 16, 1923.

Present :—Mr. Justice Das and Mr. Justice Kulwant Sahay.

MEDNI PRASAD SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NAND KESHWAR PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Share of member, whether attachable in execution—Sale of joint family property—Purchaser of share of one member, right of, to demand partition—Suit by another member to set aside sale, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXI, r. 90.

A member of a joint Hindu Mitakshara family has an interest in the joint family property which is capable of being attached in execution of a decree against him. [p. 1015, col. 2.]

The purchaser of a share of a member of a joint Mitakshara Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family. [p. 1016, col. 1.]

Joint family property was sold in execution of a decree obtained against some of the members of the family. An application for setting aside the sale having been dismissed, plaintiffs filed a suit for recovery of possession; one of the plaintiffs was not a party to the application under O. XXI, r. 90, C. P. C.:

Held, that it was not necessary for all the plaintiffs to apply under the provisions of O. XXI, r. 90 of the C. P. C., and the suit was maintainable. [p. 1015, col. 2.]

Deendayal v. *Jugdeep Narain Singh*, 3 C. 198; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604 (P. C.), referred to.

First appeal from a decision of the Subordinate Judge, Second Court, Monghyr, dated the 11th March 1920.

Mr. *P. K. Sen* (with him Messrs. *Susil Madhab Mullick* and *Sivanandan Roy*), for the Appellants.

Mr. *Guru Saran Prasad*, for the Respondents.

JUDGMENT.

Das, J.—Sometimes in 1917 the defendants instituted a suit against the plaintiffs Nos. 1 and 2 to recover a sum of money upon a *chitta* and obtained a decree for money as against plaintiffs Nos. 1 and 2. They put the decree in execution and put up to sale the right, title and interest of plaintiffs Nos. 1 and 2 in certain properties which, it is now alleged by the plaintiffs, were the

joint family properties of all the plaintiffs. On the 14th of December 1918, the defendants purchased a 10 annas 13 dams proprietary interest in the properties which in their view was the share of the plaintiffs Nos. 1 and 2 in the properties. Plaintiffs Nos. 1 and 2 thereupon applied under the provision of O. XXI, r. 90, C. P. C., for setting aside the sale. That application was dismissed for default and the plaintiffs Nos. 1 and 2 thereupon applied for restoration of that application under O IX, r. 9, and it appears that that application was ultimately dismissed. On the 3rd of March 1919 the suit out of which this appeal arises was instituted by the plaintiffs for recovery of possession of the properties which, as I have mentioned, were taken possession of by the defendants in execution of their decree against plaintiffs Nos. 1 and 2. Plaintiff No. 4 is the son of plaintiff No. 1 and plaintiff No. 3 is the brother of plaintiffs Nos. 1 and 2.

The allegations in the plaint are the necessary allegations which an applicant in an application for setting aside a sale under O. XXI, r. 90 is required to make, but in the 12th paragraph of the plaint the plaintiffs did allege that plaintiffs Nos. 1 and 2 had no specific share in the joint family properties and that no definite share in the joint family properties could in law be purchased by the defendants. The defendants in their written statement contended that the plaintiffs had no cause of action and resisted the plaintiffs' suit on the merits. They also alleged that the plaintiffs were all separate from each other and that all that they had purchased was the right, title and interest of plaintiffs Nos. 1 and 2 and that the plaintiff No. 3 could not join them in recovering possession of the share purchased by the defendants.

The learned Subordinate Judge has come to the conclusion that the plaintiffs have no cause of action as against the defendants and in that view has dismissed the whole suit without discussing the other issues which were framed by him.

It has been pointed out by the Judicial Committee over and over again that the Courts in India ought to decide all the issues in order to save a remand, and in my opinion the learned Subordinate Judge should certainly have recorded the evidence in the case and decided all the issues that arose in the case. Had he adopted that course, it would not have been necessary for us to remand the case to him.

On the question whether the plaintiffs have a cause of action as against the defendants, I agree with the learned Subordinate Judge that the plaintiffs Nos. 1, 2 and 4 have no cause of action as against the defendants; but I entirely differ from him on the question whether the plaintiff No. 3 has a cause of action as against the defendants. The view of the learned Subordinate Jude is this:—"The plaintiff No. 3 is a person whose interests are affected by the sale. He could have come under O. XXI, r. 90, C. P. C. to have the sale set aside. He did not do so. Rule 92 provides that where no application is made under r. 90 and where such an application was made and disallowed, the Court is to confirm the sale and no suit would lie to set aside the order confirming the sale, or, in other words, the sale. Thus the case of the plaintiff No. 3 comes under the provision where no application is made." In my view it was not necessary for the plaintiff No. 3 to apply under the provision of O. XXI, r. 90, C. P. C., he was not a party to the suit and his case is that under cover of a decree obtained by the defendants as against plaintiffs Nos. 1 and 2, they have seized and taken possession of property which was the joint family property and in which he has an interest. Clearly he has a right to enforce his claim by a suit and it was not at all necessary for him to apply under the provision of O. XXI, r. 90. That being so, the case must go back to the learned Subordinate Judge in order that he may determine the other issues that arise in this case.

But in order to avoid a failure of justice it is necessary to point out what the plaintiff No. 3 would be entitled to if he succeeds in his contention that the family was joint at the time when the interest of plaintiffs Nos. 1 and 2 were attached in execution of the decree obtained by the defendants as against them. It is quite clear that a member of a joint Hindu Mitakshara family has an interest which is capable of being attached in execution of a decree as against him. In this view the attachment and the sale of the interest which was of plaintiffs Nos. 1 and 2 would be good and binding upon the joint family. But though a creditor can attach and purchase the interest of a member of a joint Mitakshara Hindu family, it is not open to him to take pos-

session of that interest. The position is clearly indicated in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1). In that case their Lordships of the Judicial Committee pointed out the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale. They said that just as a partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of all the partners although the purchaser at the execution sale could acquire the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value; so also though a member of a joint Hindu family could not himself have sold his share so as to introduce a stranger into the joint family, the purchaser, by purchasing at an execution sale, acquires the right to compel the partition which his debtor might have compelled, had he been so minded, before the alienation of his share took place. In other words the purchaser of the share of a member of a joint Mitakshara Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family.

If the learned Subordinate Judge comes to the conclusion that the family was joint at the time when the defendants purported to purchase the right, title and interest of plaintiffs Nos. 1 and 2 in the joint family properties, he will give a decree for possession to plaintiff No. 3, but he will make a declaration that the defendants as purchasers at the execution sale have acquired the share and interest of plaintiffs Nos. 1 and 2 in the property and that they are entitled to take such proceedings as they shall be advised to have that share and interest ascertained by partition. We are unable ourselves to pass a decree to that effect because there is a contention of the defendants that the family was separate. This is an issue which it is necessary for the learned Subordinate Judge to try.

We allow the appeal of plaintiff No. 3, set aside the judgment and decree passed by the learned Subordinate Judge, and remand the case to the learned Subordinate Judge for disposal according to law in accordance with the observations made in this judgment.

The decision of the learned Subordinate Judge with regard to the plaintiffs Nos. 1, 2 and 4 will, however, stand. I think that in the circumstances the defendants are entitled to their costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by lower Court.

Kulwant Sahay, J.—I agree.

K. S. D. *Case remanded.*

(1) 3 C. 198; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 243 OF 1922.

March 25, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

NAGAPPA PILLAI—PLAINTIFF—PETITIONER

versus

ARUNACHALAM CHETTY—DEFENDANT—RESPONDENT.

Letters Patent (Mad.), cl. 36—Civil Procedure Code (Act V of 1908), s. 98—Provincial Small Cause Courts Act (IX of 1887), s. 25—Difference of opinion—Procedure—Contract Act (IX of 1872), ss. 23, 65—Chit fund transaction—Lottery—Suit for refund of amount paid, maintainability of.

Where in a revision petition to the High Court under s. 25, Provincial Small Cause Courts Act, there is a difference of opinion between the Judges, cl. 36 of the Letters Patent applies and not s. 98, C. P. C., and the opinion of the Senior Judge, therefore, prevails. [p. 1023, col. 1.]

(Case-law discussed.)

A *chit* fund conducted by the defendant consisted of 500 tickets, of a rupee each, and was to continue for 50 months. Two prizes to be of Rs. 25 each were to be drawn each month; a winner of one prize in the series paid annas 8 only as monthly subscription after winning; a winner of two prizes paid nothing subsequently. The prize winners were to be determined by lot. At the end of the 50 months, all the subscribers who had won no prizes were to be paid back the whole of the money they had subscribed, namely, Rs. 50 each. The fund was discontinued after 27 months. Plaintiff, who was one of the subscribers sued to recover the amount of the subscription paid by him:

Held, Per *Krishnan, J.*—(1) that the arrangement regarding the giving of prizes was clearly a lottery, and any suit brought, to recover the prize money, must fail as being one to enforce an illegal contract; [p. 1020, col. 1.]

(2) that, however, the main contract between the parties was to pay back the total sum of the subscriptions collected intact in a lump sum at the end of the period, the prize arrangement being added on to it as a collateral arrangement to the main contract; [*ibid.*]

(3) that the contract to re-pay the subscriptions at the end of the period was separable from the arrangement to give prizes and the illegality of the latter did not necessarily attach to the former; [*ibid.*]

(4) that the suit was, therefore, maintainable. [p. 1020, col. 2.]

Sankunni v. *Ikkora Kutti*, 52 Ind. Cas. 989; (1919) M. W. N. 570; 10 L. W. 156; 37 M. L. J. 209, not followed.

Per *Odgers, J.* (*Contra*).—(1) that the *chit* fund was a lottery or distribution of prizes by lot or chance and was, therefore, illegal under the law; [p. 1021, col. 1.]

(2) that part of the plaintiff's subscriptions had gone in paying the prize winners and the lottery could not and ought not to be separated from the contract to return the subscription at the end of the period fixed; [*ibid.*]

(3) that there having been a partial carrying into effect of an illegal purpose in a substantial manner, though there remained something not performed, the money paid under the illegal contract could not be recovered back; [p. 1021, col. 2.]

(4) that s. 65 of the Contract Act was inapplicable to the case. [p. 1021, col. 1.]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Devakotta, in Small Cause Suit No. 561 of 1921.

FACTS.—The defendant conducted a *chit* fund in which there were 500 subscribers, each paying a rupee a month for 50 months. Two prizes each for Rs. 25 were to be drawn each month. The subscriber who got only one prize was to pay Rs. 0 8-0 per month for the subsequent months and a subscriber who got the second prize also was not liable to pay anything thereafter. At the end of the 50th month the entire subscriptions had to be re-paid to the subscriber who had won no prizes; the single prize winners were paid Rs. 25 each.

After the decision in *Sankunni* v. *Ikkora Kutti* (1) the defendant voluntarily stopped the *chit* at the end of the 27th month and refused to pay the subscriptions due to those who had won no prize. The plaintiff one of those subscribers who had no prize brought the suit for recovery of his subscriptions paid for the 27 months.

The lower Court dismissed the suit relying on *Sankunni* v. *Ikkora Kutti* (1) on the ground that the *chit* fund was a lottery and that the subscriptions were not recoverable.

The case came on first before Coleridge, J., when the decision in *Sankunni* v. *Ikkora Kutti* (1) was questioned as having been wrongly decided and the case was referred to a Bench.

ARGUMENTS.—Mr. *N. Sivaramakrishna Iyer*, for the Petitioner :—The first question is whether the *chit* is a lottery. There is no loss to any one. No risk is involved. According to the rules whatever is paid is always recovered back, though in some instances some more amount besides the subscription is got by subscribers. The main object is to provide for an investment of small earnings for accumulation. The mere chance of gain cannot make a lottery. Neither the *chit* holder is a loser for he pays the prizes out of the interest earned by him on the subscriptions paid. Mere drawing of lots cannot make it a lottery. *Kamakshi Achari* v. *Appavu Pillai* (2).

Secondly, assuming it is a lottery, subscriptions paid can be recovered. There is a distinction between a suit for a prize won and a suit for return of subscriptions. The prize is a collateral advantage to the subscriber who always gets back his subscriptions by contract. The clause relating to refund of subscriptions can be severed from the clause relating to the prize and effect can be given to the legal portion of the contract, *viz.*, return of subscription paid.

Section 294 (*a*), Penal Code, does not make "lottery" an offence but only punishes the *chit* holder, 'whoever keeps a house for lottery'. Such provisions in Statutes are really intended to protect the needy and ignorant multitude against the devices of stake holders.

The object is to mark the criminal and to protect the public. A Statute intended to protect a particular class of persons must be construed so as not to defeat their just and lawful rights. 7 Halsbury's Laws of England, s. 846.

Accordingly it has been held in England under the corresponding Statute that subscribers can recover their subscription.

Clarke v. *Shee* (3); *Browning* v. *Morris* (4); *Jaques* v. *Golightly* (5); *Barclay* v. *Pearson* (6).

In any event the claim for refund of subscriptions is maintainable under s. 65 of the Contract Act. The present is a case of an agreement discovered to be void within the meaning of s. 65. Consequently the defendant is bound to refund. Contracts *ab initio* void if they are still agreements within the meaning of the Contract Act are within s. 65, Contract Act.

(1) 52 Ind. Cas. 989; (1919) M. W. N. 570; 10 L. W. 155; 37 M. L. J. 209.

(2) 1 M. H. C. R. 418.

(3) (1774) 1 Cowp. 197; 98 E. R. 1041.

(4) (1778) 2 Cowp. 790; 98 E. R. 1364.

(5) (1776) 2 Black. 1073; 96 E. R. 632.

(6) (1893) 2 Ch. 154; 62 L. J. Ch. 636; 3 R. 388; 68 L. T. 709; 42 W. R. 74.

Harnath Kuar v. *Indar Bahadur Singh* (7); *Ananda Mohan Roy* v. *Gour Mohan Mullick* (8).

The question as to when it is discovered to be void, whether on the date of the contract or agreement or on a subsequent date, arises only for purposes of limitation and does not affect the substantive right conferred. *Ananda Mohan Roy* v. *Gour Mohan Mullick* (8).

The rule that ignorance of law is no excuse does not apply where a question of the legal effect of an agreement arises, on a construction of which the rights of parties depend. Consequently the discovery is only when the Court pronounced the agreement to be unlawful, as was held in *Bassu Kuar* v. *Dhun Singh* (9) and *Harnath Kuar* v. *Indar Bahahur Singh* (7).

Again even in cases of unlawful agreements, the defendant has been ordered to refund *ex-acquo it bono* because he is not in equity entitled to retain the money.

Moses v. *Macferlan* (10); *Hermanu* v. *Charlesworth* (11); *Ram Chand* v. *Audaito Sen* (12); *Somu Pillai* v. *Municipal Council, Mayavaram* (13); *Gulabchand Paranchand* v. *Fulbai Harichand* (14), *Jijibhai Lal Das* v. *Nagji Gulab* (15), S. A. No. 605 of 1919 unreported.

Mr. *P. C. Sundaram*, *amicus curiæ*, for the Respondent.—Where a bargain is illegal moneys paid thereunder cannot be recovered. *Taylor* v. *Smethen* (16).

Section 65 cannot apply where a contract is void on grounds of illegality, for there can be no "discovery".

Srinivasa Aiyar v. *Sesha Iyer* (17); *Ledu* v. *Hiro Lal Bose* (18); *Srikakolapur Venkataraju* v. *Gudivada Ramanujam* (19).

The case in *Harnath Kuar* v. *Indar Bahadur Singh* (7) does not lay down any doctrine at variance with this rule. That case related to the construction of a written agreement and is not covered by the rules relating to illegal contracts.

It is only for mistakes of fact that the Statute provides for relief not for mistakes of law.

Vide ss. 71 and 72 of the Contract Act; *Ledu* v. *Hiro Lal Bose* (18).

There must be some supervening circumstances for a "discovery" subsequent to the contract s. 65 not applying, the general principle of law that money paid under an illegal contract cannot be recovered applies here.

Hampden v. *Walsh* (20); *Diggle* v. *Higgs* (21); *Trimble* v. *Hill* (22); *Tatam* v. *Reeve* (23); C. R. P. No. 441 of 1922 (24); C. R P. Nos. 164 to 166 of 1922 (25); *Chhanga Mal* v. *Sheo Prasad* (26).

It is only where nothing has been done under the unlawful contract that moneys could be recovered.

Tappenden v. *Randoll* (27); *Taylor* v. *Bowers* (28); *Kearlay* v. *Thomson* (29).

Here the lottery went on for 27 months and the plaintiff's moneys were utilised for the illegal purpose of paying the prizes.

Plaintiff is, therefore, in *pari delicto* and cannot recover. [Judgment was delivered on 7th March 1921, Krishnan, J., allowing and Odger, J., dismissing the petition].

On this difference of opinion the case was posted for argument on 13th March 1924 as to the order to be passed in the case.

(7) 71 Ind. Cas. 629; 45 A. 179; 44 M. L. J. 489; (1922) A. I. R. (P. C.) 403; 9 O. & A. L R. 270; 9 O. L. J. 652; 37 C. L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 P. L. R. 237 (P. C.).

(8) 74 Ind. Cas. 499; 50 C. 929; 45 M. L. J. 617; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.).

(9) 11 A. 47 at p. 56; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind Jur. 450; 6 Ind. Dec. (N. s.) 458 (P. C.).

(10) (1760) 2 Burr. 1005 at p. 1012; 97 E. R. 676.

(11) (1905) 2 K. B. 123; 74 L. J. K. B. 620; 54 W. R. 22; 93 L. T. 284; 21 T. L. R. 368.

(12) 10 C. 1054; 5 Ind. Dec. (N. s.) 704.

(13) 28 M. 520 at p. 525.

(14) 3 Ind. Cas. 748; 33 B. 411 at p. 416; 11 Bom. L. R. 649.

(15) 3 Ind. Cas. 761; 11 Bom. L. R. 693.

(16) (1883) 11 Q. B. D. 207; 52 L. J. M. C. 101; 48 J. P. 35.

(17) 41 Ind. Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282.

(18) 29 Ind. Cas. 625; 43 C. 115; 21 C. L. J. 537; 19 C. W. N. 919.

(19) 44 Ind. Cas. 319; 34 M. L. J. 561; 23 M. L. T. 84; (1918) M. W. N. 230; 7 L. W. 518.

(20) (1876) 1 Q. B. D. 189; 45 L. J. Q. B. 238; 33 L. T. 852; 24 W. R. 607.

(21) (1877) 2 Ex. D. 422; 46 L. J. Ex. 721; 37 L. T. 27; 25 W. R. 777.

(22) (1880) 5 A. C. 342; 49 L. J. P. C. 49; 42 L. T 103; 28 W. R. 479.

(23) (1893) 1 Q. B. 44; 62 L. J. Q. B. 30; 5 R. 83; 67 L. T 683; 41 W. R. 174; 57 J. P. 118.

(24) 44 M. L. J. 25 (*Notes*).

(25) 44 M. L. J. 27 (*Notes*).

(26) 55 Ind. Cas. 965; 42 A. 449; 18 A. L. J. 513.

(27) (1801) 2 B. & P. 467; 5 R. R. 662; 126 E. R. 1388.

(28) (1876) 1 Q. B. D. 291; 45 L. J. Q. B. 163; 34 L. T. 938; 24 W. R. 499.

(29) (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.

Mr. *N. Sivaramakrishna Iyer*, for the Petitioner.—The opinion of the Senior Judge prevails under cl. 36 of the Letters Patent. Section 98 does not in terms apply because this is a revision and not an appeal. Wherever s. 98 does not, in terms apply either by itself or by reference, the only other procedure, *viz.*, cl. 36 of the Letters Patent is applicable.

Husani Begam v. *Collector of Muzaffarnagar* (30); *Bhaidas Shivdas* v. *Bai Gulab* (31); *Manavikraman Tirumalpad* v. *Collector of the Nilgiris* (32); *Krishen Doyal Gir* v. *Irshad Ali Khan* (33); *Ram Das Hazra* v. *Secretary of State* (34); *Policherla Veeraraghava Reddi* v. *Cherla Subba Reddi* (35); *Moiram Bewah* v. *Mrijan Sardar* (36), *Kumar Chandra Kishore Roy* v. *Basat Ali* (37), *In re, Karri Venkanna Potrudu* (38).

In all cases of special jurisdictions cl. 36 applies. *Bapu* v. *Bapu* (39), see also *In re Karr iVenkanna Patrudu* (38).

The decision in *Narayanasami Reddi* v. *Usuru Reddi* (40), is no longer law after *Bapu* v. *Bapu* (39), and *Bhaidas Shivdas* v. *Bai Gulab* (31).

Jurisdiction is exercised in the present case under s. 25 of the Provincial Small Cause Courts Act. It is a special jurisdiction within the meaning of *Bapu* v. *Bapu* (39), and *Bhaidas Shivdas* v. *Bai Gulab* (31), for purposes of s. 4, C. P. C.

Section 98 is not incorporated into revisions by s. 141, C. P. C. as the latter does not apply to appeals [*In re Karri Venkanna Patrudu* (38)], but only to original jurisdiction in the nature of suits. *Thakur Prasad* v. *Fakir Ullah* (41), *Narayanan Chetty* v. *Mutiah Chettiar* (42).

Further s. 7, C. P. C. excludes the applicability of s. 98 to Courts exercising jurisdiction under Act IX of 1887.

It has been held in Calcutta that in second appeals under the Bengal Tenancy Act cl. 36 of the Letters Patent applied. *Becharam Chowdhury* v. *Purna Chander Chatterji* (43).

Mr. *P. C. Sundaram amicus curiæ.* Revisional jurisdiction is really part of the appellate jurisdiction. *Chappan* v. *Moidin Kutti* (44), *Shew Prosad* v. *Ram Chundur* (45).

Clause 36 cannot apply where s. 98 is applicable. To all *mofussil* cases s. 98 must be applicable unless the Statute excludes the application of s. 98. *Narayanasami Reddi* v. *Usuru Reddi* (40), is a decision of three Judges on the exact question now before the Court.

JUDGMENT.

Krishnan, J.—This civil revision petition has been referred to a Bench by Coleridge, J., as he considered that the ruling of Phillips, J., in *Sankunni* v. *Ikkora Kutti* (1) on which the judgment of the District Munsif is based required re-consideration.

The suit refers to a *chit* fund carried on by the defendant; there were 500 subscribers each paying a rupee a month. The *chit* was to last for 50 months during which period two prizes were to be drawn by lot of Rs. 25 each among the subscribers every month. Any subscriber who happened to win a prize was paid Rs. 25 at once and was thereafter to pay only a subscription of 8 annas a month. If he won a second prize he would be paid Rs. 25 more and his subscription ceased and his name would no longer be included in drawing the prizes. At the end of the 50 months, all the subscribers who had won no prizes were to be paid back the whole of the money they subscribed, namely, Rs. 50 each; the single prize winners were similarly to be re-paid Rs. 25 each. These are the rules under which the *chit* was carried on. There were certain other rules regarding

(30) 11 A. 176; A. W. N. (1889) 27; 13 Ind. Jur. 316; 6 Ind. Dec. (N. S.) 540.

(31) 69 Ind. Cas. 822; 45 B. 718; 40 M. L. J. 519; 25 C. W. N. 605; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 30 M. L. T. 149; 48 I. A. 181 (P. C.).

(32) 49 Ind. Cas. 27; 41 M. 943; 8 L. W. 261; 24 M. L. T. 155; 35 M. L. J. 110; (1918) M. W. N. 540.

(33) 31 Ind. Cas. 965; 22 C. L. J. 525 at p. 528.

(34) 16 Ind. Cas. 922; 17 C. L. J. 75; 18 C. W. N. 106.

(35) 53 Ind. Cas. 428; 43 M. 37; 10 L. W. 281; 37 M. L. J. 449; (1919) M. W. N. 699; 26 M. L. T. 339.

(36) 54 Ind. Cas. 169; 47 C. 438; 24 C. W. N. 97; 31 C. L. J. 183; 21 Cr. L. J. 25.

(37) 44 Ind. Cas. 763; 27 C. L. J. 418 at p. 423; 22 C. W. N. 627.

(38) 32 Ind. Cas. 330 at p. 333; 18 M. L. T. 591; 17 Cr. L. J. 42.

(39) 14 Ind. Cas. 305; 39 M. 750; 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. 419; 13 Cr. L. J. 209.

(40) 25 M. 548.

(41) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393.

(42) 80 Ind. Cas. 658; 46 M. L. J. 575; 34 M. L. T. 350; (1924) M. W. N. 482; 20 L. W. 103; (1924) A. I. R. (M.) 680; 47 M. 692.

(43) 28 C. W. N. xliv (44).

(44) 22 M. 68; 8 M. L. J. 231; 8 Ind. Dec. (N. S.) 49.

(45) 23 Ind. Cas. 977; 41 C. 323.

defaulting subscribers, but it is not necessary now to refer to them.

It will thus be seen that while the subscribers do not lose any part of the subscriptions they pay they get a chance of winning one or two prizes. That chance was decided by lot. But the prizes did not come out of the subscriptions paid as the total amount had to be re-paid to the subscribers after the 50th month. The prize money was apparently obtained from the interest that the defendant could realise by himself investing the subscription moneys received by him for the 50 months, during that period.

There can be no doubt that so far as the arrangement regarding the giving of prizes is concerned, it is clearly a lottery; and any suit brought, for example, to recover the prize money, will fail as being one to enforce an illegal contract. Section 294-A of the Indian Penal Code makes a lottery an illegal transaction. The present suit, however, is not for such a purpose but for the refund of the subscriptions paid as the *chit* has been discontinued by the defendant. The question we have to decide is whether the illegality of the prize arrangement attaches itself to the contract to re-pay in a lump sum at the end of the 50 months the total subscription collected for those 50 months and prevents the plaintiff's present claim from being recognised and enforced.

It seems to me that the main contract between the parties was to pay back the total sum of the subscriptions collected intact in a lump sum at the end of the period. As an inducement to join the *chit*, the prize arrangement has been added on to it as a collateral arrangement to the main contract. It is collateral and ancillary advantage that a fortunate subscriber may get if he wins a prize. I am inclined to think that the contract to re-pay the subscriptions at the end of the period is severable from the arrangement to give prizes and the illegality of the latter does not necessarily attach to the former. The arrangement amounts to this that in view of interest on their money the subscribers accept the chance of winning one or two prizes in a lottery; for the capital has to be refunded to them intact at the end of the term. Any illegality attaching to the interest arrangement will not necessarily affect the claim for the capital. I do not consider that it is right to hold in the circumstances of this case that any portion of the money stated to have been paid by the plaintiff has been actually paid out as prizes; for the condition to return the money at the end of the term excludes such an inference.

In the case in *Sankunni* v. *Ikkora Kutti* (1) the learned Judge did not have his attention drawn to the point of view above set out, the respondent not having been represented before him. In the view I am taking, it follows that the plaintiff's suit is maintainable as brought and it is not necessary to refer to the various English and Indian cases cited before us.

I would, therefore, set aside the decree of the District Munsif and remand the case to him for disposal on the merits and direct defendant to pay the costs of this civil revision petition to the plaintiff; and direct other costs to abide and follow the result, and the stamp duty for this petition to be refunded.

Odgers, J.—This is a civil revision petition by the plaintiff in a Small Cause Suit. He sued for the recovery of a sum of money representing his subscriptions to a certain *chit* fund and interest. The District Munsif found the *chit* in question was a lottery and relying on the ruling in *Sankunni* v. *Ikkora Kutti* (1) dismissed the plaintiff's suit. The first question, therefore, is whether the District Munsif was right in his opinion that the *chit* was a lottery. It consisted of 500 tickets of a rupee each and was to continue for 50 months. On the 5th of every Tamil month, two prizes were to be drawn of Rs. 25 each, a winner of one prize in the series paid annas 8 only as monthly subscription after winning; a winner of two prizes paid nothing subsequently. The prize-winners each month were determined by lot. It is contended that this *chit* fund falls within the scope of the ruling in *Kamakshi Achari* v. *Apparu Pillai* (2) where it was laid down that a transaction is not necessarily a lottery within Act V of 1844 because some matter is agreed to be decided by lot. In that case it was to be determined by lot which of the subscribers should be entitled to take the whole amount of the month's subscriptions. All got their subscriptions returned, it was only the loan of the common fund which was determined by lot. The present case goes much further than this. A lottery not authorised by Government is now illegal by virtue of s. 294-A, Indian Penal Code, and in the present case it is clear that in the most favourable event,

a subscriber could draw two prizes or Rs. 50 at the first drawing, *i. e.*, on subscribing rupee one. In the least favourable event, he drew no prize and got his subscription back at the end of the 50th month. The *chit* fund proceeded for 26 or 27 months and the proprietor or stake-holder then stopped the *chit*, on hearing, it is said, of the judgment of Phillips, J., reported as *Sankunni* v. *Ikkora Kutti* (1). The present suit is to recover back the instalments already paid by plaintiff as subscriber to the *chit*. I have no doubt that the *chit* fund under consideration is a lottery or distribution of prizes by lot or chance; and is, therefore, illegal under the law. The appellant before us, however, urges that the lottery can be and ought to be separated from the contract to return the subscriptions at the end of the 50th month and that as the plaintiff's subscriptions in the hands of the stake-holder have not yet been applied to the illegal purpose, they can be recovered. That part of the plaintiff's subscriptions has gone in paying the prize winners is clear. Further plaintiff has taken his chance in the lottery of drawing one or two prizes every month for 26 or 27 months. His name or number has been placed in the lottery for each one of those drawings. He has not chanced to draw a prize though he has competed for it by taking part in the lottery. I do not see, therefore, how the two things can be kept distinct. The plaintiff argues that the case falls within the law as to wagers, *i. e.*, s. 30, Contract Act, and corresponding to s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109). There was some argument before us that s. 65, Contract Act, applied to this case. I am of opinion that it is wholly inapplicable, the agreement here is not discovered to be void nor did the contract *become* void—it was illegal from the beginning. Under the section of the Gaming Act it has been held that the words prohibiting the recovery of money which shall have been deposited to abide the event upon which any wager shall have been made do not prevent the party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stake-holder, *cf.* *Hampden* v. *Walsh* (20), where the authority of *Hastelow* v. *Jackson* (46) is established and *Diggle* v. *Higgs* (21). Both cases were approved by the Privy Council in *Trimble* v. *Hill* (22). Therefore, when money has been paid under an unlawful agreement but nothing else done in performance of the latter, the money may be recovered back. *Tappenden* v. *Randall* (27) followed in *Ledu* v. *Hira Lal Bose* (18). The exception engrafted on the section of the Gaming Act by this case is probably confined to cases where the agreement is not actually criminal or immoral. See particularly per Chambre, J., in *Tappenden* v. *Randall* (27). If this is so, the present case would appear to be outside the benefit of the exception as falling within the Criminal Law. Even otherwise, the effect of *Kearley* v. *Thomson* (29) and *Taylor* v. *Bowers* (28) is that the recovery may be made before the illegal purpose or any material part of it is carried out. Fry, L. J., at page 747* in *Kearley* v. *Thomson* (29) says: "I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back". In this case can it be said here that no material part of the illegal purpose has been carried out? I think not. 26 or 27 months have elapsed out of the 50 originally contemplated or more than half the term of the lottery has run and prizes have been awarded by lot every month up to the time the lottery was brought to an end. One has little sympathy indeed with the defendant, who has enriched himself at the expense of his subscribers but where both plaintiff and defendant are in *pari delicto*, and there is no ground here whatever for holding that they are not, *potior est conditio possidentis* and in my opinion the plaintiff is not entitled to recover. The civil revision petition must, therefore, be dismissed. I should like to express my indebtedness for the assistance of the able arguments advanced by the learned Vakils in this case, Mr. Sivarama Krishna Iyer for the appellant and Mr. Sundaram Iyengar who in the absence of the respondent kindly argued the case as *amicus curiæ*.

This petition coming on again for argument on the 13th of March 1924 and having stood over for consideration till this day, the Court delivered the following

(46) (1828) 8 B. & C. 221; 2 Man. & Ry. 209; 6 L. J. K. B. 318; 32 R. R. 369; 108 E. R. 1026.

*Page of (1890) 24 Q. B. D.—[*Ed.*]

JUDGMENT.

Krishnan, J.—We have differed in our opinion as to the result of the revision. The question now to be decided is whether cl. 36 of the Letters Patent or s. 98 of the C. P. C. applies to the case.

Section 98 in terms applies only to appeals under the C. P. C. Section 108 makes it applicable to second appeals, but there is no similar provision making it applicable to revision petitions under s. 115, C. P. C. or under s. 25 of the Small Cause Courts Act or under the Government of India Act. Section 141 cannot be relied on for applying s. 98 to such proceedings, as it refers only to procedure provided for suits and not for appeals as pointed out in the case in *In re Karri Venkanna Patrudu* (38). Furthermore as pointed out by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (41), s. 647 corresponding to the present s. 141 refers to matters in the nature of suits such as proceedings in Probates, guardinships and so forth; it does not refer to revision petitions in the High Court. When the High Court acts in revision in a small cause suit, it does not do so under the C. P. C. but under s. 25 of the Provincial Small Cause Courts Act and s. 98 cannot be applied to it in the absence of a special provision so applying it. On the other hand s. 7 of the C. P. C. expressly excludes the applicability of s. 98 to Small Cause Courts. Section 115 is also excluded showing thereby that s. 7 is not confined in its application to Small Cause Courts in their original jurisdiction when trying suits but applies also to Courts exercising revisional powers in small cause matters; s 7 seems to be conclusive to show that s. 98 does not apply to small cause revisions.

On the other hand there is no difficulty in applying cl. 36 of the Letters Patent though it speaks only of original and appellate jurisdictions. It has been consistently held that the expression "appellate jurisdiction" in this clause includes revisional jurisdiction. [See *Chappan* v *Moidin Kutti* (44) and *Srinivasa Iyenger* v. *Ramaswami Chettiar* (47).] This view is further supported by the recent amendment of s. 15 of the Letters Patent excluding judgments in civil revision cases from the class of appealable judgments. As pointed out by Edge, C.J., in *Husaini Begam* v. *Collector of Muzaffarnagar* (30) the provision in the Letters Patent must be applied to all cases in the High Court except those to which s. 575 of the old Code, now s. 98, can properly and without straining its language be applied. In that case cl. 27 of the Allahabad Letters Patent, corresponding to cl. 36 of ours, was applied to a case where the learned Judges differed on the question whether sufficient cause for excusing delay in filing an appeal had been shown or not. Recently the Privy Council had to consider the question whether s. 98, C. P. C., or the Letters Patent applied to an appeal from a decree passed on the original side, see *Bhaidas Shivdas* v. *Bai Gulab* (31). Their Lordships refer to ss. 4 and 98, C. P. C., and point out that there is no specific provision in s. 98 and that there is a special form of procedure which was already prescribed, namely, cl. 36 of the Letters Patent and, therefore, under s. 4, the former could not be treated as controlling the latter. It was held in *In re Karri Venkanna Patrudu* (38) already referred to that cl. 36 of the Letters Patent applied where two Judges differed in a matter under s. 476, Cr. P. C. A similar question was again decided by a Full Bench of this Court in *Bapu* v. *Bapu* (39) in the same way, holding that the power conferred by s. 195 of the Cr. P. C. was a special power and, therefore, the case was governed by cl. 36 of the Letters Patent. Similarly by analogy it may be argued that as the exercise of our power under s. 25 of the Small Cause Courts Act is the exercise of a special power, it is not governed by the C. P. C. In an application under s. 107 of the Government of India Act to revise an order under s. 145 of the Cr. P. C., the Calcutta High Court followed the ruling in *Bapu* v. *Bapu* (39) and held that cl. 36 of the Letters Patent applied. [See *Moiram Bewah* v. *Nrijan Sardar* (36)]. It was also held in *Kumar Chandra Kishore Roy* v. *Basat Ali* (37) that in a case under s. 115, C. P. C., cl. 36 applied and the opinion of the Senior Judge prevalied.

Against all this authority there is an expression of opinion in a case in the Madras reports that in a small cause revision in the High Court, s. 575 of the old Code corresponding to the present s. 98 applies by reason of s. 647, now s. 141, and not the Letters Patent; [see *Narayanasami*

(47) 29 Ind. Cas. 846; 39 M. 235; 29 M. L. J. 12; 18 M. L. T. 46.

Reddi v. *Usuru Reddi*(40)]. Though that opinion was given by a Bench of three Judges I consider that it was an *obiter dictum* as the Letters Patent Appeal before the learned Judges was disposed of on the merits and nothing turned upon which judgment prevailed in the revision petition. The point was not discussed by the learned Judges possibly because it was a matter of no consequence in the appeal. I do not think we are bound by that expression of opinion or that there is any necessity to refer the matter to the Full Bench again. The weight of that opinion is lost by reason of the subsequent rulings of this Court particularly that of the Full Bench in *Bapu* v. *Bapu* (39). I hold, therefore, that cl. 36 applies to the present case and not s. 98, C. P. C. and that our order in the civil revision petition must be in the terms proposed by me.

Odgers, J.—This was a petition under s. 25 of the Provincial Small Cause Courts Act, which runs as follows:—"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

It will be remembered that the suit was brought in the Small Cause Court for the recovery of certain subscriptions to a *chit* fund. The lower Court dismissed the plaintiff's claim on the ground that the *chit* fund was a lottery. In this Court my learned brother and myself differed in opinion. My learned brother held that the illegal element in the lottery could be discovered from the legal point in so far as it conformed to the ordinary *chit* fund transactions with which we are all familiar. I held on the other hand that the illegality tainted the whole transaction and that, therefore, the plaintiff could not succeed and his suit should be dismissed.

Now the question has been raised whether my learned brother's judgment should prevail under para. 36 of the Letters Patent as being the opinion of the Senior Judge or whether it is open to us to make a reference in the matter under s. 98, sub-s. 2, C. P. C.

It is clear that this is not an appeal, and although it is called a revision petition it is doubtful whether it is really of that nature. It is a special procedure provided by s. 25 of the Provincial Small Cause Courts Act, by which, if so advised, the High Court can correct an erroneous order passed by the Small Cause Court. Several authorities have been cited to us, but I do not think it necessary to refer to them all. In *In re Karri Venkanna Patrudu* (38) two learned Judges Abdur Rahim and Ayling, JJ., had differed on a petition under s. 115, C. P. C. to revise the order of a District Munsif who had committed the petitioner to a Magistrate on a charge of forgery. The learned Judges of the High Court differed. Mr. Justice Abdur Rahim was for setting aside the order under s. 476, Cr. P. C. Mr. Justice Ayling saw no reason to interfere. The Court held that cl. 36 of the Letters Patent applied to the case and that s. 141, C. P. C. did not make s. 98 applicable to matters of this kind. That case was, of course, strictly a case of revision and the Privy Council has held in *Bhaidas Shirdas* v. *Bai Gulab* (31) that the two provisions cl. 36 of the Letters Patent and s. 98, sub-s. (2), C. P. C., do not affect each other. The case before their Lordships was a difference of opinion, on an original side appeal to which Ch. VII of C. P. C. has of course no application. But it is quite obvious from their Lordships judgment that there is no ground for contending that s. 98, C. P. C., has obviated the provisions of cl. 36 of the Letters Patent. The case in *Bapu* v, *Bapu* (39) was a difference of opinion in a sanction matter and the Full Bench held that the application to the High Court under s. 195, Cr. P. C., was neither an appeal nor a revision but a matter of special procedure and that, therefore, cl. 36 of the Letters Patent would apply on a difference of opinion. This seems to me to be a strong authority for holding that cl. 36 of the Letters Patent would apply to the case before us, because as pointed out, s. 25 of the Small Cause Courts Act is a special procedure and in my opinion is not a revision. The difficulty in adopting this view is caused by a case reported as *Narayanasami Reddi* v. *Usuru Reddi* (40). It is not a Full Bench case though it was heard by a Bench of three Judges, and it is *prima facie* a case on all fours with the present. There an unsuccessful defendant in a Small Cause Court filed a civil revision petition to this Court. One learned Judge was of the opinion that the case should be remanded for disposal while the other held that the case was not one in which the High Court should interfere. The defend-

ant preferred an appeal under cl. 15 of the Letters Patent and an objection was taken that there was no judgment in the strict sense of the term from which an appeal could be taken. The Court held that there was a judgment and further that the case was governed by s. 575 (corresponding to s. 98, C. P. C.) The learned Judges distinguished the case cited to them for the appellant [*Husani Begam* v. *Collector of Muzaffarnagar* (30)] which held cl. 36 of the Letters Patent applicable on the ground that there had been no hearing of the appeal within s. 575 (equivalent to s. 98), C. P. C. and that in the case before them there was a hearing of the petition by the two Judges who differed as to the way the petition should be disposed of. The point was very summarily dismissed, if one may say so with respect, by the Bench in *Narayanasami Reddi* v. *Usuru Reddi* (40) but even so, I was at first inclined to think that it might be entitled to weigh with me in the present case. Even though, for the reasons I have given I am doubtful if *Narayanasami Reddi* v. *Usuru Reddi* (40) cannot be considered good law in face of the decision in *In re Karri Venkanna Patrudu* (38), the Privy Council decision in *Bhaidas Shivdas* v. *Bai Gulab* (31) and more especially the inference to be drawn from the Full Bench decision of this Court in *Bapu* v. *Bapu* (39). Under these circumstances I was inclined to the view that the only satisfactory way to clear up this difficulty which, it is obvious, may recur at any moment, was to have an authoritative decision by a Full Bench on the point. On further consideration, however, I have come to the conclusion that this is unnecessary; the opinion expressed in *Narayanasami Reddi* v. *Usuru Reddi* (40) is in almost a single line, the point is not discussed and further the Judges there held they were entitled to go into the merits which they did and reversed the opinion of Subramania Iyer, J., whose judgment, it was contended, prevailed under Letters Patent. As pointed out this is not a Full Bench case and is, therefore, not technically binding on us. I have already given reasons for thinking its opinion unsound. I, therefore, agree that cl. 36 of the Letters Patent governs this case, and the judgment of my learned brother as Senior Judge must prevail.

V. N. V.
Z. K. *Petition allowed.*

PATNA HIGH COURT.

CIVIL APPEAL No. 1505 OF 1921.
July 25, 1924.
Present:—Mr. Justice Ross and Mr. Justice Sen.

Shaikh MAHMUD ALAM—DEFENDANT—APPELLANT
versus
NATHU SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Finding of fact—Allegation in plaint not denied specifically in written statement—Record of Rights, entry in—Finding, whether can be challenged.

Where an allegation in a plaint is not specifically denied in the written statement and is supported by an entry in the Record of Rights and by the plaintiff's own statement, a finding in support of such allegation cannot be said to be based on no evidence and cannot, therefore, be challenged in second appeal.

Appeal from a decision of the District Judge, Darbhanga, dated the 29th August 1921, reversing that of the Munsif, Madhubani, dated the 14th May 1921.

Mr. *Muhammad Hasan Jan*, for the Appellant.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

ROSS, J.—The only ground urged in support of this appeal is that there is no evidence to justify the finding of the learned District Judge that the plaintiffs' family were settled *raiyats* of the village from a very long time. In para. 2 of the plaint it was alleged that for a long time the plaintiffs' ancestor was and after him the plaintiffs had been *kashtkars* of a large area of land in *Mouza* Khanna, and further in para. 4 that the plaintiffs and their ancestors were *kaimi* settled *raiyats* of *Mouza* Khanna and they and their ancestors had acquired occupancy right in the disputed land and in the survey *khatian* they had been recorded as *kaimi raiyats*. In the written statement there was no specific denial of these allegations. There was only the general plea that the defendant did not admit any of the plaintiffs' allegations except those that were admitted by him in his written statement. Besides the pleadings there is the entry in the Record of Rights which shows that the father of plaintiff No. 2 was recorded as a *kaimi raiyat* in respect of the land in suit. And further the plaintiff stated in his evidence that he had other old ancestral *kasht* land.

It seems to me that the learned District Judge was entitled to hold that the plaintiffs' family were settled *raiyats* of the

village and that it cannot be fairly said that this finding rests on no evidence. Therefore, there is no point of law in this appeal which must be dismissed with costs.

Sen, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.
FULL BENCH.

ORIGINAL SIDE APPEAL No. 6 OF 1924.

August 26, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, Mr. Justice Devadoss and Mr. Justice Srinivasa Ayyangar.

In the matter of an application of G. KRIHSNASWAMI AYYAR, HIGH COURT VAKIL.

Insolvency Act, 1848, (11 & 12 Vic. C. 21), s. 3—Presidency Towns Insolvency Act (III of 1909), s. 122—Legal Practitioners Act (XVIII of 1879), s. 4—High Courts Act, 1861, (24 & 25 Vic. C. 104), s. 15—Vakils, whether entitled to audience in Presidency Insolvency Court—Insolvency Court, whether subordinate to High Court.

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras. [p. 1028, col. 1.]

The effect of section 121 of the Presidency Towns Insolvency Act is, that if Vakils had the right of audience in the Insolvency Court before 1909 it was not taken away from them; but if they had not such a right previously it was not conferred on them. [p. 1026, col. 2.]

The mere fact that appeals lie from the decision of the Presiding Judge of the Insolvency Court to the High Court and the fact that s. 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its appellate jurisdiction, does not make the Insolvency Court subordinate to the High Court. Rule 13 of Ch. III of the Appellate Side Rules of the Madras High Court, which states that Advocates, Vakils and Attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has, therefore, no application to the Insolvency Court. [p. 1027, col. 1.]

Section 4 of the Legal Practitioners Act was not intended to override the special provisions relating to insolvency in the Presidency towns. [p. 1027, col. 2; [p. 1028, col. 2.]

Case-law discussed.

Appeal from the judgment of Mr. Justice Waller, dated the 15th January 1924, on the application of Mr. G. Krishnaswami Ayyar, a Vakil of the High Court, claiming a right of audience in the Insolvency Court on behalf of Chakrapani Achari, the detaining creditor in Insolvency Petition No. 392 of 1923.

Mr. G. *Krishnaswami Iyer*, in person.

Mr. A. *Krishnaswami Iyer*, for the Vakils.

Messrs. *Nugent Grant* and *Sidney Smith* for the Advocates.

This Original Side Appeal came on for hearing on the 7th and 11th August 1924, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Spencer, Offg. C. J.—The question that comes up for our decision in appeal is whether Vakils have a right of audience in the Insolvency Court at the Presidency Town of Madras. We have heard full arguments from Mr. G. Krishnaswami Ayyar, and Mr. A. Krishnaswami Ayyar, on behalf of the Vakils and from Mr. Grant and Mr. Sidney Smith, for the Advocates. The whole question has been dealt with in their arguments exhaustively and in every aspect.

Vakils appear and plead on the Original Side of the High Court at Madras, notwithstanding that the Charter of 1800 authorized only three classes of practitioners, namely, (1) *bona fide* practitioners of the law in the old Court of the Recorder, which was thereby abolished; (2) Barristers-at-Law in England or Ireland; and (3) Attorneys or Solicitors admitted in one of the Courts at Westminster or otherwise capable of acting as well in the character of Advocates as of Attorneys, and the Charter went on to "declare that *no other person or persons whatsoever* shall be allowed to appear and plead, or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them;" notwithstanding also that, in 1879, the Legal Practitioners Act provided in s. 4 that no Vakil should be allowed to practise under that section before any Judge of the High Court exercising Original Jurisdiction in a Presidency Town.

To this day, in the High Courts of Calcutta and Bombay, Vakils have no right to practise on the Original Side. How Vakils obtained a footing on the Original Side of the Madras High Court is a matter of history, which is set out in *In the matter of the petition of Attorneys* (1) and *Namberumal Chetty* v. *Narasimhachari* (2).

(1) 1 M. 24; 11 Mad. Jur. 92; 1 Ind. Dec. (N. S.) 15.

(2) 37 Ind. Cas. 699; 31 M. L. J. 698; (1916) 2 M. W. N. 529.

I do not propose to deal in detail with the history of the Original Side. It is sufficient to state that cls. 7, 8 and 9 of the Letters Patent of 1862 empowered the High Court to enrol so many Advocates to appear and plead, so many Vakils to appear, plead and act, and so many Attorneys to appear and act, as the Court deemed fit, while cl. 9 of the amended Letters Patent of 1865 empowered the High Court to enrol such and so many Advocates, Vakils and Attorneys as the Court deemed fit, and described the functions of each class of practitioners collectively without the use of the word "respectively"; that, in the rules made on August 28, 1863, under the first Letters Patent, r. 8 runs thus: "Vakils shall not appear, plead and act for any suit or in this Court in any matter of ordinary original jurisdiction, civil or criminal or in any matter of appeal from any case of ordinary civil jurisdiction or upon review of any criminal case under cl. 25 of the Letters Patent," but rr. 1, 2, and 3 made on the 1st of October 1863 recognized the right of Vakils to practise on the Original Side; and that rr. 4 and 5 made on July 5, 1866, under the amended Letters Patent of 1865 permitted Vakils admitted under the rules of October 1863 to appear, plead and act for the suitors in all matters over which the Court had any jurisdiction. In *In the matter of the petition of Attorneys* (1) it was held in 1875 by a Full Bench that these rules were within the powers of the High Court: and when the matter came up again in 1916 Coutts-Trotter. J. in *Namberumal Chetty* v. *Narasimhachari* (2) felt bound to follow the earlier decision. Rule 533 of the Original Side Rules declares that "a Vakil may appear, plead and act upon all proceedings, whether in Court or in Chambers." There is no mention of the Insolvency Court in any of these rules. In fact historically there is no reason to treat the Insolvency Court as a part or branch of the Original Side.

In 1828 Courts were established for the relief of insolvent debtors in the East Indies by the Statute 9, Geo. IV, Ch. 73. The Insolvency Court was from those early days a separate Court, and the Indian Insolvency Act 11 & 12 of Vic. Ch. 21, enacted in 1848 by s. 3 that a Court for the relief of Insolvent Debtors should be held once a month in Calcutta and so often as might be necessary within the towns of Madras and Bombay and be presided over by a Judge of the Supreme Court, and it declared that every Advocate and Attorney of the Supreme Courts at Calcutta, Madras and Bombay should be entitled to practise in the way of his profession in the said Courts and that *no other persons* should practise as Advocates or Attorneys in the said Courts. This section remained in force until it was repealed in 1909 upon the passing of the Presidency Towns Insolvency Act III of 1909. When High Courts were established at Calcutta, Madras, and Bombay in 1861, the Indian High Courts Act 24 & 25 Vic. Ch. 104 made the provisions of the Indian Insolvency Act which referred to the Supreme Courts of Bengal, Madras and Bombay and to the Judges of those Courts, applicable under s. 11 to the High Courts of those places so far as the provisions were consistent with that Act and with the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act states, "Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of Insolvent Debtors." The effect of this section is that, if Vakils had the right of audience in the Insolvency Courts before 1909, it was not taken away from them; but if they had not such a right previously, it was not conferred on them.

No rules have been framed either before or since the passing of that Act permitting Vakils to appear in insolvency proceedings before a Judge of the High Court. The rules made on December 22nd, 1848, for regulating the proceedings in the Court for the relief of Insolvent debtors speak only of the Attorney of every prisoner representing him in the said Court. The Insolvency Rules of 1910 in O. XV speak only of Attorneys and Advocates representing Insolvents in the Insolvency Court. Section 9 of the Indian High Courts Act of 1861 confers on the High Court jurisdiction in all civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial matters, but is silent on the

subject of insolvency. Clause 18 of the Letters Patent of 1865 refers to the Court for the relief of Insolvent Debtors as a Court governed by its own laws and held before one of the Judges of the High Court. In para. 13 of the Secretary of State's letter, dated 14th May 1862, that accompanied the Letters Patent, the omission to reserve the right of pleading in the Insolvent Court after the issue of the Charter to Attorneys of the Supreme Court is explained as due to the fact that the Insolvent Court was a separate tribunal, not affected by the Act authorizing the Letters Patent. In conclusion, it is stated (The Insolvent Court) "will continue a separate Court, though for the future presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself."

Although the Court for the relief of insolvent Debtors was always treated as a *separate Court* presided over by one of the Judges of the Supreme Court or *High Court*, as the case might be, the fact that appeals lie from the decision of the Presiding Judge to the High Court, and the fact that s. 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its Appellate Jurisdiction do not necessarily make it a *subordinate Court* any more than the Original Side Court or an Admission Court, from which appeals lie under the Letters Patent against the decision of a Single Judge, can be described as subordinate to the rest of the High Court. Rule 13 of the Appellate Side Rules, Ch. III, which states that Advocates, Vakils, and Attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has, therefore, no application.

For the Vakils, reliance was placed on s. 4 of the Legal Practitioners Act. This declares that any person entered as an Advocate or Vakil on the roll of any High Court who ordinarily practises in that Court or in some Court subordinate thereto shall notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, in any High Court on whose roll he is not entered. Although this Act was passed in 1879, it did not purport to expressly repeal s. 3 of the Indian Insolvency Act. No doubt, under cl. 44 of the Letters Patent of 1865, the provisions of the Letters Patent were made subject to the law making powers of the Governor-General in Council, but, I should hesitate to imply that an earlier Act is repealed by implication by a later Act without more express words to that effect. In Volume XXVII, Halsbury's Laws of England, page 197, we find the principles laid down, that a Statute may be repealed by implication (1) if its provisions are wholly incompatible with the subsequent Statute or (2) if the two, standing together, will lead to wholly absurd consequences or (3) if the entire subject-matter of the first is taken away by the second. Now, s. 4 of the Legal Practitioners Act is not wholly incompatible with the provisions of the Indian Insolvency Act or of the Presidency Towns Insolvency Act. It merely provides that a person entered on the rolls of a High Court, who ordinarily practises in that Court or in some Court subordinate to it, may practise, *as such*, in any High Court where he is not enrolled if he gets the permission of that Court, or without such permission he may practise in any other Court in British India but a High Court.

The words "as such" denote that his claim to practise must be in his capacity as an enrolled Vakil ordinarily practising in the Court where he is enrolled. As there are no rules made by the Madras Court for the practice of Vakils in the Insolvency Court, such practice is not a feature of their ordinary practice, and, therefore, they cannot claim a right to practise, *as such*, in any other Court. For instance a Madras High Court Vakil could not legitimately claim to be heard in the Insolvency Court of Bombay, because he does not ordinarily practise in the Insolvency Court of Madras, nor could a Vakil demand to be allowed to practise as an Advocate in a Court on whose rolls he is not entered. By this section Advocates and Vakils who wish to practise outside the High Court in which they are enrolled are placed on the same footing as regards obtaining permission of the High Court where they wish to practise when they are not on the roll of that Court.

On the principle of *generalia specialibus non derogant* I think that s. 4 of the Legal Practitioners Act was not intended to over-

ride the special provisions relating to insolvency in the Presidency Towns.

Mr. G. Krishnaswami Ayyar at one time suggested that the word "Advocate" in the Indian Insolvency Act might be understood in its wider significance of one who pleads the cause of another; but it is clear from the Charter Act that it was meant to include only those Barristers who had been enrolled as Advocates in the Courts at Calcutta, Madras and Bombay, respectively, and those who had been practitioners in the Recorder's Court, if any such were still alive in 1848.

I have come to the conclusion that the order of Waller, J., refusing to allow Vakils to appear and plead in the Insolvency Court is correct. The appeal will be dismissed but without costs.

Devadoss, J.—This is an appeal from the order of Waller, J., upholding the action of the Deputy Registrar, Original Side, who returned a Vakalat filed in Insolvency Petition No. 392 of 1923 by Mr. G. Krishnaswami Ayyar on the ground that a Vakil had no right of audience in the Insolvency Court. Mr. G. Krishnaswami Ayyar has preferred this appeal and the Vakils' Association, Madras, supports it. The Bar Association and the Attorneys' Association, Madras oppose the appeal. The appellant's contention is that a Vakil has a right of audience in the Insolvency Court. The arguments advanced on behalf of the appellant may be summarised under the following heads :—

(1) The Vakils had a right of audience in the Supreme Court, Madras, and are, therefore, included in the class of practitioners mentioned in s. 3 of 11 & 12 Vic., Ch. 21.

(2) Even if they had not the right of audience in the Supreme Court, after the establishment of the High Court they were given by the High Courts Act and the Letters Patent the right of audience on the Original Side, and s. 3 of 11 & 12 Vic., Ch. 21, should be read as applying to all the practitioners of the High Court.

(3) The class of practitioners mentioned in s. 3 of 11 & 12 Vic., Ch. 21, having become extinct, the term "Advocate" used in s. 3 of the Act should be held to apply to Vakils who exercise the profession of Advocates.

(4) The Insolvency Court being a Court subordinate to the High Court, a Vakil had a right of audience in that Court under s. 4 of the Legal Practitioners Act. Even if it was not a subordinate Court, the Court for the relief of Insolvent Debtors having been a Court in British India, the Vakils had a right of audience in that Court.

(5) The Court for the relief of Insolvent Debtors having been abolished and the insolvency jurisdiction having been vested in the High Court by the passing of the Presidency Towns Insolvency Act, a Vakil of the High Court has the right of audience when the High Court exercises insolvency jurisdiction.

(6) Granting that the High Court has power to frame rules prohibiting Vakils from appearing in insolvency cases, no such rule having been framed, a Vakil's right of audience on all sides of the High Court subsists.

The question involved in this appeal is the right of audience of a Vakil before a Judge exercising original insolvency jurisdiction and before the Deputy Registrar, Original Side, who is empowered under the rules to hear and determine certain matters. The question whether a Vakil is entitled to appear in appeals from orders and judgments of the Judge exercising Original Insolvency Jurisdiction was settled so far back as 1888 in favour of the Vakils. In O. S. Appeal No. 10 of 1888 a Bench of the High Court held that a Vakil was entitled to appear in an appeal from an order of the Insolvency Commissioner. In this appeal we are, therefore, concerned with the right of the Vakil to appear in what I may call, for brevity's sake, original insolvency cases.

In order to determine whether a Vakil had the right of audience in the Supreme Court, it is necessary to see what class of practitioners were allowed to practise before the Supreme Court. A Mayor's Court was established in Madras in 1753. It was superseded by the establishment of the Recorder's Court in 1798. The Supreme Court of Madras was established by a Royal Charter in 1800 by virtue of the Government of India Act of 1800. The Letters Patent of that year contained the following provision as regards the practitioners of that Court: They "authorized and empowered the Supreme Court of Judicature to approve, admit and enrol such and so many persons being *bona fide* practitioners of the law in the said Court of the Recorder at Madras at the time of the publication of

this our Charter at Madras or having been admitted Barrister-at-Law in England or Ireland or having been admitted Attorneys or Solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare, to act as well in the character of Advocates as of Attorneys in the said Court. And we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them." The persons permitted to practise before the Supreme Court under the Letters Patent were.

(1) Persons being *bona fide* practitioners of the law in the Court of the Recorder at Madras;

(2) Barristers-at-Law in England or Ireland;

(3) Attorneys or Solicitors in one of the Courts at Westminster;

(4) Being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare to act as well in the character of Advocates as of Attorenys in the said Court. It is contended that the 4th class contemplated in the Letters Patent were Vakils. What the clause means is, persons otherwise capable according to such qualifications as the Court shall for the purpose make and declare, may be admitted to practise as Advocates or Attorneys. It was never intended by that clause that there was a class of practitioners who had the right to appear, plead and act. Such a practitioner was unknown to the Courts in England and to the Mayor's Court as well as the Recorder's Court at Madras. The Supreme Court was established on the model of the King's Bench Court as is clear from the High Courts Act of 1800, 39 & 40 Geo. III, Ch. 79. The Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December 1800, states the Court was to have "such jurisdiction and authority as our justices of our King's Bench Court have and may lawfully exercise within that part of Great Britain called England as far as circumstances may permit." The King's Bench Court knew of no class of practitioners who could appear, plead and act. An Attorney appears and acts, and an Advocate appears and pleads and their privileges and functions as well as their disabilities are well defined. It would be doing violence to language to construe the words of the Letters Patent as introducing a class of practitionres unknown to the framers of the Act. That the Supreme Court recoginzed no class of practitioners as Vakils is clear from the rules of the Supreme Court now available. Under the rules in force so late as 1849, only Attorneys, Solicitors and proctors were recognized as persons who could act in that Court. There is no evidence that a Vakil was ever allowed to practise before the Supreme Court. This circumstance may be taken to be some indication of what was meant by the Letters Patent and what the Judges and Practitioners understood them to mean. The Letters Patent empowered the Supreme Court to enrol persons properly qualified according to its rules as Advocates or Attorneys and did not empower it to enrol persons who as practitioners had the right to appear, plead and act. The clause "we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them" is very emphatic. The Letters Patent did not give a wide discretion to the Supreme Court but empowered it to enrol duly qualified persons as Advocates or Attorneys whose functions, privileges and disabilities were well known to the framers of the Supreme Courts Act of 1800. That their Lordships of the Privy Council attach great importance to the negative clause of the Letters Patent in construing the whole clause is clear from the case reported in *Morgan* v. *Leech* (3). In the light of this decision it cannot be reasonably contended that the 4th class contemplated by the Letters Patent were the Vakils.

Second point.—Before the Crown took over the Government of India, the Supreme Court or the King's Court exercised jurisdiction within the limits of the Madras city, and the East India Company's Courts called Sudder Adalat and Fauzdari Adalat exercised appellate jurisdiction, civil and criminal, over the territories of the East India Company in the Presidency of Madras. After the Crown took over the Government of India, the Courts continued to exercise their several functions till the passing of

(3) 2 M. I. A. 428; 3 Moo. P. C. 368; 1 Sar. P. C. J. 2; 18 E. R. 362; 13 E. R. 149.

the Indian High Courts Act of 1861, 24 & 25 Vic., Ch. 104. It empowered the Crown to establish High Courts of Judicature in Bengal, Madras and Bombay. By s. 8 of the Act the Supreme Court of Madras and the Sudder Adalat and Fauzdari Adalat of this Presidency were abolished upon the establishment of the High Court. Clause 7 of the Letters Patent of 1861 authorized and empowered the High Court to approve, admit and enrol such and so many Advocates as to the said High Court should seem meet. Clause 8 authorized and empowered the High Court to approve, admit and enrol such and so many Vakils as the High Court should deem fit. Clause 9 relates to Attorneys. Clause 10 empowered the High Court to make rules for the qualification and admission of Advocates, Vakils and Attorneys. The High Court was given Civil and Criminal Appellate Jurisdiction and Extraordinary Original Jurisdiction over the Presidency, and Ordinary Original Civil and Criminal Jurisdiction within such local limits as may be declared by law or regulation of the Governor in Council. Rule 7 of the High Court Rules, dated 28th August 1862, allowed Vakils to appear, plead and act in all matters of Appellate Jurisdiction Civil or Criminal, and in the matters of Extraordinary Original Civil Jurisdiction, under s. 13 of the Letters Patent. It is clear from the rules that Vakils had no right of audience on the Original Side of the High Court whether it exercised Civil or Criminal Jurisdiction and also in appeals from orders, judgments and decrees passed in the exercise of Original Jurisdiction. For the first time in 1863 it appears from the rules of the High Court, dated 1st October 1863, that some Vakils were permitted to practise on the Original Side. A few Vakils were enrolled as Vakils on the Original Side and a separate roll was maintained for that purpose. Rule 2 relating to remuneration and practice of the Vakils on the Original Side of the High Court was framed on the 1st October 1863. In 1865 Amended Letters Patent were issued. Clause 9 of the Letters Patent empower the High Court to enrol Advocates, Vakils and Attorneys. Fresh rules and orders relating to Advocates, Vakils and Attorneys and the taxation for allowance of costs were framed by the High Court and were published on 5th July 1866. The rules of 1863 were to be read as part of the rules so far as the qualification and admission of Advocates, Vakils and Attorneys were concerned. The rules recognized a Vakil as a practitioner on the Original Side. In 1874 the Attorneys objected to Vakils practising on the Original Side on the ground that the rules permitting them to paractise were *ultra vires*. But a Full Bench of the High Court held that the rules were *intra vires*. *Vide In the matter of the petition of the Attorneys* (1). It is neither desirable nor expedient to question the correctness of the decision. It was not challenged till quite recently and vested interests have been created and on the principle that what has been once settled should not be lightly upset it is not proper to question the soundness of the decision.

The right to appear on the Original Side did not *ipso facto* give the Vakil a right to appear in the Court for the relief of Insolvent Debtors. The Letters Patent did not give insolvency jurisdiction to the High Court. The Court for the relief of Insolvent Debtors was first established by an Act of Parliament, 9 Geo. IV, Ch. 73, and the Act was extended from time to time. In 1848, 11 & 12 Vic., Ch. 21, was passed wherein it was enacted that "the Court for the relief of Insolvent Debtors was to be holden by any Judge of the Supreme Court of Judicature in Calcutta and within the towns of Madras and Bombay and 'every Advocate' and Attorney of the said Supreme Courts at Calcutta, Madras and Bombay respectively shall be entitled to practise in the way of his profession in the Court for the relief of Insolvent Debtors of that Presidency and no other persons shall practise as Advocates or Attorneys in the said Court for the relief of Insolvent Debtors." This section did not allow Vakils to practise before the Court for the relief of Insolvent Debtors.

Third point.—It is next argued that the class of practitioners mentioned in s. 3 of 11 & 12 Vic., Ch. 21, ceased to exist when the Supreme Court was abolished and there could not have been Advocates and Attorneys of the Supreme Court when there was no such Court and, therefore, the word "Advocate" could only apply to one who exercised the profession of an Advocate, and a Vakil being one who exercised the profession of an Advocate became entitled to appear before the Court for the relief of Insolvent Debtors. Section 3 of 11 & 12 Vic. Ch. 21, recognized only Advocates and Attorneys. When the Supreme Court ceased to exist the Advocates and Attorneys of

that Court became Advocates and Attorneys of the High Court in its Original Civil and Criminal Jurisdiction, and special provision was made by r. 4 of the rules, dated 23th August 1862, for their being enrolled as Vakils on the Appellate Side of the High Court. The Rules of 1862 did make a marked distinction between the Original and the Appellate Sides of the High Court. The Advocates and Attorneys of theSupreme Court became Advocates and Attorneys of the High Court. Their qualifications, rights and privilges as well as their disabilities remained the same. Though the Supreme Court was abolished, all its functions, powers and privileges were transferred to the High Court by s. 10 of the High Courts Act of 1861. This section was repealed by 28 & 29 Vic., Ch. 15, s. 2. Section 11 of the High Ceurts Act of 1861 made applicable to the High Court and the Judges thereof all the provisions then in force of Acts of Parliament, or of any orders of Her Majesty in Council, or of any Acts of the Legislature of India, etc. What was applicable to the Supreme Court by virtue of s. 3 and other provisions of 11 & 12 Vic., Ch. 21, became applicable to the High Court and the Judges thereof. Clause 18 of the Letters Patent makes it clear that the law and practice of the Court for the relief of Insolvent Debtors was not to be changed by the abolition of the Supreme Court and by the establishment of the High Court but was to be continued as it was before 1861. Clause 18 is in these terms:—"And we do further ordain that the Court for the relief of Insolvent Debtors at Madras shall be held before one of the Judges of the said High Court of Judicature at Madras, and the said High Court and any such Judge thereof shall have and exercise within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to Insolvent Debtors in India." The portion of the clause "such powers and authorities with respect to original and appellate jurisdiction and otherwise as are consituted by the laws relating to Insolvent Debtors in India" leves no room for doubt that the old order of things was to continue. The Chief Justice of the High Court deputed one of the Judges to preside over the Court for the relief of Insolvent Debtors, and he was known as the Commissioner in Insolvency. That Court was governed by the laws relating to the Insolvent Debtors in India. With regard to the practitioners, s. 3 of 11 & 12 Vic., Ch. 21, was in force. Before 1861 only Advocates and Attorneys practised before the Court for the relief of Insolvent Debtors, and after 1861 the same practitioners continued to practise and s. 3 did not permit any other person to practise before it.

The contention that Advocates and Attorneys ceased to exist when the Supreme Court was abolished and, therefore, the Advocates and Attorneys of the High Court had no right of audience in the Court for the relief of Insolvent Debtors is not worth serious consideration in the light of cl. 18.

The extreme contention that a Vakil is an Advocate and, therefore, he is entitled to practise in the Insolvency Court overlooks plain facts. Advocates are a distinct class with qualifications, rights and privileges and disabilities of their own. They are enrolled as a distinct class as Advocates, whereas Vakils do not possess the same qualifications and are not subject to the same disabilities. A Vakil, therefore, cannot come within the term "Advocate" as used in the High Courts Act, in the Letters Patent and in s. 3 of 11 & 12 Vic., Ch. 21. It is unnecessary to consider this contention further.

The Court for the relief of Insolvent Debtors was not a part of the High Court but a distinct Court and any practitioner of the High Court was not as such entitled to a right of audience unless he fulfilled the conditions laid down in s. 3 of 11 & 12 Vic., Ch. 21.

Fourth point.—"The Court for the relief of Insolvent Debtors was a Court subordinate to the High Court and under s. 4 of the Legal Practitioners Act a Vakil was entitled to appear in that Court."

It is argued that the Court for the relief of Insolvent Debtors was a Court subordinate to the High Court because the High Court was empowered to make rules for that Court and was authorized to call for reports and hear appeals from it. There is no warrant for saying that the Court for the relief of Insolvent Debtors was a Court subordinate to the High Court. The Original Side of the High Court is presided over by one or more Judges of the High Court. It can by no means be said to be a Court subordinate to the High Court The High Court frames rules for the conduct of business on the Original Side and hears appeals from the orders and decrees

passed on that side. The Original Side of the High Court is a part of it and not a subordinate Court. The Court for the relief of Insolvent Debtors was a distinct and separate Court established by an Act of Parliament and was presided over by one of the Judges of the Supreme Court, Madras, and after the High Court was established, by one of the Judges of the High Court; and appeals from orders and judgments in insolvency cases lay to the Supreme Court during its existence and thereafter to the High Court. This circumstance did not make the Court for the relief of Insolvent Debtors a Court subordinate to the High Court within the meaning of s. 4 of the Legal Practitioners Act.

It is next urged that even if the Court for the relief of Insolvent Debtors was not a Court subordinate to the High Court s. 4 of the Legal Practitioners Act authorized a Vakil to parctise in all the Courts in British India except a High Court on the roll of which he was not entered, and the Court for the relief of Insolvent Debtors being a Court in British India a Vakil was entitled to practise before it. If this contention is to be upheld an Attorney on the roll of the Madras High Court would be entitled to practise in the Court for the relief of Insolvent Debtors in Bombay or Calcutta.

Great reliance is placed upon the words "and all" used in s. 4. The same words are used in s. 5 which relates to Attorneys. From the use of these two words it cannot be said that the Legislature intended to repeal s. 3 of 11 & 12 Vic., Ch. 21. When the High Court of Bengal, Bombay and Madras had not insolvency jurisdiction *qua* High Courts, it would be imputing absurdity to the Indian Legislature to say that it intended that a Vakil on the roll of the High Court should have the right to practise before the Court for the relief of Insolvent Debtors established by a special Act of Parliament wherein it was enacted what class of practitioners should practise before it. It is strongly urged on behalf of the appellant that s. 3 has been impliedly repealed by the enactment of s. 4 of the Legal Practitioners Act. The principle upon which the Courts should interpret a later Act as repealing a former enactment by implication has been laid down by eminent Judges, and the tests which they lay down do not apply to the present case. In *Dobbs* v. *Grand Junction Waterworks Co.* (4). Field, J., in deliveing the judgment of the Court observes as follows:—"Repeal by implication is never to be favoured, it is no doubt the necessary consequence of inconsistent legislation whenever it occurs; but which must not be imputed to the Legislature unless absolutely necessary." In *Seward* v. *Vera Cruz*, (5) Earl of Selborne, L. C., lays down the principle in the following terms at p. 68: "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation is indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular is intention to do so. For that principle I may, refer to *Hawkins* v. *Gathercole* (6)." A. L. Smith, J., states the principles upon which the Court should be guided in construing whether a later enactment repeals a former one by implication in *Kutner* v. *Phillips* (7). "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim *Leges posteriores contrarias abrogant* applies. Uuless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together: *Thorp* v. *Adams* (8). Lord Coke in *Gregory's case*, (9) lays it down 'that a later Statute in the affirmative shall not take away a former Act, and *eo potior*' if the former be particular and the latter be general; and Lord Hardwicke in the case of *Middleton* v. *Crofts* (10) is to the

(4) (1882) 9 Q. B. D. 151 at p. 158; 51 L. J. Q. B. 504; 46 L. J. 820; 31 W. R. 15; 46 J. P. 756.

(5) (1885) 10 A. C. 59; 54 L. J. Adm. 9; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.

(6) (1855) 6 De. M. G. & G. 13 Eq. R. 348; 24 L. J. Ch. 332; 1 Jur. (N. S.) 481; 3 W. R. 194; 43 E. R. 1129; 106 R. R. 1.

(7) (1891) 2 Q. B. D. 267 at p. 271; 60 L. J. Q. B. 505 64 L. T. 628; 39 W. R. 526.

(8) (1871) 6 C. P. 125; 40 L. J. M. C. 52; 23 L. T. 810; 19 W. R. 352.

(9) 6 Co. Rep. 19b; 77 E. R. 282.

(10) (1736) 2 Atk. 650 at P. 675; 26 E. R. 789.

same effect." Lord Blackburn explains the principle in his own inimitable way in *Garnet* v. *Bradley* (11) "I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to show that. If they have done something in such a way as would show that that was their intention, if they have said in negative words that those rights or privileges shall all be taken away, any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the Legislature shall not be presumed to have done anything unfair, and to have taken away this particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist and use arguments to show why it should not be taken away, but having simply used general words quite consistent with their never having thought of this privilege at all, I think, my Lords, that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle." See Browne's Legal Maxims, 7th Ed. page 19.

11 & 12 Vic., Ch. 21, was a special enactment. The Legal Practitioners Act is a general Act made applicable to the whole of India. It cannot be said that in passing a general Act like the Legal Practitioners Act the rights and privileges enjoyed by a particular class of persons under a special enactment which established a particular Court, were taken away and that the Legislature intended to alter the existing state of things and intended to repeal s. 3 of 11 & 12 Vic., Ch. 21. The intention of the Legislature not to alter vested rights or existing state of things is clear from the proviso to s. 4 itself. That proviso is in these terms: "Provided that no such Vakil or Pleader shall be entitled to practise under this section before a Judge of the High Court, Divisional Court or High Court exercising Original Jurisdiction in a Presidency Town." When the Legislature took care to perpetuate the state of things existing in 1878 in Bombay and in Calcutta in the High Court itself for the benefit of whose practitioners it was enacting s. 4, can it be said that the Legislature intended to throw open the Insolvency Court to the Vakils? I think this proviso is an answer to the contention of the appellant.

In construing s. 4 the reason for enacting it should not be overlooked. Before the Legal Practitioners Act of 1879 was passed, Advocates and Vakils of the High Court had to get permission from the presiding Judge of the District Court and other subordinate Courts before they could appear and plead in such Courts though in Madras the High Court by its rules of 1863 gave Advocates and Vakils the right to appear in all the subordinate Courts. In order to remove this restriction of the right of the Advocates and Vakils to appear before the subordinate Courts s. 4 was enacted. The Act was not primarily intended for the practitioners on the roll of the High Court but for the Pleaders not on the roll of the High Court. Only ss. 4, 5, 7, 16, 25, 27, 32 and 36 are made applicable to Advocates, Vakils and Attorneys admitted and enrolled by the High Court under the Letters Patent. This contention of repeal by implication is an untenable one.

Fifth point.—In 1909 the Presidency Towns Insolvency Act was passed repealing 11 & 12 Vic., Ch. 21. The Act gave insolvency jurisdiction to the High Courts of Judicature at Fort William, Calcutta, Bombay and Madras, and the Chief Court of Burma. The insolvency jurisdiction is now one of the several jurisdictions of the High Court. It is contended that the Vakil is entitled to appear before the High Court whatever jurisdiction it may exercise: Section 121 of the Presidency Towns Insolvency Act was specially enacted to preserve the state of things prevailing on the date of the passing of the Act with regard to the rights and privileges of the practitioners entitled to practise in the Court for the relief of Insolvent Debtors. The section did not confer any right of audience on persons who had it not before the passing of the Act. Section 121 is in these terms: "Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in

(11) (1878) 3 A. C. 944; at p. 969; 48 L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

insolvency matters on any person who had not a right of audience before the Courts for the relief of Insolvent Debtors." The section is emphatic in its terms. The Court for the Relief of Insolvent Debtors did not allow Vakils to practise before it. By the transfer of the jurisdiction to the High Court the right of audience which did not exist before was not conferred on any class of practitioners. In order to prevent the practitioners of the High Court who had not the right to appear in the Court for the relief of Insolvent Debtors claiming the right of audience in the new jurisdiction, s. 121 was enacted.

Before the passing of the Presidency Towns Insolvency Act the rules framed for the conduct of the business in the Court for the relief of Insolvent Debtors recognized only one class of practitioners, namely Attorneys,—see rr. 117 and 118 of the rules under 11 & 12 Vic, Ch. 21. After the passing of the Indian Insolvency Act fresh rules were framed by the Madras High Court. They also recognized only Attorneys,—*vide* O. XV, rr. 121 to 131 of the rules framed under the Presidency Towns Insolvency Act. For nearly a century, only Advocates and Attorneys were recognized as practitioners in the Court for the relief of Insolvent Debtors. For nearly half a century after the establishment of the High Court, no Vakil claimed a right of audience in the Court for the relief of Insolvent Debtors. After the passing of the Act of 1909, there is nothing to show that till this case came up, any Vakil claimed a right of audience in the Insolvency Court. On the principle that vested rights should not be lightly interfered with and that the existing state of things should be maintained s. 121 was enacted. It denies Vakils the right of audience when the High Court exercises Original Insolvency Jurisdiction. A very strong case must be made out before a long-established practice could be considered as illegal or opposed to law: In this connection I may refer to a decision of Fletcher, J., in *In re A Vakil's Application* (12). In that case a Vakil claimed a right to file a warrant of Attorney in respect of a suit pending before the Midnapur District Court, in which a rule had been issued on behalf of the defendant calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction. Fletcher, J., refused to allow the Vakil to appear and made the following observations at page 854* "There has been a "long-continued practice in which Vakils have never appeared, dating from the establishment of the High Court in 1862 and continuing down to 1910; and one would have thought that, had the Vakils the right to appear, some exercise or claim to exercise that right would have been put forward during a period of almost half a century. I am satisfied that the claim to appear on an application for transfer has never yet been made. That being the established practice of this Court, it would be obviously improper for a Single Judge sitting on the Original Side to depart from a practice regulating the various branches of the profession for such a period unless he was satisfied that the practice was wrong." The High Courts of Calcutta and Bombay have not thrown open the Insolvency Side of the High Court to Vakils. This may not be a satisfactory argument against the appellant's contention, but it shows that the other High Courts have taken the same view. At least it shows that the Vakils did not put forward a right to appear in insolvency cases. I am quite satisfied that s. 121 is a bar to the Vakil's claim to appear in Insolvency cases.

Sixth point.—It is further urged that granting that the High Court has power to frame rules prohibiting Vakils from appearing in insolvency cases, no such rules have been framed and the Vakil's right of audience on all sides of the High Court subsists. The Act which created the Court for the relief of Insolvent Debtors laid down what class of practitioners were to practise before it, and unless it can be held that the law relating to insolvency jurisdiction and its practice has been changed, it would not be open to a class of practitioners who had not the right to practise in an Insolvency Court to claim the right now. There are no rules prohibiting Vakils from appearing in insolvency cases. Nor are there rules permitting them to appear in insolvency matters. The rules relating to practitioners both before and after the passing of the Indian Insolvency Act apply only to Attorneys. There are no rules providing for the remuneration of Vakils and taxation of their costs in insolvency matters. A safe inference can be drawn from the absence of rules as to

(12) 8 Ind. Cas. 724; 37 C. 853.

*Page of 37 C.—[*Ed.*]

remuneration of Vakils in insolvency matters that the High Court denied them the right of audience in insolvency cases. The long established practice has to be taken into consideration in deciding this point. Though there are no positive rules prohibiting a Vakil from practising in the Insolvency Court, yet it must be presumed that the High Court gives effect impliedly to s. 3 of 11 and 12 Vic. Ch. 21 and s. 121 of the Insolvency Act. If the Vakils have no right to appear in Presidency Towns in insolvency matters, the absence of a rule prohibiting them would not entitle them to appear in such cases. It was vehemently argued that the High Court could not make rules prohibiting Vakils from appearing in the Insolvency Court. The High Court has power to frame rules for regulating the conduct of Advocates, Vakils and Attorneys, and it has also power to frame rules with regard to their rights and privileges. The High Court can frame rules, if it likes that a Vakil shall not practise before the Insolvency Court. It is unnecessary to pursue this matter further as there are no rules prohibiting Vakils from appearing in insolvency matters. The absence of any rule prohibiting Vakils from appearing in insolvency matters does not give them the right to appear. On a full and anxious consideration of the question, I have no hesitation in holding that a Vakil has no right of audience in insolvency matters. The appeal fails and is dismissed.

Srinivasa Aiyangar, J.—The question raised in this appeal has been invested with almost a sensational importance by reason of a long standing and perhaps natural jealousy between two important and influential sections of the Bar in Madras. So far as I am personally concerned, the process of coming to a decision on such an important question has not been rendered easier for me by the bias in my mind imbibed albeit unconsciouly during my close association with three generations of one of those sections of the Bar. I am now free to confess that during many years past the belief that the Vakils had an unquestionable right of audience in the Insolvency Court and that, therefore, their exclusion from it has been maintained only by the continued perpetration of a wrong has been one of the cardinal articles of creed in that branch of profession and the names of some of the most eminent lawyers who belonged to that branch of profession have come down associated with that faith. I have had, therefore, necessarily to steel myself against all such preconceived bias and approach the decision of the question merely as a dry question of law. After giving my earnest and anxious consideration to all the aspects of the arguments so ably placed before us by the learned gentlemen who appeared to represent the various branches of the profession, I have felt bound to come to the conclusion that under the law and the rules of Court, as they stand at present, the Vakils have no right of audience in the Insolvency Court. By the courtesy of my Lord the Chief Justice I have had the advantage of perusing his judgment. It is not, therefore, necessary for me to go over the entire ground. Mr. G. Krishnaswami Ayyar argued that even prior to the constitution of the High Court in 1861 under the Charter Act, Vakils had a right of audience in the Insolvency Court as constituted by 11 and 12 Vic., Ch. XXI. I am constrained to observe that that branch of his argument was more subtle than convincing and I am not sure that he was himself inclined seriously to press it. Mr. A. Krishnaswami Ayyar who appeared for the Madras High Court Vakils' Association confined himself only to two arguments both of which call for a close and critical examination. The pith of the contentoins with regard to these two arguments may be summed up somewhat as follows: When under the Charter Act the High Court was established in the year 1861 the Insolvency Court established under 11 and 12 Vic, Ch. XXI either remained and continued as a separate Court or else became merged in the High Court. If it be held that it became merged in the High Court, we shall show that as High Court Vakils enrolled as such on the rolls of the High Court we are entitled, in the absence of any express rules prohibiting the same, to an audience in the Insolvency Court and we shall also show that by express rules the right of practising in all the jurisdictions of the Court has been expressly granted to us. If, on the other hand, it should be held that even after the constitution of the High Court the Insolvency Court remained and continued a separate Court, then we say that on the passing of the Legal Practitioners Act of 1879 and under the provisions of s. 4 of that enactment we became entitled to practise before the Insolvency Court, because that Court is subordinate to the

High Court and subject to its supervision or is at any rate a Court in British India not being a High Court. At first sight this dilemma seems no doubt staggering and almost unanswerable. I shall first deel with the first branch of this dilemma, namely, the arguments based on the theory of the merger of the Insolvency Court in the High Court. I am unable to see my way to accept any such theory of merger. The Court for the Relief of Insolvent Debtors was the creature of a separate Parliamentary Statute 11 and 12, Vic., Ch. XXI. That Statute is independent and complete in itself. The only connection which that Court had under that Statute with the Supreme Court at the time was that the person to be appointed the Commissioner in Insolvency was to be one of the Judges of the Supreme Court. This and any other incidental connections with the Supreme Court cannot take away from the statutory independence as a separate Court of the Court for the relief of Insolvent Debtors. The Charter Act of 1860 and the Letters Patent issued thereon did no more than substitute the High Court in the place of the Supreme Court for purposes of such incidental connections. There are no apt words in any enactment by which it could be deemed that the Court for the relief of Insolvent Debtors either became abolished or was merged in the High Court. It is not, therefore, necessary for me to consider the arguments based on the theory of merger. I admit there would be considerable force in the arguments advanced on the basis of the theory of merger if such merger could be found: but as it could not be found that there has been any such merger, no useful purpose is likely to be served by considering those arguments.

We are then left only with the other branch of the dilemma, namely, that of the Insolvency Court having continued as a separate Court in British India until the passing of the Legal Practitioners Act and the enactment of s. 4 therein. I feel I cannot agree with the contention that as a separate Court the Insolvency Court was not a Court subordinate to the High Court. The provisions of law for the High Court making rules, appointing officers, etc., are of such a character which to my mind would make the Insolvency Court subordinate to the High Court within the meaning of any enactment and certainly within the meaning of s. 4 of the Legal Practitioners Act. It is not necessary for me to labour that point because it is inconceivable that the Insolvency Court should not be held to be at any rate a separate Court in British India. Under s. 4 of the Legal Practitioners Act every High Court Vakil is given a right to practise in every Court in British India other than the High Court on the rolls of which he is not enrolled. If, therefore, the Insolvency Court is a separate Court in British India, it follows that High Court Vakils should, under the provisions of s. 4 of the Legal Practitioners Act, have a right of audience in it. The position then is this: Under s. 3 of 11 & 12 Vic., Ch. XXI, a Parliamentary Act, only Advocates and Attorneys are allowed to practise in the Court for the relief of Insolvent Debtors. Then in 1879 the Government of India passed the Legal Practitioners Act under which in general terms High Court Vakils on the rolls of any of the High Courts are accorded the right of practice in all the Courts in British India except the High Court on the rolls of which they are not so enrolled. The Indian Legislature has undoubtedly the power under the Parliamentary Statutes themselves to vary, modify and rescind with certain exceptions any enactment relating to India passed by the Imperial Legislature. The question then resolves itself into this. Has the Indian Legislature by passing the Legal Practitioners Act rescinded, varied or modified, s. 3 of 11 & 12 Vic., Ch. XXI? The question has to be solved merely as a question of interpretation of Statutes. It is clear that the Legal Practitioners Act has not purported to rescind, modify or vary s. 3 of 11 & 12 Vic., Ch. XXI, or any provision therein contained. It is true that the general words of s. 4 of the Legal Practitioners Act granting a right of audience to Vakils are inconsistent with the right of exclusive audience given by s. 3 of 11 & 12 Vic., Ch. XXI, to Advocates and Attorneys. *In limine* it seems to me that while the Subordinate Legislature is given power by the Supreme Legislature to rescind, modify or vary within limits any enactments of the Supreme Legislature, such power should, generally speaking, be exercised only expressly, and in the absence of any express exercise of such power it ought not to be open to construe any enactment of the subordinate Legislature as involving necessarily an implied exercise of such power

The conflicts between the enactments of superior and inferior Legislatures should not be dealt with or considered in the same manner as if such conflicts arose between two enactments one earlier and the other later of the same Legislature. On principle there ought to be a difference made between the two cases, and I would venture to suggest that in the former case where the subordinate Legislature has only a power to vary within the limits, the exercise of such power should either be express or at any rate be under circumstances or in terms tantamount to such express exercise of power. I cannot in the case before us see in the terms of the Legal Practitioners Act any express exercise of power or intention to abrogate any enactment of the Imperial Legislature or any circumstances or terms tantamount to such express exercise of power. Assuming, however, that the principles of construction applicable to this conflict between the Imperial enactment and the Indian enactment are exactly the same as those applicable to the earlier or later enactments of the same Legislature, even then, I am unable to come to the conclusion that the Legal Practitioners Act should be deemed to have abrogated or rescinded the provisions of s. 3 of the Insolvency Act. The principle of the maxim *Generalia specialibus non-derogant* is not only a proper rule of statutory construction, but is a rule based on good common sense. To take a common illustration, if a gentleman should give directions to his peon that a particular person should never be allowed to enter his house and some days afterwards give a general direction that all visitors should be admitted between certain hours, it cannot possibly be suggested that the later general direction was intended to cancel the particular order with regard to the particular person previously given. The principle on which such a rule of construction is based would appear to be that the cancellation or rescission of a previous special order could not have been intended if there is no indication whatever of the attention being drawn to such special order in connection with the mere general directions given subsequently. In other words, it being a question of intention of the Legislature, unless there is something to indicate such intention or in the absence of anything to show that the attention of the Legislature was specially drawn to the previous special provision, no such intention could be inferred from a mere general provision subsequently made. In s. 3 of the Indian Insolvency Act the special provision is not only to the effect that every Advocate or Attorney of the Supreme Court shall be entitled to practise in the way of his profession in the Court for the relief of Insolvent Debtors but there is the further proviso that no other person shall practise as Advocate or Attorney in the said Courts. It is a distinct affirmatively excluding provision. It is a provision not only special but special in a special sense, namely, that while declaring the right to practise of certain persons it expressly excludes from practice all other persons. Now the question is whether by the terms of s. 4 of the Legal Practitioners Act the Indian Legislature intended or should be deemed to have intended to abrogate or cancel the special provisions contained in s. 3 of 11 & 12 Vic., Ch. XXI. It seems to me that no such intention could be inferred. Language much more apt than was used in s. 4 of the Legal Practitioners Act would and should have been used by the Indian Legislature if it was so intended. Further in the clause which specially enables High Court Vakils to practise in any Court in British India the words used are "any person so entered shall *notwithstanding anything herein contained* be entitled as such to practise." If the contention of the appellant in this case should be correct the words used in that section should be not "*notwithstanding anything herein contained*" but some such words as "*notwithstanding any law or provision of law to the contrary.*" It almost seems to me that the express limitation of the words to anything contained in the Act itself would rather seem to indicate that the intention of the Legislature was not to interfere with any other special law or provision of law contained elsewhere. The words "as such" must have been put in, in order specially to prevent members of one branch of the profession claiming to practise as members of any of the other branches of the profession. I doubt, however, whether these words "as such" are apt enough by themselves to exclude High Court Vakils from practising in any Court in British India merely because previously to the Act, High Court Vakils were not allowed to practise in such Courts. But it is unnecessary to consider this point as, even apart from it, I have come to the conclusion that on a proper

construction of s. 4 of the Legal Practitioners Act it could not be held that the provisions of s. 3 of the Indian Insolvency Act have been abrogated or repealed.

If, therefore, even after the passing of the Legal Practitioners Act, High Court Vakils had no right of audience in the Insolvency Court, it follows that when the Presidency Towns Insolvency Act was passed in 1909 they were not so entitled, and that even though the Insolvency Court became by reason of that Act merged in the High Court. By reason of the provisions of s. 121 of that Act nothing in any transfer of jurisdiction effected by that Act shall be deemed to confer any right of audience not possessed by any person at the time of the passing of the said Act, and as I have come to the conclusion that there was no such right previous to 1909 it follows that no such right could have been obtained merely by reason of the merger of the Insolvency Court into the High Court under that Act. I, therefore, agree that the appeal fails and is liable to be dismissed.

V. N. V.
Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 920 OF 1921.

June 25, 1923.

Present:—Mr. Justice Fawcett.

RAHIMTULLA—PLAINTIFF

versus

HASANALI ALIMAHOMED—DEFENDANT.

*Vendor and purchaser—Construction of document—Agreement to sell—*Fazandari, *meaning of—Leasehold under Government, whether* Fazandari—*Re-entry, right of, existence of, effect of.*

The word *Fazandari* in its strict or proper meaning denotes an indefeasible right to hold land in perpetuity on payment of a small quit or ground rent; in its loose sense it means any kind of tenure agreed upon between the parties. [p. 1040, col. 2.]

Parmananddas Jivandas v. *Ardeshir Framji*, 27 Ind. Cas. 512; 39 B. 320*n.*; 16 Bom. L. R. 723*n.*, followed.

Yeshwant Vishnoo Nene v. *Keshavrao Bhaiji*, 23 Ind. Cas. 880; 39 B. 316 at p. 318; 16 Bom. L. R. 252 and *Doe'd Dorabji* v. *The Bishop of Bombay*, (1848) Perry's O. C. 498; 4 Ind. Dec. (o. s.) 456, referred to.

The term *Fazandari* cannot in its strict sense be applied to a lessee from Government, where a right of re-entry is reserved to the Government. [*ibid.*]

Defendant agreed to sell to the plaintiff a *Fazandari* estate which was described as "an estate equivalent to an estate in fee simple in possession free from incumbrances" subject to a small quit rent. It turned out that the estate was held by the superior holder under a lease from Government containing a covenant for perpetual renewal which reserved a right of re-entry to Government in certain contingencies:

Held, (1) that by the use of the term *Fazandari* in the agreement of sale the parties contemplated a *Fazandari* estate in the strict sense; [p. 1044, col. 2.]

(2) that the estate held by the defendant was not a *Fazandari* estate in the strict sense of the word. [p. 1045, col. 1.]

(Case-law discussed.)

FACTS.—On 23rd July 1920 defendant agreed to sell certain immoveable property to the plaintiff. The agreement of sale provided that "the vendor shall satisfy the purchaser that the tenure of the land agreed to be sold is perpetual Fazandari at a yearly rent of Rs. 10, and that there is no *sanad* or surplus therein." The plaintiff paid Rs. 2,000 as earnest-money to the defendant. During the course of the correspondence between the Solicitors of the parties, the Solicitors of the plaintiff intimated to the Solicitors of the defendant that they were not satisfied that the Fazandari was perpetual and that if the defendant failed to make out his title in that respect the plaintiff would not be bound to complete the purchase. The defendant's Solicitors replied that they were unable to produce any further documents. Thereafter some correspondence continued between the Solicitors and finally the plaintiff brought a suit for recovery of the earnest-money paid by him together with costs etc.

Mr. *J. H. Vakeel*, for the Plaintiff.

Mr. *B. J. Wadia*, for the Defendant.

JUDGMENT.—[His Lordship after stating the facts proceeded]:—The main question is, therefore, whether the defendant has properly complied with cl. (6) of the agreement Ex. F and adduced satisfactory proof that the tenure of land agreed to be sold is perpetual Fazandari subject only to the small annual rent of Rs. 10. The land in question is admittedly situated in the quarter known as Matharpakhadi, which forms part of what is known as the Mazagaon Estate, and it is fortunate that the history of this estate, in regard to the disposal of lands included in it, is known from about the middle of the sixteenth century A. D. The Court is much indebted to the care and ability with which the respective Attorneys and Counsel have pre-

pared and argued this case and also to the compilation of Mr. Vaidya regarding the Bombay City Land Revenue Act, in the introduction to which (*viz.*, in Chapter III) he has given the history of this Mazagaon Estate. It may be mentioned that this history is based on historical records, many of which appear in Vol. XXVI of the Bombay Gazetteer, being Part III of the Materials collected by the late Sir James Campbell for the Gazetteer of Bombay Town and Island, and a similar account of the Mazagaon Estate will be found in Vol. II of the Gazetteer of Bombay City and Island, compiled by Mr. Edwards, at pages 391 to 408. So that there can be no question of the authority of the facts stated in Chapter III of Mr. Vaidya's Compilation, and as this was referred to by Counsel in the suit, I shall adopt it for reference whenever I find it necessary to do so.

It is unnecessary for the purposes of this judgment to go in detail into the history of this Mazagaon Estate from its commencement. It is enough to say that the estate became vested in the East India Co., and that most of it was farmed out by the Collector of Bombay from towards the end of the eighteenth century. The Matharpakhadi portion had been leased in 1781 to a Mr. A. Nesbit (Vaidya Introduction, page lxx) and it again came to him in 1788 (*Ibid*, lxxi). Then from the recitals in a document dated April 9, 1868 (which there is no reason to question), it appears that the Company gave a lease of this portion of the Mazagaon Estate on January 31, 1831, for twenty-one years to the trustees of the late Mrs. Nesbit, who presumably had come into possession of the estate from her husband. Then, on August 5, 1831, these trustees assigned the lease to Sir Jamsetjee Jeejeebhoy and on January 27, 1855, got a lease of this property for twenty-one years from 1852. Sir Jamsetjee Jeejeebhoy left three sons who partitioned the property among themselves, and this Matharpakhadi property came to his son Rustomjee, who took possession accordingly, but through some error the property appears to have been actually conveyed on September 22, 1865, to his brother Sorabjee. Both Rustomjee and Sorabjee became insolvents and eventually a document was executed under which Sorabjee and the trustees for the liquidation of Rustomjee's estate and other parties conveyed the residue of the lease for twenty-one years to one Narayan Vasudev in consideration of the sum of Rs. 12,000. This document is Ex. A, dated April 9, 1868.

Narayan Vasudev died on August 6, 1874, having executed a Will dated June 3, 1874, of which Probate was granted on November 24, 1874. Negotiations took place between the executors of Narayan Vasudev and Government for the renewal of the lease which had expired in 1873. They asked for a term of 99 years to which Government consented, and on February 16, 1877, the Government granted a lease to these executors for 99 years from January 1, 1873 at the annual rent of Rs. 108-4-0. A certified copy of the document is Ex. B. The title of the executors of Narayan Vasudev appears to be now vested in Mr. Abaji Bhaskar, a sister's son of Narayan Vasudev who is a witness in this case.

It may be mentioned here that the area leased is about 52,000 square yards but we are only concerned with one of the plots into which this property has been divided, *viz.*, plot No. 20, according to the division recognised by Abaji Bhaskar. Its measurement is in dispute but it appears to be somewhere between 200 and 250 square yards.

The first document of title produced and relied upon by the defendant is dated June 26, 1875, from one Domingos Pascoal Gonsalves to Minguel de Mello. In this the plot in question is described as:

"That messuage tenement or dwelling house standing on the Fazandari Ground of the Honourable Narayan Wassoodevjee situate lying and being without the Fort of Bombay at Matharpacady in the Sub-District of Mazagaon."

And it recites that Domingos Pascoal Gonsolves is:

"Absolutely seized and possessed of or otherwise well and sufficiently entitled to a messuage tenement or dwelling house hereinafter particularly described and intended to be hereby granted, released and conveyed for an estate of inheritance in fee simple in possession free from incumbrances."

Then there are various other subsequent title-deeds in which the property is similarly described. The last one is a document of 1913, under which the defendant obtained the property.

It will be seen that the land in question has been described as Fazandari from 1875 and Abaji Bhaskar deposes that he calls

himself a Fazandar, following the practice of his predecessor-in-title Narayan Vasudev. He also says that as far as he is aware there is no writing evidencing the terms on which this particular plot was originally granted to Domingos Pascoal Gonsalves or his predecessor-in-title. He says that except in one or two cases the occupancies are held under oral grants; that they are perpetual, being grants for "as long as the Sun and Moon endure;" and that he does not claim to be entitled ever to resume possession of them. On the other hand he admittedly holds the property under a lease, from Government, of February 16, 1877, Ex. B. He states that the 118 plots in this property were originally granted by Sir Jamsetjee Jeejeebhoy in about 1860 but this statement has not been verified, nor is it necessary to delay this trial for an investigation of this point.

The above are the facts so far as it is necessary to state them for the purpose of deciding the question at issue, and obviously the first consideration is as to the meaning to be attached to the word "Fazandari." This is not the first time that a question of this kind has come before this Court. It is referred to the case of *Doed Dorabji* v. *The Bishop of Bombay* (1), Perry C. J., at pages 505 and 506 says that there is an ambiguity regarding the Fazandar's position but that in his opinion the term "Fazandari" usually denotes land not belonging to Government, by which I understand he means land not subject to the ordinary liability of resumption and increase of assessment by Government; in other words, land that may be described as "freehold." The other Judge, Yardley J., gave it a wider meaning and speaks of the Fazandar as equivalent to an immediate landlord of the occupant provided that landlord is not Government (page 508).

Farran. J., had the same question before him in the case of *Parmananddas Jivandas* v. *Ardeshir Framji* (2) and sums up the matter by saying at page 325*

"My experience is that it (*i. e.* the word 'Fazandari') is used with reference to tenants holding under a private landholder to indicate semetimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties."

This practically agreed with the different meanings assigned to it by Perry, C. J., and Yardley, J. The first, namely, the strict or proper meaning, is what Farran J. calls "an indefeasible right to hold in perpetuity on payment of a small quit or ground rent;" and the second, the loose or inaccurate meaning is where the land is "any kind of tenure agreed upon between the parties " The remarks of Farran, J., on this point- have been approved by a Division Bench of this Court in *Yeshvant Vishnoo Nene* v. *Keshavrao Bhaiji* (3). I think, therefore, I cannot do better than follow Farran, J. and give the two meanings to the word "Fazandari" that I have just detailed.

It is interesting to notice that the land which was in question in the suit tried by Farran, J., was a piece of land at Bhundarwara Hill, which presumably formed part of the Mazagaon Estate, for Bhandarwady is one of the divisions of that estate, and the map also shows this hill as part of Mazagaon. References to the Bhandarwady part of the estate will be found in Vaidya's Compilation at pages lxix, lxx, etc. In that particular case the occupant Manekbai had taken an indenture of lease under which she was in possession as monthly tenant, and one Canjee Chattoor had become the assignee of the lease under which this Bhandarwady Hill had been granted by Government. Farran, J., says (page 325):

"The title of Fazandar as it was used to describe the plaintiff in the case of *Doe d Dorabji* v. *The Bishop of Bambay* (1) was quite inapplicable to Canjee Chattoor who held under the leases from Government of which he was assignee."

That is certainly in favour of the plaintiff in this case, so far as it is a ruling that the term "Fazandar" cannot properly in its strict sense be applied to a lessee from Government such as the holder under the lease Ex. B.

But I have to consider primarily what was the meaning that can be reasonably put upon the word Fazandar as being within the contemplation of the parties to the agreement Ex. F., and it seems to me quite clear that that meaning must be taken to be the strict meaning which I have already mentioned and not the inaccurate or loose meaning which is opposed to it. In the first

(1) (1848) Perry's O. C. 498; 4 Ind. Dec. (o. s.) 456.
(2) 27 Ind. Cas. 512; 39 B. 320 *n.*; 16 Bom. L. R. 723*n.*
(3) 23 Ind. Cas. 880; 39 B. 316 at p. 318; 16 Bom. L. R. 252.

*Page of 39 B.—[*Ed.*].

place the fact that in cl. (1) the property is described as being sold and purchased "for an estate equivalent to an estate in fee-simple in possession free from incumbrances" is one that cannot be ignored. The document is one drafted and approved by Bombay Solicitors, and the effect of such a description is to introduce the English standard as to the incidents of an estate in fee simple as opposed to lesser estates. These words are not merely taken haphazard from a printed form, as was suggested by Mr. Wadia, but clearly are derived from the description of the property in the title-deeds of the defendant including the first one Ex. 1. The words "equivalent to" are of course appropriate, because we are here dealing with not an English estate but an Indian estate, and the effect of it is to claim that the estate sold and purchased is one approaching as near as possible to an estate of absolute ownership. I gather that this was conceded by Mr. Wadia for the defendant. On the other hand cl. (6) shows that the fact that there was an annual rent of Rs. 9 or 10 payable to the superior holder was within the contemplation of the parties, and to that extent the idea of absolute ownership was detracted from. On the other hand, it is equally clear that it was within the contemplation of the parties that the estate should be one of unlimited duration, subject of course to such rights as the right of the Crown to escheat on failure of heirs, and to that extent the analogy of an estate in fee simple is applicable to the case, for unlimited duration is an ordinary incident of such an estate: *cf.*, Halsbury's Laws of England, Vol. XXIV, Article 315, p. 164. And in this particular case we have the word "perpetual" introduced before "Fazandari" in cl. (6), so that this unlimited duration was part of the necessary incidents of the estate which was to be sold. It may be here stated that it has been held that to describe an estate as "nearly equal to a freehold" when it is really leasehold amounts to mere puffing. See *Fenton* v. *Browne* (4). But this case is on quite a different footing, for here the estate required is not one "nearly equal to an estate in fee-simple" but one "equivalent to" that estate. Before I leave this particular element of the question, I may refer to the very learned judgment of Sir Michael Westropp, Chief Justice, in *Naoroji Beramji* v. *Rogers* (5). There he refers to the case of *Freeman* v. *Fairlie* (6), in which Lord Lyndhurst held that the English Law was applicable in Calcutta and said (page 313*):

"If then, we are to apply to it the English Law; if the absolute ownership of the soil is possessed by the party, and the English Law is in any shape to be applied to it, the party must take a fee-simple, and the property will descend to his heirs."

Sir Michael Westropp says that this is an argument quite as applicable to Bombay as it was to Calcutta. This is relevant with regard to the analogy of an estate in fee-simple being applied to land in Bombay as denoting almost absolute ownership. This application has been approved in *In re Esufali Salebhai* (7).

The next point that may be considered is the position of the occupant of this plot No. 20. It is of course conceivable that he may have a title to the plot independently of the lease-holder under Government, who calls himself a Fazandar but who can be more properly described as a "superior holder," the term used in s. 8 of the City of Bombay Land Revenue Act II of 1876. In this particular case, however, the reference in the defendant's first title-deed, Ex. 1, to the plot as being one standing on Fazandari ground of Narayan Vasudev implies, I think, that the title was derived from Narayan Vasudev or his predecessor-in-title; and it has not been contended, or at any rate it has not been shown, that the title arose independently of this superior holdar. There is no evidence as to the actual terms on which this plot was conveyed to the original holder by the superior holder, except the evidence of Abaji Bhaskar. That evidence is certainly in fovour of such title being permanent so far as the title conveyed by the superior holder could be permanent, and this may be taken as sufficiently proved for the purposes of this case. But the main rule that applies is that Narayan Vasudev, or any predecessor of his, could not give a larger estate than he himself possessed, and that if there is a forfeiture of the superior holder's estate then that would involve the forfeiture of all the under-leases. On this point reference may be made to Halsbury's Laws of England, Vol. XVIII, Article 1037, p. 531, and to the

(4) (1807) 14 Ves. 144 at p. 149; 33 E. R. 476; 9 R.R. 255.

(5) 4 Bom. H. C. R. (O. C. J.) 1 at p. 74.

(6) 1 M. I. A. 305; 1 Sar. P. C. J. 123; 18 E. R. 117

(7) 10 Bom. L. R. 994 at p. 997 on appeal 5 Ind. Cas. 621; 34 B. 618 at p. 630; 12 Bom. L. R. 34.

*Page of 1 M. I. A.—[*Ed.*]

corresponding law in s. 115 of the Transfer of Property Act. In para. 2 of that section an exception is made of cases where the forfeiture of the lease has been procured by the lessor in fraud of the under-lessees or relief against the forfeiture is granted under s. 114; but it is doubtful whether that exception would apply to the lease, Ex. B, in view of the provisions of the Crown Grants Act, 1895 Therefore, under the ordinary law it certainly seems that the right of re-entry which Government still has under the lease, Ex. B, is one which does prejudice the duration of the tenure on which the defendant holds this plot No. 20. But the main contention set up by Mr. Wadia for defendant is that this is only a technical objection and that there is no reasonable danger of Government ever exercising their right of re-entry, in view of the fact that Ex. B contains a covenant for perpetual renewal of the lease on the same terms subject to the payment of a small fine and the costs of executing the new lease. There is, I think, no doubt very considerable force in this contention for two reasons. The first is that, having regard to the history of this Mazagaon Estate, the lease granted in 1877, Ex. B is the lineal descendant of the original farming leases and its effect is to constitute the superior holder such a farmer. It is probable that through some carelessness, in spite of the strict orders of the Court of Directors and the general land revenue policy of the Government to the contrary, the renewal clause was so drafted as to have the effect of allowing perpetual renewal on the same rent, and that the Government thereby lose their ordinary right of enhancing the assessment. But, however, that may be, supposing the superior-holder or lease-holder did fail to pay the stipulated rent or did commit a breach of any other covenant of the lease so as to entitle the Government to-re-enter, the probability is that if Government elected to exercise their right of re-entry, they only would do this to the extent of ejecting the particular lease-holder and substituting another. This was the action actually taken in regard to cases of that kind in 1788 and 1793 as stated in Vaidya's Compilation pages lxx and lxxi. This would be sufficient to enable them in the ordinary case to obtain the rent, the recovery of which is the main reason for the lease and it would be unnecessary for them to disturb the actual occupants who are referred to in the recitals of Ex. B in the passage saying that the premises "were formerly and are now in the occupation of the several under-tenants." may also in this connection refer to the analogous case of resumption by Government of an Inam or Saranjam estate which generally leaves under tenures undisturbed. See *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (8) and *Balvant Ramchandra* v. *Secretary of State* (9).

Then the defendant also relies upon evidence that Government seldom, if ever, exercise the right of resumption in such a case as the present. Some testimony to that effect has been given by Mr. Vaidyae and this contention is to some extent supported by a part of the history of Bombay lands contained in Vaiday's Compilation. For instance, at page xxi passage is given from the judgment of the Recorder, Sir James Mackintosh, in which he refers to the hardship of enforcing the right of resumption in cases where the Company had suffered an expectation to be created that the exercise of this right would be exceedingly rare. Again, instances are given at pages xxxii and xxxv where, in consideration of similar circumstances, Government did not exercise their right of resumption. Then, again, there is the case at pages lxxv to lxxvii and lxxxii to lxxxiv of lands at Bhandarwady and Collewady, part of this Mazagaon Estate, where, although the lease-holder was got rid of, Government did not disturb the occupants under him but were content to raise the assessment. These are certainly facts which do undoubtedly support Mr. Wadia's contention. But there are considerations which have to be borne in mind and which go the other way.

First of all, the lease, Ex. B, is so drawn that it includes in the right of re-entry a right to possession and enjoyment of the demised premises "together with all the buildings and improvements thereon." The clause regarding the relinquishment of the property on the expiration of the lease also says that the land is to be given up "together with all erections and buildings then standing or being thereon;" and there is no provision even for compensation for any improvements effected such as was sometimes inserted in similar documents: *cf.* pages xxviii and 73 of Vaidya's Compilation. So far as the lease itself

(8) 10 B. 112; 5 Ind. Dec. (N. S.) 460.
(9) 32 B. 432 at p. 439; 10 Bom L. R. 531.

goes, there does not appear to be any restriction on the right of Government to re-enter and to have all sub-leases or sub-grants also forfeited, provided, of course, the condition precedent exists giving Government the power of re-entry. The fact that ordinarily Government do not insist on their right to re-enter is not, of course, sufficient to show that the right has been either destroyed or relinquished. Mr. Vaidya himself admitted that there was no resolution of Government in which they had bound themselves not to exercise the right of re-entry. And I may in this connection refer to the Government of India Act VI of 1851, where there was a relinquishment by the East India Company of what is called their "freehold reversion," that is, the right of resumption in regard to certain Foras Lands in Bombay. This is mentioned by Sir Michael Westropp in the judgment that I have already referred to [*Naoroji Beramji* v. *Rogers* (5)]. In that particular case there is actual legislation in order to give legal effect to a relinquishment of this kind and the terms of the compromise that was arrived at between the Government and the occupants of these lands. I, therefore, feel that Mr. Vakil is on firm ground when he contends that this right of resumption still subsists and that it has not been relinquished. The case of *Flower* v. *Hartopp* (10) is in point as showing that the existence of this right prevents the estate being one equivalent to an estate in fee-simple. It is, no doubt, to the interest of the lease-holder to comply with the conditions of his lease, *i. e.*, to pay his rent regularly and do all he can to prevent there being a forfeiture of the lease; but that in itself is not sufficient to prevent the estate being subject to a detrimental condition which affects the question of the duration of the tenure. It is always possible that owing to unforeseen circumstances there might arise a breach of some covenant of the lease, which would give Government the right to re-enter. In this connection I may refer to the covenant in Ex. B which requires that the lease-holder shall not during the term of the lease "make any such disposition of the said land hereby demised or any part thereof as shall have the effect of vesting the same for the said term or any part thereof in other than one and the same party or parties at one time without the previous sanction of the Governor of Bombay in Council for the time being." Mr. Vakil contended that that covenant was being broken in regard to the grants made by the lease-holder allowing the occupation of the 118 plots, into which this property has been divided. But I think that this would be giving an unreasonable meaning to this particular covenant. Its origin can with some probability be attributed to the corresponding term contained in the first known grant of this estate by the Portuguese Government. In Vaidya's Compilation, page lxiv, this is summarised as follows :—

"In any case, the village was not to be sold, exchanged or alienated, without the the permission of the King of Portugal or the license of his Viceroy in India."

A fuller recital of this particular covenant is given in *Naoraji Beramji* v. *Rogers* (5), where it is quoted as follows (page 85*):

"Which said village...it shall not be lawful to sell, give, or exchange, or in any other way to alienate, without my leave or that of my Viceroy or Governor of India; nor yet shall it be in the least divided, but shall go always entire in only one person, who shall himself cultivate, and take the uses and fruits it may produce, as his own property."

And it was contended by the East India Company that there had been an actual breach of this condition which entitled them, as successors of the Portuguese Government, to obtain the estate. This is mentioned in the last paragraph of page lxvi of Vaidya's Compilation. The covenant in question cannot, I think, reasonably be intended to prevent the letting out of plots to under-tenants, first of all, because these under-tenants are referred to in the lease and, therefore may be said to be recognised by Government, and secondly, because that is the only way in which the lease-holder can obtain profits from the land and recuperate himself for the rent he has to pay to Government. The main object of this covenant seems to be that Government should not have to look to more than one lease-holder or set of lease-holders, and that the right of the lease-holder should not be partitioned up or assigned to different persons by different documents. So I put out of account any breach of the kind suggested as increasing the probability of Government exercising the right of resumption.

(10) (1843) 6 Beav. 476; 12 L. J. Ch. 507; 7 Jur. 613; 63 R. R. 140; 49 E. R. 910.

*Page of 4 B. H. C. R. -[*Ed.*]

But there is this further point to be considered that, though the Government may not actually enforce their right of re-entry, their power to re-enter is one that puts them into an advantageous position in regard to the occupants, and it might, for instance, be utilised by Government to obtain an enhancement of assessment from the occupants as a condition of allowing them to remain in the occupation of their plots. This is not a point which was mentioned by Counsel in the course of the arguments; but it does seem to me to be a point which is very material in the case. This is what has actually happened with regard to the Collewady and Bhandarwady lands in this Mazagaon Estate. I have already referred to this and I do not think it necessary to give the whole history in detail. It suffices to refer to pages lxxiv, lxxv, lxxvii, lxxx, lxxxii and lxxxiv of Vaidya's Compilation. This shows that about 1804 the Collector was called upon to report what terms he would be likely to obtain from the occupants for being suffered to retain their occupancies. This report does not appear to have been made at once, but the Collector who for the time managed the lands imposed a tax of 11 reas per square yard on the Collewady lands in 1811 (see pages lxxx, lxxxi). And finally in 1903 the lands were offered to their holders on certain terms (see page lxxxiii), and these terms, with slight modifications in one or two cases, were ultimately accepted by the holders. History has a way of repeating itself, and there is a possibility that, though Government might not disturb the occupant of this plot No. 20, he might find that he was called upon to accept a lease for a definite term or at any rate pay a considerably increased amount of rent or assessment. In this connection it is interesting to note that even in the first title-deed of the defendant (Ex. 1) the conveyance is made "subject, nevertheless, to the annual ground rent to the said Fazandar";—it does not stop there but goes on—"and assessment to Her Majesty's Government of Bombay." That would rather go against any contention that might be set up that—to use the language of s. 8 of the Bom. Act II of 1876—there is a right in limitation of the right of Government to assess. I may also refer to the well-known case of *Shapurji Jivanji* v. *The Collector of Bombay* (11) which lays down that strict proof must be given of any right set up in derogation of the inherent right of the Sovereign to assess the land at his discretion; and the fact that a very small rent has been paid for many years, does not show that the Government has forfeited its right to enhance the assessment in respect of such land. And in this particular case it would not (at any rate for some years) be open to the occupant to show that he and his predecessors-in-title had paid this small rent for over sixty years. The only evidence on this point in this case is that the rent has been paid from 1874, and it would not be till about 1935 or so that the period of sixty years referred to in Art. 149 of the Indian Limitation Act would expire.

These considerations have led me to the conclusion that, if the word "Fazandari" in this agreement Ex. F means, as I think it must mean, Fazandari in the strict sense specified by Farran, J., in *Farmananddas Jivandas* v. *Ardeshir Framji* (2), the land cannot properly be described as "perpetual Fazandari." It could only be applied in the loose sense to which I have already referred. It is no doubt the fact that the term "Fazandari" has for many years been applied to properties of this kind, and I am certainly not disposed to say that, provided it is intended and understood to be used in this loose sense, its use may not be legitimate. For instance in the case, about which evidence was given, namely, the conveyance to the witness Canjibhai Allarakia of two plots in Matharpakhadi, the marketable title free from all reasonable doubt, which had to be shown under cl. (4) of the agreement in that case, was sufficiently made out, for in that case the property is only described as "Fazandari" without any reference to an estate equivalent to an estate in fee-simple, and there is the further provision that the purchaser shall not require any further proof about Fazandari than the Fazandari's ground rent bills. In such a case of course there is good ground for saying that the stipulated title is sufficiently deduced from the mere fact that the land was described in bills, as Fazandari.

But this is a different case, and I have to judge by the agreement in this particular case. In my opinion what the agreement Ex. F contemplates is, to use the language of Farran, J., an indefeasible right to hold in perpetuity on payment of a small quit or ground rent. And the conditions under

(11) 9 B. 483; 5 Ind. Dec. (N. S.) 321.

which the superior-holder holds this land are such that that right is not established. Evidence has been given in this case by witnesses whom I may call *quasi*-expert witnesses, namely, Mr. Kola for the plaintiff and Mr. Vaidya for the defendant. I need not go in detail into their evidence. It seems to me that there is no material difference between them. Mr. Kola, for instance, says that "leasehold" and "Fazandari" are quite inconsistent terms; while Mr. Vaidya says that "leasehold" tenure is a distinct tenure recognised by Government, and that it is a distinct tenure from "Fazandari," which in his opinion comes under "pension and tax;" and it is so shown in his Compilation at page lxxxvii. He there says: "Closely associated with the pension and tax tenure is a kind of sub-tenure known as 'Fazandari'." Then he goes on to give some details about it. This is supported by the evidence which has been adduced in this case, that these particular Matharpakhadi lands are not classified as "pension and tax," or under any similar tenure in the Collector's Records, but merely as "leasehold," and the Collector does not in fact recognise any tenure under the separate name of "Fazandari". Though, therefore, I have considerable sympathy for the contention of Mr. Wadia that, in practice, it is very improbable that the occupant of this plot will ever be disturbed by Government, yet the substantial fact remains that he is liable to such disturbance, and also, even if he is not disturbed, to being called upon to pay enhanced assessment; and in view of that liability it seems to me that the defendant has not satisfied the condition of cl. (6) of Ex. F that he shall show that the land agreed to be sold is "perpetual Fazandari" at a small yearly rent.

The result is that I answer Issue No. 4-A in the negative.

As regards Issue No. 3 the clause about the marketable title free from reasonable doubt is subordinate to cl. (5) regarding the title being of a particular kind; and it is sufficient to say that the defendant has not made out a marketable title of the kind stipulated.

* * * * *

Z. K. *Suit decreed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 370 OF 1922.

August 29, 1924.

Present:—Mr. Justice Madhavan Nair.

ALLABAKSH MIRA MOHADEEN SAHIB AND OTHERS—PLAINTIFFS Nos. 1, 3, AND 4—APPELLANTS

versus

SETTI CHINNA FAKRUDDIN SAHIB —DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Collector's sanction for suit with certain prayers—Suit omitting some prayers, maintainability of.

Where a Collector sanctioned the institution of a suit under s. 92, C. P. C., for removal of a trustee, for setting aside certain alienations by him and for recovery of the properties from the alienees, but the plaint as ultimately filed omitted the latter two reliefs and asked only for the removal of the trustee:

Held, that the suit was not maintainable and that the plaint must consequently be rejected. [p. 1047, col. 1.]

Srinivasa v. *Venkata*, 11 M. 148; 4 Ind. Dec. (N. S.) 103, *Sayad Hussein Miyan* v. *Collector Kaira*, 21 B. 157; 11 Ind. Dec. (N. S.) 174, relied on.

Ramrup Das v. *Mohunt Sujaram Das*, 7 Ind. Cas. 92; 14 C. W. N. 932; 12 C. L. J. 211, distinguished.

Asam Raghavulu Setty v. *Pellati Sitamma*, 25 Ind. Cas. 794; 27 M. L. J. 266; 16 M. L. T. 178; (1914) M. W. N. 692, referred to.

Second appeal against a decree of the District Court, Anantapur, in Appeal Suit No. 91 of 1921, preferred against that of the Court of the Subordinate Judge, Anantapur, in O. S. No. 18 of 1920.

Mr. *B. Somayya*, for the Appellants.

Mr. *T. R. Subramania Iyer*, for the Respondent.

JUDGMENT.—The only question argued in this second appeal is as regards the maintainability of the suit. The plaintiffs who are appellants instituted the suit out of which this second appeal arises for the removal of the defendant from the trusteeship of a certain Muhammadan religious institution in Tadpadri Town after obtaining sanction from the Collector under s. 93, C. P. C. The Collector's order according sanction to file a suit was not only for removing the trustee but also "for declaring the alienations made by him null and void" * * (Relief No. 3 in Ex. A) "and for recovering the trust properties from the alienees" (relief No. 4). The plaint, however, omitted these two reliefs and asked only for the removal of the trustee who was made the sole defendant in the suit. It was held by the lower Court that, since the reliefs asked for in the plaint did not precisely correspond with the reliefs mentioned in the sanction order, or, in other words, since the suit instituted differed from

the one for which sanction was given, the plaint was rightly rejected, by the District Munsif. The correctness of this decision is now challenged in this second appeal.

In *Srinivasa* v. *Venkata* (1), two worshippers at a Hindu temple obtained sanction, under s. 18, corresponding to s. 92, C. P. C., of the Religious Endowments Act, to sue for the removal of the managers of the temple on the ground of breach of trust and for damages. In the suit, actually brought by them, the claim for damages was omitted and it was held that, as the suit actually instituted was not the one for the institution of which sanction was given, the plaint was properly rejected. The principle on which this decision is based is thus stated by Muttusami Iyer and Brandt, JJ.: "Having regard to the fact that the character of the suit, which the appellant proposed to institute was one of the circumstances which the Judge was entitled to take into consideration in forming an opinion as to whether the application was *bona fide*, we are not prepared to hold that the appellant was entitled, as a matter of right, to give the suit a character different from that in respect of which sanction was granted. The obligation which s. 18 imposes on the Judge to satisfy himself that there are sufficient *prima facie* grounds for the institution of suit and the power conferred upon him by s. 19 to call for the production of accounts of the trust for giving leave for the institution of the suit, indicate an intention on the part of the Legislature to provide an adequate protection to the trustees against vexatious suits, and, in cases of doubt, we think, we ought, so to construe s. 18 as not to take away the protection." This decision is cited with approval in *Sayad Hussein Miyan* v. *Collector of Kaira* (2) which was a case in which a relief other than those included in the terms of the sanction was sought.

It is argued on behalf of the appellants that, if the reliefs omitted in the plaint do not strictly fall within the scope of s. 92 as in the present case, then the fact that the order according sanction mentions them does not entitle the Court to reject the plaint: in other words the close correspondence between the terms of the order granting sanction and the plaint is not required in such cases. This argument receives support to a certain extent from a decision in *Ramrup Das* v. *Mohunt Sujaram Das* (3). In that case, the plaintiffs had instituted a suit under s. 92, C. P. C., for (*a*) removal of a *Mohant*, (*b*) for the appointment of plaintiff No. 1, as the *Mohant* *

* and for other reliefs marked (*c*), (*d*), (*e*) and (*f*) in the plaint. Apparently for the purpose of reducing the Court-fees, when that question was raised the plaintiffs obtained an amendment of the plaint by striking out the relief prayed for the appointment of plaintiff No. 1 as the *Mohant*: When the order allowing amendment was attacked on the ground that it could not be made without the sanction of the Advocate-General, Holmwood and Chattarjee, JJ., observed in their judgment as follows:—"If the Advocate-General has sanctioned the suit under s. 92 and something outside the scope of that sanction has been inserted in the plaint and that has been covered by the general sanction, it cannot be said that the striking out of that relief which did not fall strictly within the scope of s. 92 cannot be made without the sanction of the Advocate-General * * *. If the original prayer struck out does not fall within the scope of s. 92, then there can be no reason in our opinion, why the amendment should not he made". It is obvious that the further question whether the plaint in such cases should be rejected was not considered in that case. It is also not clear from the report whether the relief struck out was specifically mentioned in the order of the Advocate-General granting sanction. Applying the principle of this decision, the case of *Sayad Hussein Miyan* v. *Collector of Kaira* (2) is explained by the appellant's learned Vakil by pointing out that the added relief in that case was one for which sanction was required under s. 92, C. P. C. But, as already mentioned that decision cites with approval, the decision in *Srinivasa* v. *Venkata* (1). It has also been argued for the appellants that since the alienees are not necessary parties to a suit under s. 92, C. P. C., the reliefs omitted cannot be asked for in this suit and that the plaint should not, therefore, have been rejected. In *Asam Raghavulu Setty* v. *Pellati Sitamma* (4) it was observed by the learned Chief Justice: "That, if they

(1) 11 M. 148; 4 Ind. Dec. (N. S.) 103.
(2) 21 B. 157; 11 Ind. Dec. (N. S.) 174.
(3) 7 Ind. Cas. 92; 14 C. W. N. 932; 12 C. L. J. 211.
(4) 25 Ind. Cas. 794; 27 M. L. J. 276; 16 M. L. T. 178; (1914) M. W. N. 692.

(alienees) had desired to be made parties, I agree that an order adding them might properly have been made, but I do not think that they ought to be made parties against their will to a suit under s. 92". In my opinion, none of these decisions affects the principle which has been enunciated by the learned Judges in *Srinivasa* v. *Venkata* (1). Obviously, it must be difficult to assess the value of each of the considerations that operated to secure the consent of the Advocate-General. As pointed out by the District Judge: "It may well be that had the applicants not expressed their intention to recover the trust properties, the Collector would not have consented to the suit". Following *Srinivasa* v. *Venkata* (1), I hold that the plaint in this case was rightly rejected.

As it will cause no serious hardship to the appellants to file a fresh suit, I think the amendment of the plaint asked for only in the Appellate Court was rightly disallowed by the District Judge.

This second appeal is, therefore, dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 160 OF 1924.

November 23, 1924.

Present:—Mr. Justice Walsh and Mr. Justice Sulaiman.

Sardar HARBANS SINGH AND OTHERS —OPPOSITE PARTY—APPELLANTS

versus

Rani RAJINDER KUAR—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 32—Trusts Act (II of 1882), ss. 77, 78—District Judge, jurisdiction of, to dispossess third persons in possession of minor's property—Trust created by minor's father for payment of debts, whether can be cancelled by District Judge.

Under the Guardians and Wards Act a District Judge has no jurisdiction to dispossess third persons from property over which they may be, rightly or wrongly, in possession. He can at best give directions to the guardian to take necessary steps to recover the property. [p. 1043, col. 2.]

In order to arrange for the payment of their debts three separated Hindu brothers executed a deed of trust under which trustees were appointed to take charge of the management of their entire estate and to pay out of its income the debts that were outstanding against it. Subsequently, one of the brothers died and his minor son succeeded to his interest in the estate. The widow of the deceased was appointed the guardian of the person and property of her minor son, but the District Judge being of opinion that it was desirable that the management of the estate should continue in the hands of the trustees, passed an order to that effect and added the minor's mother as one of the trustees. The District Judge also permitted the guardian to enter into a deed of partition with the other proprietors under which the minor's share in the estate was separated and the exact amount of his liability was allocated. Sometime afterwards the minor's guardian became dissatisfied with the management of the other trustees, and on her application the District Judge, after expressing the view that it was no longer in the interest of the minor that the trustee should continue to manage the property when his mother was altogether excluded from the management, said that he thereby "cancelled the trust." He also directed that the guardian should herself manage the property through paid managers:

Held, (1) that the trustees not having been directly appointed by the District Judge were not under his direct control, and he had no jurisdiction in a summary proceeding either to issue orders to the trustees to hand over the possession of the minor's property to the guardian or to terminate the trust; [p. 1049, col. 1.]

(2) that the trust created by the minor's father and uncles had continued to be in existence throughout and all that had happened on the death of the minor's father was that a new trustee had been added and that, therefore, the District Judge had no jurisdiction to set aside the trust; [*ibid.*]

(3) that even if it was assumed that a new trust was created on behalf of the minor by his guardian it could not be cancelled or revoked unless the case fell within the provisions of s. 77 or s. 78 of the Trusts Act. [*ibid.*]

Civil revision from an order of the District Judge, Aligarh, dated the 25th of July 1924.

Messrs. *P. N. Sapru* and *D. C. Banerji*, for the Appellants.

Messrs. *P. L. Banerji* and *Ram Nama Prasad*, for the Respondent.

JUDGMENT.—This is an application in revision to get revised an order of the District Judge, of Aligarh, dated the 25th of July 1924, rather difficult to define and say under what Act or section it was passed.

It is necessary to state briefly certain facts leading up to this application before disposing of it finally.

Kunwar Mahendrajit's grandfather Rao Umro Singh died in the year 1898 leaving a considerable estate behind him and considerable debts. It is admitted that some years afterwards his three sons representing the three branches became separate in estate. In order to arrange for the payment of the debts that were outstanding the three brothers on the 1st of August 1912 executed a deed of trust under which three trustees were appointed to take charge

of the management of the entire estate and to pay out of its income the debts that were outstanding against it. Provisions were made how in case of the death of any of the trustees his successor should be appointed. We may mention that in 1912 Mahendrajit Singh was a minor of tender years and he could not himself have been a party to the deed and there can be no doubt that his father Hari Raj Singh acted as the head of the family and entered into the deed of trust along with his brothers. In 1918 Hari Raj Singh unfortunately died. After his death his widow was appointed the guardian of the person and property of the minor by an order dated the 16th of February 1920. The learned Judge who passed that order thought that it was desirable that the management should continue in the hands of the trustees so long as the Court of Wards did not take over the management of the minor's share in the estate. Accordingly in appointing Rani Rajinder Kuar, the widow, as the guardian of her minor son, he made reservations that the management of the property should continue to vest in the trustees pending the decision of the question whether it could not be taken over by the Court of Wards. Subsequently it seems to have been conceded by all the parties concerned that it was not possible for the Court of Wards to take over charge of the minor's share unless his interest be separated and his liability clearly defined. With a view to carry out this purpose the learned District Judge permitted the guardian to enter into a deed of partition with the other proprietors, under which the minor's share was separated and the exact amount of his liability allocated. This deed was executed after the sanction of the District Judge on the 9th of August 1921 and was duly registered. In his order the learned Judge sanctioned the continuance of the property of the minor under the management of the existing trustees with the addition of the name of Rani Rajinder Kuar as a trustee. There were numerous subsequent orders or directions under which the trustees were directed that Rs. 500 a month should be paid to the widow as maintenance allowance to her and her minor son.

For some reasons which it is not necessary to consider here, Rani Rajender Kuer became dissatisfied with the management of the other trustees. Numerous applications, one after another, were filed in the Court complaining against the trustees and pointing out various grievances said to exist. The order in question is supposed to have been passed on one of the nine applications made by her.

Under the order before us the learned Judge after expressing the view that it was no longer in the interest of the minor that the trustees should continue to manage the minor's property when his mother was altogether excluded from the management, said that he thereby "cancelled the trust." He also directed that the Rani herself should manage the property of the minor and that, as she was a *pardanashin* lady, she should employ two leading Pleaders of the Court to work as managers of the estate on a remuneration fixed.

So far as the order of the District Judge can be said to amount to directions given by him to the guardian under s. 32 of the Guardians and Wards Act, it is impossible to say that it was without jurisdiction. Whether that order was a proper one or not, was a matter for the District Judge to consider. It is even now open to him to re-consider those directions at any time if certain fresh circumstances are brought to his notice and he is satisfied that the *pardanashin* guardian cannot be a fit person to manage the estate. Those directions are also open to a further amendment in case the Court of Wards is actually prepared to take over the charge of the minor's estate. We, therefore, do not propose to say anything with regard to this order so far as it affects the guardian appointed by the Court.

The question that remains is: How far that order can bind the trustees?

It is clear that an order purporting to be passed under the Guardians and Wards Act cannot bind third parties who are in possession of the estate. It has been laid down in severel cases that under the Guardians and Wards Act a District Judge has no jurisdiction to dispossess third persons from the property over which they may be, rightly or wrongly, in possession, but can at best give directions to the guardian to take necessary steps to recover the property.

The learned Advocate for the respondent has contended that inasmuch as the deed of partition had been sanctioned by the District Judge and as such sanction was absolutely necessary under s. 7 of the

Indian Trust Act, it must be taken that the trustees came under the direct control and supervision of the District Judge and that he had absolute power of directing them to give up possession at any time when he was satisfied that they could not act in the interests of the minor. We are unable to accept this contention. It is true that the deed of partition was executed after the sanction of the District Judge had been obtained, but the sanction of the District Judge merely amounted to a permission to the guardian to enter into a deed of partition. Assuming for the sake of argument that this partition deed really created a new trust, even then the creation of the trust must be deemed to have been made by the guardian after the permission of the Judge. It cannot be said that it was the District Judge who appointed the trustees. The trustees not having been directly appointed by the Judge are not under his direct control and the learned Judge in a summary proceeding had no jurisdiction either to issue orders to the trustees to hand over the possession of the property or to terminate the trust. We are far from saying that the partition deed of 1921 created a new trust. On the other hand in the proceedings it seems to have been assumed all along that the old trust which was created by the deceased father of the minor, who then admittedly was the head of the family, was still in existence. Even in his order dated the 9th of August 1921 Mr. Sams referred to that trust as the existing trust. The deed of partition also does not anywhere suggest that the old trust had terminated and a new trust was being created. If, therefore, it be taken that the old trust had continued and all that had happened was that a new trustee was added then the learned District Judge would still more clearly have no jurisdiction to set that old trust aside. On the other hand even if it be assumed that a new trust was created on behalf of the minor by the guardian in 1921 it cannot be cancelled or revoked unless the case falls within the provisions of ss. 77 and 78 of the Indian Trusts Act. Section 77 obviously cannot apply because the purpose, namely, the payment of the debts for which it was created has not been completely fulfilled, nor has it become unlawful, nor impossible. Sub-cls. (*a*) and (*b*) of s. 78 do not apply. The learned Advocate for the respondent has contended strenuously that cl. (*c*) of s. 78 does apply and he says that this is a case where the trust, being for the payment of the debts of the author of the trust and not having been communicated to the creditors, is liable to be revoked at the pleasure of the author of the trust. The first difficulty in his way was that there were three authors of the trust and only one of them can be said to be trying to revoke it. The learned Advocate, however, has tried to get over it by saying that this is really a composite document under which three distinct trusts were created and that, therefore, under the Trusts Act this is merely a revocation of the trust by its sole author. But assuming that that position can be taken, it is clear that cl. (c) does not apply unless it would be a fact that the trust has not been communicated to the creditors. In the present case this, of course, is impossible to say. Although the creditors were no parties to the deed of partition or the deed of trust, nevertheless they have been receiving part of the debts all along from the trustees and there is no suggestion either, in the applications or anywhere on the record that the trust had not been brought to their notice. The learned District Judge has not passed this order on this ground, nor was this made a ground of attack in the applications filed on behalf of the Rani. It, therefore, seems to us that this cannot be said to be a case where the trust can be revoked by the District Judge in these proceedings.

On the other hand it may be possible for the minor to say that he is not bound by the deed of trust which was created by his father as joint owner of the property. That would be a mixed question of law and fact which cannot be decided in these summary proceedings. It may also be open to the guardian of the minor to have this deed of trust set aside by a subsequent instrument or through Court. Or if there was in reality no trust at all, but a mere appointment of managers, her course would be easier.

We accordingly do not in any way wish to suggest that it is not open to the guardian to have the deed set aside or revoked in the way open to her and allowed by law. All that we wish to say is that in these summary proceedings the learned Judge had no jurisdiction to pass an order setting aside the trust so as to bind the trustees for all time to come and compel them to hand over the property imme-

diately. If really the trust can be revoked and has been validly revoked by the guardian then the possession of the minor's estate by the trustees would be without right and they may be liable to pay mesne profits to the minor. But that is altogether a different question.

We are accordingly of opinion that the order of the learned District Judge cancelling the trust as against the present trustees was passed without jurisdiction and cannot be upheld.

We may, however, note that Mr. Durga Charan Banerji and Mr. Sapru on behalf of the trustees have given an undertaking that they have never objected to the payment of Rs. 500 a month to the Rani Saheba for her maintenance and the maintenance of her son so long as the management remains in their hands and they undertake to pay this sum to her regularly month by month

In view of these undertakings we would set aside the order of the District Judge *so far as the trustees are concerned*, leaving the contents of that order as if they were mere directions to the guardian to take steps as directed. We would also like to add that the receipt of the monthly allowance of Rs. 500 by the lady from the trustees would in no way prejudice her right to get this trust revoked or cancelled in the way allowed by law.

In view of the fact that, except on the last date when the trustees did not agree to the trust being put an end to at once, there seems to have been some acquiescence on their part in the procedure adopted by the learned Judge, we direct the parties to bear their own costs of these proceedings both here and in the Court below.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 873 OF 1921.
March 10, 1924.
Present:—Mr. Justice Krishnan.
APPATTA CHATHU NAMBIAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
APPATTA SEKHARAN NAMBIAR AND OTHERS—DEFENDANTS Nos. 1, 3, TO 12, 13 TO 22, 24 TO 27, 29 TO 47, 48 TO 57 AND 60, 61—RESPONDENTS.

Malabar Law—Tavazhi—Karnavan, *acquisitions by*—*Presumption*—*Maintenance arrangement with* karnavan *of* tarwad—*Junior members, rights of*—*Denial of* tarwad *right*—*Forfeiture.*

In the absence of evidence to the contrary, the presumption is in favour of the view that property acquired by the *karnavan* of a Malabar *tavazhi* is acquired for the *tavazhi* and with the *tavazhi* funds, and the presumption must prevail unless the person who avers that the property is a self-acquisition proves that fact by evidence. [p. 1051, col. 1.]

It is not open to the junior members of a Malabar *tarwad* to set aside any arrangement that the *karnavan* has made for the purpose of the enjoyment of the *tarwad* properties by certain other junior members for their maintenance, and the latter are entitled to continue in possession of the properties of the tarwad until and unless the *karnavan* of the *tarwad* asks for the return of their possession from them. [p. 1051, col. 2.]

Where the members of a *tavazhi* are in possession of certain properties of their *tarwad* under an arrangement with the *karnavan* for their maintenance, a recital in a *karar* amongst themselves that the properties belong to the *tavazhi* does not operate to work a forfeiture of their rights and the other junior members of the *tarwad* cannot on that ground get a decree for recovery of possession of the properties, where the members of the *tavazhi* unconditionally admit in their written statement in the suit that the properties belong to the *tarwad.* [p. 1053, col. 1.]

Second appeal against a decree of the District Court, North Malabar, in A. S. No. 11 of 1917, preferred against that of the Court of the District Munsif, Quilandy, in O. S. No. 17 of 1915.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—This suit is brought to recover with mesne profits possession of the properties described in the plaint from the possession of the defendants on the allegation that they are *tarwad* properties. The plaintiffs and the defendants are all members of a *marumakkatayam tarwad* called "Appatta." The first defendant is the present *karnavan* of that *tarwad* and the other defendants also belong to the *tarwad.* The plaintiffs who are some of the members of the *tarwad* are the appellants before me. The defendants against whom reliefs are claimed in this suit are also members of a *tavazhi* in the *tarwad* called Kuttierikandi *tavazhi.* The lower Courts have found that though the existence of the *tavazhi* was denied such a *tavazhi* does exist as a separate body in the *tarwad* with a separate *karnavan* and owning separate properties. The members of the *tavazhi* claim the suit properties as theirs except items Nos. 1 to 12 and 14 which are admitted to be *tarwad* properties. The second appeal has been argued before

me only with reference to items Nos. 27, 28, 29, 34, 35, 37, and 38 an items Nos. 1 to 6 and the improvements on items Nos. 8, 9 and 10. As regards items Nos. 27 and 28 the evidence is that they were originally acquired on an *otti* right in the name of one Ukkandan Nambiar by the then *karnavan* of the *tavazhi*, Imbichunni Nambair, and that in 1889 the *jenm* right was acquired by Imbichunni Nambiar himself, part of the consideration of the *jenm* right being the *otti* amount which had previously been advanced. Imbichunni Nambiar being the *karnavan* of the *tavazhi* at the time, there is a presumption in favour of holding that he acquired the properties for the *tavazhi*. The lower Court has also found that the claim of the *tarwad* even if it had at any time, is clearly barred by limitation as from 1889 onward the defendant's *tavazhi* has been in possession.

As regards item No. 29 that was acquired by Ukandan Nambiar in 1071 (1896) under Ex. FF. At that time he had become the *karnavan* and manager of Kuttierikandi *tavazhi*. So the learned Judge was right in holding that in the absence of evidence to the contrary, the presumption was in favour of the view that the property acquired by him was acquired for the *tavazhi* and with the *tavazhi* funds. And this presumption must prevail unless the person who avers that the property is self-acquisition proves that fact by evidence.

Items Nos. 34 and 35 were purchased in Court auction in 1889 by Kelappan Nambiar, the previous *karnavan* of this *tavazhi*, and the *tavazhi* has been dealing with these items as pointed out by the learned Judge ever since as their property.

Items Nos. 37 and 38 were also acquired by the same person Kelappan Nambiar. Kelappan Nambiar himself was a party to the Karar, Ex. QQ, and admitted that these properties belonged to the *tavazhi* and were acquired with the help of the other *tavazhi* members and with *tavazhi* funds. Therefore it is clear that these properties belong to the *tavazhi*.

A point of law was raised before me that the self-acquisitions of a junior member of a *tarwad* lapsed to the *tarwad* on his death and not to the *tavazhi* even though he is a member of the *tavazhi* also. That was so laid down in *Govindan Nair* v. *Sankaran Nair* (1).

(1) 2 Ind. Cas. 183; 32 M. 351; 6 M. L. T. 106; 19 M. L. J. 350.

That case has no application here. It is only of importance to show the lower Court's statement in para. 4 that the self-acquisition of the junior members of the *tavazhi* lapsed to the *tavazhi* and not to the *tarwad* is not correct.

As regards items Nos. 1 to 6 they are admittedly *tarwad* properties and they are in possession of some of the members of the Kuttierikandi *tavazhi* but the members of the Kuttierikandi *tavazhi* are also members of the *tarwad* and they are entitled to be in possession of the properties of the *tarwad* until and unless the *karnavan* of the *tarwad* asks for the return of their possession from them. But in this case the *karnavan* is not suing and as the plaintiffs are junior members and belong to another *tavazhi*, it is not open to them to set aside any arrangement that the *karnavan* has made for the purpose of the enjoyment of the *tarwad* properties by the junior members. In the case of items Nos. 1 to 6 even the plea that the junior members were setting up adverse possession of the *jenm* title against the *tarwad* has not been established and, therefore, there is no ground for recovering the properties from these junior members of the *tarwad*. It is, therefore, clear that the suit for recovering items Nos. 1 to 6 cannot stand.

It is finally urged that item No. 32 has been lost sight of by the lower Appellate Court in its judgment though it was admitted to be *tarwad* property. But on looking at the statement in para. 37 of the Munsif's judgment, it is clear that the plaintiffs' claim for items Nos. 30 to 33 were given up before him. That must be the reason why nothing has been said by the Appellate Court as regards item No. 32.

The last contention is as regards the improvements on items Nos. 9, 10 and 11. It is urged that these improvements were made by one Kanaran Nambiar, a junior member of the *tarwad* and that, therefore, on his death these improvements should be taken to have lapsed to the *tarwad* under the ruling in *Govindan Nair* v. *Sankaran Nair* (1). But unfortunately for this argument the man who made the improvements had made a gift of his property before his death under Ex. XLIV to his brothers and other members of his *tavazhi*. That claim also fails. There does not seem to be any valid ground for the second appeal which fails and must be dismissed with costs.

MEMORANDUM OF OBJECTIONS.

The memorandum of objections refers to items Nos. 7, 9, 10 and 11. The Munsif dismissed the suit as regards them also but the Subordinate Judge has given a decree to the plaintiffs for possession of those properties on payment of the value of improvements; and the value of improvements has been assessed by him. These properties are admittedly *tarwad* properties just as items Nos. 1 to 6 are which have been already dealt with in the appeal. The only difference between items Nos. 1 to 6 and these items is that in a *Karar* entered into by the members of the Kuttierikandi *tavazhi*, a statement was made that they were the *jenm* properties of the *tavazhi*, whereas with regard to items Nos. 1 to 6 there was no such statement. The Subordinate Judge has held that because the *jenm* title of the *tarwad* was denied by the members of the *tavazhi* the properties should be taken away from them and he has decreed possession in favour of the plaintiffs. It must be borne in mind in this connection also that the *karnavan* of the *tarwad* does not seek to recover possession of these properties. The question then is whether the fact that in the *Karar* the members of the Kuttierikandi *tavazhi* made a statement denying the *jenm* title of the *tarwad* is a sufficient ground for differentiating between items Nos. 7 and 9 to 11 and the other items of the *tarwad* property. I am inclined to think that it is not. In the written statement filed by the defendants they unconditionally admitted that these properties also belonged to the *tarwad* and have withdrawn from the position they took up in the *Karar*. They have only claimed in the case the value of the improvements on these items which they said belonged to the *tavazhi*. Now that being so there is no reason for thinking that their being continued in possession of these properties would in any way work to the prejudice of the *tarwad*. It might be that because the *jenm* title of the *tarwad* was denied in the *Karar*, the plaintiffs were right in bringing the matter into Court but when once the defendants admitted the *jenm* title of the *tarward* there is no further reason to take away the possession of the properties from the defendants. They as members of the *tarwad* are quite entitled to be in possession of these properties with the permission of the *karnavan* of the *tarwad* as the plaintiffs themselves are who are only other junior members of the *tarwad*. It would be open always to the *karnavan* to get possession of these *tarwad* properties from the plaintiffs if he wants them. But I do not think the plaintiffs should be allowed to insist upon a decree being given for the delivery of these properties to them on behalf of the *tarwad*. I am inclined to think that the reasons given by the Munsif are correct and that the Subordinate Judge should not have interfered with his decree. The Subordinate Judge has treated the defendants as if they were tenants under the *karnavan* of the *tarwad* of these properties and has held that the denial of the title of the *tarwad* in the *Karar* has worked a forfeiture of any right thay have in the property. This view is clearly incorrect as it was not the case of the plaintiffs or any one else that the defendants were in possession of these properties as tenants. In fact, on the evidence referred to by the District Munsif it is clear that the plaintiffs were not able to say in what capacity the defendants were in possession. The defendants themselves have had possession of these properties with the permission of their *karnavan* for their own maintenance after paying the Government revenue and other incidental expenses, and it is clear also that they have considerably improved the properties. Under these circumstances it seems to me that the memorandum of objections must be allowed and the decree giving possession of the properties to plaintiffs should be set aside. As regards costs of the memorandum as the defendants did once deny the *tarwad* title I do not think that any costs should be given to them. I direct each party to bear their own costs so far as these items are concerned not only in the memorandum of objections but in both the Courts below.

Memorandum of objections allowed.

V. N. V.
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 91 OF 1922.

April 16, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

JOLFA BIBI—PLAINTIFF—APPELLANT

versus

AJALADDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition, suit for—Partition for convenience of possession—Decree, whether can be passed.

A partition effected for convenience of possession cannot stand in the way of a decree for partition so long as it is not found that it is in conformity with the shares of the respective parties. [p. 1054, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, Chittagong, dated the 14th of May 1921, modifying that of the Munsif at Patiya, dated the 20th February 1920.

Babus *Girija Prasanna Sanyal* and *Charu Chandra Sen*, for the Appellant.

Babu *Narendra Coomar Das*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for partition instituted by the plaintiff Jolfa Bibi to have her 3 annas 11-12/27 pies share in the lands of Sch. I and 10 annas 2 pies share in the lands of Sch. II of the plaint after partition by metes and bounds.

The plaintiff's case was that one Pela Gazi left three sons, Baksha Ali, Kamar Ali and Safar Ali, that Baksha Ali predeceased his two brothers, that defendants Nos. 1 to 8 are the descendants of Baksha Ali and Kamar Ali, that Safar Ali left a son Nijamat Ali, that Nijamat Ali died leaving a widow named Sabjan, a daughter (*viz.*, the plaintiff) and a son who subsequently died leaving a widow, the defendant No. 9, and a daughter, the defendant No. 10, and that last of all Sabjan died. According to the plaintiff the lands of Sch. I were owned by Pela Gazi, and those of Sch. II belonged to Nijamat Ali. Defendants Nos. 11 to 26 are said to have purchased portions of the lands from some of the aforesaid defendants.

Of the defendants only Nos. 1, 9, 10, 11, 12, 13, 16, and 18 filed written statements and the others did not appear in the suit. Of these again all gave up the contest except Nos. 1 and 18.

The main defence of the defendant No. 1 was that the lands did not belong to Pela Gazi but to Baksha Ali, that plaintiff's grand-father Safar Ali was not a son of Pela Gazi but of one Munshea, that Munshea purchased some lands of lots Nos. 1, 2 and 7 of Sch. I, that his two sons Chand Mia and Safar Ali were in possession thereof and as such the names of Makbul Ali (Chand Mia's son) and Nijamat Ali (Safar Ali's son) are to be found in the *khatians*, but that the entries are not quite correct, and that in the lands of lot No. 2 of Sch. II, Nijamat Ali's vendor Jinnat Ali had no title.

The defence of the defendant No. 18 was much on the same lines with that of the defendant No. 1, and he further alleged that the plaintiff was already in possession of her share in the lands that she had inherited from her father.

The learned Munsif gave the plaintiff a decree declaring her right to the shares claimed and a decree for partition and mesne profits. He gave certain directions as to how the partition was to be effected without disturbing present possession as far as practicable and suggesting that equality of division was to be secured by awarding compensation if that was necessary.

Against this decree the defendant No. 1 alone preferred an appeal, and he impleaded the plaintiff alone as respondent in that appeal. The learned Subordinate Judge allowed the appeal and dismissed the plaintiff's suit in its entirety. He came to the findings that Safar Ali was a son of Pela Gazi, that lots Nos. 1 to 5 of Sch. I belonged not to Pela Gazi but to Baksha Ali, that Nijamat Ali's vendor Jinnat Ali had no title to the lands of lot No. 2 of Sch. II; and as a result of these findings he came to the conclusion that Safar Ali inherited one-sixth share in lots Nos 1 to 5 of Sch. I, and Nijamat Ali had one-third share in lots Nos. 6, 7, 7 (*ka*) and 7 (*kha*) of Sch. I and lot No. 1 of Sch. II.

Apart from anything else it is difficult to appreciate on what materials this distinction is made between the properties acquired by Baksha Ali and those acquired by Nijamat Ali; at any rate none are disclosed in the judgment of the learned Subordinate Judge.

The learned Subordinate Judge then proceeds to observe that "the plaintiff's title is hence found to her legal share in the said lots of the said schedules." What he means by this is not clear, whether the shares claimed by her, which could not be correct

in view of the finding that lots Nos. 1 to 5 of Sch. I were the properties not of Pela Gazi but of Baksha Ali or shares which she was entitled to under the Muhammadan Law on the footing of the findings of fact referred to above.

The learned Subordinate Judge has found that there was some sort of partition for convenience of possession. He has not found that any of the parties acquired any right by adverse possession; on the other hand, his findings as they stand suggest the contrary. A partition for convenience of possession such as has been found by the learned Subordinate Judge does not appear to have been suggested in the pleadings of the contesting defendants, in any case, that by itself cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the respective parties. It is unnecessary to refer in detail to the other findings, for instance, as to some of the *dags* being in the possession of strangers and as to the plaintiff not having been really dispossessed of her paternal lands, and as to other matters, for they are too obscure and indefinite.

I have carefully considered the pleadings in this case and have also analysed the findings of the two Courts below and while on the one hand the judgment of the Court of first instance is not altogether free from comment that of the Court of Appeal below, to say the least of it, is not less unsatisfactory.

The case must, therefore, go back to the lower Appellate Court so that the appeal of the defendant No. 1 to that Court may be dealt with afresh and disposed of in accordance with law.

Costs to abide the result.

Before parting with the case I only wish to add that it is desirable that every effort should be made to dispose of the appeal as early as possible.

Walmsley, J.—I agree.

K. S. D. *Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 731 OF 1923.

October 13, 1924.

Present:—Mr. Justice Devadoss.

JAMMALAMADAKA VENKATARAMAYYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAMMALAMADAKA RAGHAVALU—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 27 (b)—Contract of sale of immoveable property by one member of joint family—Subsequent settlement of all properties in favour of another member—Partition, whether amounts to transfer—Suit for specific performance—Sale of particular item—Right of alienee to share of specific property.

Though the right of a member of a joint Hindu family to ask for partition of the family properties is by virtue of birth, a partition amounts to a transfer of the right of each member in favour of the other. [p. 1055, col. 1.]

Bappu v. *Annamalai Chettiar*, 72 Ind. Cas. 42; 44 M. L. J. 226; (1923) M. W. N. 218; 17 L. W. 364; 32 M. L. T. 253; (1923) A. I. R. (M) 313, distinguished.

Rasa Goundan v. *Arunachella Goundan*, 72 Ind. Cas. 978; 44 M. L. J. 513; 17 L. W. 613; (1923) M. W. N. 320; 32 M. L. T. 344; (1923) A. I. R. (M.) 577, relied on.

Where in a family arrangement between two brothers, one brother relinquishes all his rights in the family properties and settles them upon the other, there is a "transfer" in favour of the latter of all the rights of the former within the meaning of cl. (*b*) of s. 27 of the Specific Relief Act, so as to render him liable in a suit for specific performance at the instance of a person in whose favour the transferor had entered into a contract for sale prior to relinquishing his rights. [p. 1055, col. 2.]

It is unnecessary in such a suit for the plaintiff to show that the partition arrangement is a fraudulent one. It will be enough if it is shown that the brother who got the properties under the arrangement took them with knowledge of the contract of sale entered into by his brother. [p. 1056, col. 1.]

Rangayya Reddy v. *Subramanya Aiyer*, 40 Ind. Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385, distinguished.

Where a junior member of a Hindu family agrees to sell any specific property belonging to the family, there is no invariable hard and fast rule of law that a decree cannot be passed against him for specific performance of the contract. [*ibid.*]

Whether it is an actual sale or a mere contract of sale, the question would depend upon the circumstances of each case. If the other members of the family are not likely to suffer by giving the vendee, or the person who has contracted to buy, a specific item, the Court should give him that item. [p. 1056, col. 2.]

Duvvur Subba v. *Venkatarami*, 26 Ind. Cas. 983; 38 M. 1187; 16 M. L. T. 370, dissented from.

Baluswami Aiyar v. *Lakshmana Aiyar*, 63 Ind. Cas. 374; 44 M. 605; 13 L. W. 562; 29 M. L. T. 306; (1921) M. W. N. 316; 41 M. L. J. 129, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Naraspur, in Appeal Suit No. 61 of 1922, preferred against a decree of the Court of the

District Munsif, Bhimavaram, in Original Suit No. 543 of 1919.

Messrs. *G. Lakshmanna* and *P. Bapirazu*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—The first point urged in the second appeal is that the second defendant is not a transferee of the right of the first defendant and that, therefore, s. 27 of the Specific Relief Act has no application to him. The first and the second defendants are brothers. By Ex. 1, called a deed of settlement, the first defendant relinquished all his rights in the family property in favour of the second defendant. The contract of sale with the plaintiff was on 4th March 1919. The Subordinate Judge has held that the second defendant entered into the arrangement evidenced by Ex. 1 with the knowledge of the contract in favour of the plaintiff. The question is whether the second defendant is a transferee of the right of the 1st defendant. The argument of Mr. Lakshmanna for the appellants is that the second defendant is a member of a joint Hindu family and when the members of the family agree to divide their property it cannot be said that there is a transfer of the right of any one in favour of any another and that every member of a joint family is entitled to all the properties and that if one member takes some property for himself under a partition arrangement, it cannot be said that the person so taking all the properties acquires the rights of the other or is a transferee within the meaning of s. 27 of the Specific Relief Act. When a partition arrangement is made, members relinquish their rights in the properties allotted to the other members. If there is a release by one member in favour of the others, by the release the other members acquire the right of the person who releases his right in the properties. Though the right to partition is by virtue of birth, yet when properties are divided, it cannot be said that there is no transfer of the right of each of the members in favour of the others. Mr. Lakshmanna relied upon an observation in *Bappu v. Annamalai Chettiar* (1) that "when one member of the co-parcenary dies, his share passes to the others, but it is a mere question of lapse of the title of the deceased person rather than an acquisition of title in the survivors, for even before the death of the one co-parcener they had a right in the whole of the property, including the share of the deceased member." In the case of the death of one of the members, the shares of the others are increased. If there are four members and if one of them dies, each of the remaining brothers would be entitled to one-third share. Though the members of an undivided Hindu family have a right to a share on partition, it cannot be predicated at any time they will be entitled to so much at the time of partition. The share of each co-parcener can be determined only at the time of partition. In this case there is no question of any member dying and the share of the others being increased, or the share of any one lapsing in favour of the others. Here the first defendant by an act of his transferred whatever right he had in the property in favour of the second defendant. Exhibit 1 is not an ordinary partition deed. It is a settlement deed and under that deed, the family property is settled upon the second defendant subject to a reservation in favour of the first defendant of a small portion of the property. I think under Ex. 1 the first defendant has transferred his right in the family property to the second defendant and that Ex. 1 is a transfer of the first defendant's right within the meaning of cl. (*b*) of s. 27 of the Transfer of Property Act. That a partition can amount to a transfer was held by a Bench of this Court in *Rasa Goundan* v. *Arunachella Goundan* (2). The learned Judges differed from an observation of Mr. Justice Spencer that the partition affected only a mode of enjoyment of property and was not an act conveying property from one person to another and held that a partition arrangement did amount to a transfer of the interest of one person in favour of another. In this case Ex. 1 is not an ordinary partition deed; it is called a deed of settlement and from the terms it is quite clear that the first defendant transferred whatever right he had in the family property, in favour of his brother, the second defendant. I, therefore, hold that there is nothing in this contention of the appellants.

The next point urged by Mr. Lakshmanna is that there should be finding that the partition arrangement was a fraudulent one

(1) 72 Ind. Cas. 42; 44 M. L. J. 226; (1923) M. W. N. 218; 17 L. W. 364; 32 M. L. T. 253; (1923) A. I. R. (M.) 313.

(2) 72 Ind. Cas. 978; 44 M. L. J. 513; 17 L. W. 613; (1923) M. W. N. 320; 32 M. L. T. 344; (1923) A. I. R. (M.) 577.

in order to enable the plaintiff to get specific performance against the defendants and he relied upon an observation of Srinivasa Iyengar, J., in *Rangayya Reddy* v. *Subramania Aiyar* (3). It is unnecessary for the plaintiff to show that the transaction is a fraudulent one. If the second defendant got a title to the property under a transfer subsequent to the date of the contract of sale with the knowledge of it, that would be quite sufficient to enable the plaintiff to get the remedy he seeks. The question was not specifically raised in *Rangayya Reddy* v. *Subramania Aiyar* (3) and the observation is only *obiter* and with all respect to the learned Judge I do not think that it is necessary for the plaintiff to show that the partition arrangement is a fraudulent transaction in order to claim specific performance against one of the members of the joint family. Granting that the observation of Srinivasa Iyengar, J., lays down a sound principle of law, I do not think it can apply to this case for as I have already held, Ex. 1 is not an ordinary partition deed but a deed of settlement by which the first defendant relinquished all his rights in the family property in favour of the second defendant.

The next point urged by Mr. Lakshmanna is that the agreement, Ex. A, relates only to two items of the family property and that the Court should not decree specific performance in respect of specific items of property contracted to be conveyed by a member of a joint Hindu family before partition. He strongly relied upon the observation of Sankaran Nair, J., in *Duvvur Subba* v. *Venkatarami* (4). The learned Judge observed at page 1192* "If the learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree may be passed against him to sell his share of that specific property, I am unable to agree with that view". This observation is dissented from in *Baluswami Aiyar* v. *Lakshmana Aiyer* (5). Kumaraswami Sastri, J., who delivered the leading judgment in that cases comes to the conclusion that specific items of immoveable property could be contracted to be sold by a member of the joint Hindu family before he divides his share from the other members. I do not think any hard and fast rule can be set down as regards this. If there are numerous items of property and if the joint family consists of a large number of members, it would not be proper for any member to alienate any specific item in favour of a stranger and insist upon that item being conveyed to his vendee; Whether it is an actual sale or a contract of sale, the question whether the vendee or one who has contracted to buy, a specific item of the joint family property should be given that item would depend upon the circumstances of each case. Where as in this case there are only two items of land and both of them are capable of equal division and where there are only two members of the family the first and second defendants, it would not be right to say that the plaintiff is not entitled to the half of the first item. Each case must depend upon the circumstances and no hard and fast rule should be laid in cases like these. The Court should see whether the parties are likely to suffer by enforcing any hard and fast rule. If members of a joint family are not likely to suffer by giving the vendee or the person who has contracted to buy a specific item of the family property, the Court should give him that item. In this case as I have already said there are only two items of property. There can be no ground at all either in law or in equity to deny the plaintiff the right to a half share of the plaint item.

The next point urged by Mr. Lakshmanna is that the plaintiff should be given only damages and should not be given a decree for specific performance. No such point was raised in the grounds of appeal. No issue was raised as to whether the plaintiff is only entitled to damages in case he is not entitled to specific performance. I do not think I should allow him to raise this point at this stage. Even if it had been raised I should hold that this is an eminently fit case in which the Court should grant specific performance in favour of the plaintiff. It cannot be said that the plaintiff has by his conduct or otherwise lost his right to get specific performance of the contract entered into with him by the first defendant. In the result, the second appeal fails and is dismissed with costs.

V. N. V. [*Appeal dismissed.*]

(3) 40 Ind. Cas. 429; 40 M. 355; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385.

(4) 26 Ind. Cas. 983; 38 M. 1187; 16 M. L. T. 370.

(5) 63 Ind. Cas. 374; 44 M. 605; 13 L. W. 562; 29 M. L. T. 306; (1921) M. W. N. 316; 41 M. L. J. 129.

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The remedy of a person who feels himself aggrieved by an order of acquittal is to ask the Government's legal advisers to take up the matter. **Pat.** ANANT SINGH *v.* HARI CHARAN, 2 Pat. L. R. 250 Cr.; (1925) A. I. R. (PAT.) 321; 26 Cr. L. J. 516 **356**

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Adverse possession. *See* MUHAMMADAN LAW. **763**

——— *Hindu brothers owning land jointly—Death of one—Widow's possession, nature of.*

Out of two Hindu brothers *J*, and *M*, who were joint

Adverse possession--concld.

and owned an 8-pies share in a village, *J*. died first, leaving a widow *B*. whose name was recorded with respect to a 4-pies share with the consent of *M*. On the death of *M*. *B*.'s name was also recorded in respect of his share and *B*. continued to be in possession of the whole till her death in 1917. On the 6th November 1906, she made a transfer by way of sale of 4-pies share in favour of the defendant and on the 13th September 1918 her reversioners sued for recovery thereof:

Held, (1) that there was nothing to show that the widow ever claimed title in herself and a title adverse to her husband's estate;

(2) that the first assertion of adverse title took place on the 6th November 1906 and the suit was amply within time from that date. A BINDRABAN *v.* RAM NARAIN, L. R. 6. A. 127 Civ.; (1925) A. I. R. (A.) 330 **449**

——— *Trespasser—Constructive possession—Wrong-doer, whether and when can acquire title by adverse possession--Intention.*

Adverse possession to be effective must be possession adequate in continuity, in publicity and in extent of area and must be actual, visible, exclusive and hostile. The doctrine of constructive possession cannot be applied in favour of a wrong-doer whose possession is confined to the area of which he is in actual occupation.

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if, in fact, there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession.

In order to bring a case within the Statute of Limitation there must be both absence of possession by the person who has the right and actual possession by another whether adverse or not, to be protected, to bring the case within the Statute. If a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the Statute abandons possession, the rightful owner on the abandonment, is in the same position in all respects as he was before the intrusion took place.

Once in fact there has been cessation of possession the question of intention is wholly immaterial, but in determining whether there has been discontinuance of possession, intention cannot altogether be left out of account. C ABHOY SANKAR *v.* SATYENDRA PRASANNA **594**

Agra Tenancy Act (II of 1901), ss. 57 (c), 58 (b), 63, 73—*Lease for fixed period—Covenant to vacate if land required by lessor for* khud kasht—*Ejectment, suit for, nature of.*

Clause (c) of s. 57 of the Agra Tenancy Act contemplates an independent covenant the breach of which would entail a forfeiture of the lease. It does not contemplate a breach of a condition relating to evacuation of the land itself.

Defendants held certain lands from the plaintiff under a lease for a fixed period, one of the conditions of which was that whenever the plaintiff required lands for his *khud kasht* the defendants would vacate the lands without waiting for the expiry of the full term of the lease. Plaintiff sued the defendants for ejectment on the ground that he wanted the lands for his *khud kasht* and that the defendants had refused to vacate them after due notice:

Held, that the case fell under cl. (*b*) of s. 58 of the Agra Tenancy Act and ejectment could take place

Agra Tenancy Act—concld.

only in accordance with the provisions of that clause. A JHABBA LAL *v.* DEBI RAM, L. R. 6 A. 121 Rev. **575**

——— **s. 65 (2)**—*Jurisdiction of Civil and Revenue Courts—Suit for injunction restricting tenants from using water of well for particuler purpose, nature of—Ex-proprietary tenant, whether entitled to use water of well in one part of holding for irrigating other parts.*

A suit for an injunction restricting a tenant from irrigating certain plots of land from a particular well, does not fall within the purview of s. 65 (2) of the Agra Tenancy Act and is not excluded from the jurisdiction of a Civil Court.

An ex-proprietary tenant is not prohibited from using the water of a well situated in one plot of his holding for the irrigation of other plots in that holding merely because the latter plots belong to a different landlord from the owner of the plot in which the well is situated. A LACHMI NARAIN *v.* MOOLI, L. R. 6 A. 39 Rev. **537**

——— **s. 198 (2)**—*Title determined by Revenue Court--Subsequent suit, whether barred*—Res judicata.

In a suit filed by a person against another who denies that the relation of landlord and tenant exists between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. A SALAMAT ALI *v.* GAJ KUMAR CHAND, L. R. 6 A. 53 Rev. **302**

Agreement *regarding sale of share—Successors of parties, whether bound.*

An agreement regarding the sale of a share in a grove is binding even on the successors of the parties who entered into it. A GULZARI LAL *v.* HAR PRASAD, L. R. 5 A. 260 Rev.; (1925) A. I. R. (A) 97 **99**

Appeal (Civil)—*Court, duty of—Judgment without considering evidence—Handwriting, comparison of.*

An Appellate Court is not justified in setting aside a judgment without considering the entire evidence adduced in the case.

A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts." C AMBIKA CHARAN BARUA *v.* NARESWARI DASI, 29 C. W. N. 75; (1925) A. I. R. (C.) 145 **525**

——— *New case, whether can be made—Admission party whether can go behind.*

New cases cannot, except in exceptional circumstances, be made out in appeal.

An alienee from a Hindu resisted a suit by the brothers of the alienor for a declaration that the alienation was invalid by reason of the fact that there had been no partition among the brothers and that the property in dispute was enjoyed by them in co-parcenary right, on the ground that the brothers had separated before the date of alienation. The alienee admitted in his pleas that the property in dispute was originally ancestral property. It was found that there had been no partition among the brothers:

Held, that in appeal the defendant could not be permitted to go behind his admission that the property

Appeal (Civil)—concld.

was ancestral and to question the ancestral character of the property. O MATHURA DAS v. RAMJI MAL 1006

——————— *Revision—Order declaring Court-fee sufficient.*

An order declaring that the Court-fee paid on a plaint is sufficient is not open to appeal or revision. Pat. KANHAYA LAL v. BALDEO LAL 538

——————— *Suit entertained without jurisdiction—Appeal, when maintainable—Appeal entertained without jurisdiction—Second appeal, whether maintainable.*

If a Court assumes jurisdiction over a matter over which it has no jurisdiction and passes a decree either in the suit or in appeal, and that decree is open to appeal under the ordinary law, no objection can be taken to an appeal from that decree on the ground that the Court below had no jurisdiction to try the matter, for an appeal may lie to a higher Court on the sole question of jurisdiction.

Where a Court of first appeal entertains an appeal which does not lie to it, an appeal will lie from the decree of that Court. C WAJUDDI PRAMANIK v. MOHAMMAD BOLAI 576

———, **(Second).** *See* EASEMENT 84

——————— *Finding based on no evidence, whether can be questioned.*

Where there is an entire absence of evidence in support of a finding, the finding is liable to be set aside in second appeal as defective on a ground of law. O SHIV NARAIN v. GREAT INDIAN PENENSHULA RAILWAY CO., 10 O. & A. L. R. 1069; 27 O. C. 331, 1 O. W. N. 763 338

——————— *Finding of fact—Allegation in plaint not denied specifically in written statement—Record of Rights, entry in—Finding, whether can be challenged.*

Where an allegation in a plaint is not specifically denied in the written statement and is supported by an entry in the Record of Rights and by the plaintiff's own statement, a finding in support of such allegation cannot be said to be based on no evidence and cannot, therefore, be challenged in second appeal. Pat. MAHMUD ALAM v. NATHU SAHU, 2 Pat. L. R. 284 1024

——————— *Finding of fact—Mistakes of law—Burden of proof, erroneous, view of.*

A finding of fact in arriving at which a lower Court has committed vital mistakes on simple questions of law and has ignored the question of the burden of proof is not binding on the High Court in second appeal. M DHANAMATHI AMMAL v. JAYAKEERTHI NAIRAN 958

——————— *Inference from documentary evidence—Question of fact—High Court, whether will interfere.*

Inference drawn by the Court from the documentary evidence relied on by the parties are inferences of fact and not of law, and the High Court cannot interfere in second appeal even if the inferences in question are not correct. L POKHAR MAL v. JAI BHAGWAN, (1924) A. I. R. (L.) 719; 6 L. L. J. 311 89

——————— *Inferences of fact from documentary evidence, whether can be questioned—Documents not mentioned in judgment of lower Appellate Court, whether ignored.*

The mere fact that some of the documents which constitute the evidence in the case have not been specifically referred to in its judgment by the lower Appellate Court does not indicate that the documents have not been considered by that Court.

Inferences of fact drawn from documentary evidence on the record are not open to question in second appeal merely on the ground that if the Court of second appeal had considered the documents itself it would have arrived at conclusions different from those arrived at by the lower Appellate Court. O SITALA v. RAM BHUKAN 967

Appeal (Second)—concld.

——————— *Question of fact abandoned in lower Appellate Court, whether can be raised.*

A question of fact which is abandoned before the lower Appellate Court cannot be allowed to be raised in second appeal O RAM NIDH v. JANKI, 10 O. & A. L. R. 937; 1 O. W. N. 674 387

——————— *Question of fact not put in issue—Finding, whether can be challenged.*

Where the Court gives a finding on a question of fact not put in issue, such finding can be contested in second appeal. L CHANDU LAL v. LAKHMI CHAND JOWALA DAT, 5 L. L. J. 49 92

——————— *Question of law.*

The amount of enquiry necessary in such a case is a question of law and a finding on this point is liable to be examined in second appeal. O RAMAN v. BARATI, 10 O. & A. L. R. 965; 27 O. C. 329; 1 O. W. N. 654 489

——————— Question of law—Presumption of permanent tenancy. *See* LANDLORD AND TENANT—TENANCY 103

——————— *Tenancy, nature of—Question of law.*

A question as to the nature of a tenancy is a question of law and may be dealt with in second appeal. The High Court is entitled to draw its own conclusions and inferences as to the legal incidents of the tenancy in order to Judge the character of the tenancy and the status of the tenant.

The question is primarily one of intention as between the contracting parties. C JOGEEH CHANDRA ROY v. TAZAR ALI 757

Approver, prosecution of. *See* Cr. P. C., 1898, s. 339 149

Arbitration—*Proceedings, nature of—Failure to hear parties—Misconduct.*

The enquiry before an arbitrator is assimilated as near as may be to the proceedings on a trial in the Courts. In the ordinary course, at the appointed time and place the parties appear with their witnesses to support their respective cases.

If the parties are not given notice of any meeting, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators.

There must be clear justification appearing, before the Court can allow a contention that the arbitrator had power to decide without hearing the parties. B TYEBBHAI ESSUBHAI v. ABDUL HUSEIN, 25 Bom. L. R. 392; (1924) A. I. R. (B.) 149 424

——— **proceedings**—*Suit filed, effect of—Award, validity of.*

Where a reference to arbitration is proceeded with and the award made during the pendency of a suit between the same parties in respect of the same subject-matter, the award is bad and unenforceable.

The jurisdiction of a Court is not taken away either by a submission clause in a contract, or by the existence of arbitration proceedings; the right of a party to seek the assistance of the Courts is un-

Arbitration proceedings—concld.

restricted, and the Courts will not permit their jurisdiction to be ousted

As the jurisdiction of the Courts is not to be ousted, whenever a party to a submission brings an action in respect of any matter that he has contracted to refer, he may be liable to damages for the violation of his contractual obligation, but the Court that has seisin of the suit, is the only Tribunal for the time being invested with the jurisdiction to decide the rights of the parties and the arbitrators become *functi officio*, and their authority to deal with the dispute abates.

When a party to a contract files a suit in respect of any matter that he has contracted to refer to a private Tribunal, the Court is not ousted of its jurisdiction to try the suit. It is open to the other party to apply for stay of the suit on the ground of the contractual liability to refer the matters in dispute to arbitration and the Court may in a proper case hold its hand and refuse to proceed with the trial of the suit. But in the event of no application being made to the Court for a stay of the suit, the Court that has seisin of the disputes between the parties can proceed to adjudicate upon them and its decision is binding upon the parties.

The Court in which the suit is filed acquires seisin of the suit immediately on its institution, and its jurisdiction to try it cannot remain suspended till such time as an application for stay of the suit has been made to it and it decides whether it should proceed with the suit or not. S MITSUI BUSSAN KAISHA LTD. *v.* TOLARAM BHAGWANDAS, 17 S. L. R. 223 **393**

Arbitration Act (IX of 1899), reference under. *See* C. P. C., 1908, s. 104, SCH. II **341**

Arms Act (XI of 1878), s. 19 (f)—*Temporary possession of gun without license—Offence, whether complete.*

A person found in possession of a gun belonging to his father shooting birds with it is guilty of an offence under s. 19 (*f*) of the Arms Act. A MUHAMMAD HASAN *v.* EMPEROR, 22 A. L. J. 1095; L. R. 6 A. 23 Cr.; (1925) A. I. R. (A.) 175; 26 Cr. L. J. 479; 47 A. 267 **159**

Attachment, *proof of—Entries on warrant, whether sufficient.*

The warrant of attachment can be rightly put in evidence for the limited purpose of proof of the issue of such warrant and as a basis of the proper evidence that the attachment thereunder was rightly effected.

But the mere entries on the warrant that the notice was posted on the courthouse are not sufficient evidence of the execution of the warrant as against the person disputing the regularity of the attachment. R HLA BAN U *v.* RAMANATHAN CHETTYAR, 3 Bur. L. J. 287; (1925) A. I. R. (R.) 89 **308**

Award *based on compromise—Order setting aside award—Revision, whether competent.*

The parties to a suit having agreed to refer the matter in dispute to arbitration, stated before the Arbitrators that they had arrived at a compromise and the Arbitrators made an award in accordance therewith. On the matter going before the Court, one of the parties took exception to the award on the ground that the compromise had been arrived at by means of lottery and was not binding. The Court gave effect to this objection and set aside the award. The other party applied to the High Court in revision:

Held, that no application in revision lay against

Award—concld.

the order passed by the Court. A SHAH MUHAMMAD FAKHRUDDIN *v.* RAHIMULLAH SHAH, L. R. 6. A. 22 Civ.; 47 A. 121 **502**

Batwara proceedings—*Injunction restraining party to civil suit from proceeding with* batwara *proceedings, whether can be granted—High Court, power of.*

The High Court has no jurisdiction over the *Batwara* Court, but it has complete jurisdiction over the parties to a civil suit pending in a Court subordinate to it, and will always assert its right to act *in personam*. In a proper case it will grant an injunction restraining any party to a civil suit from proceeding with *batwara* proceedings until the determination of the civil suit. In such a case it will not assume that the *Batwara* Court will take any step which is unfair to the party thus restrained or which will compel the latter to act in any way inconsistently with its duty of obedience to the High Court. **Pat.** AMAR KUMAR *v.* COVENTRY **551**

Benami transaction—*Purchase-money, source of—Advancement, presumption of—Attestation by real owner—Decree against* benamidar *and real owner—Execution sale—Payment by reversionary heir asserting hostile title—Charge on property—Contract Act (IX of 1872), ss. 69, 70—Transfer of Property Act (IV of 1882), s. 91.*

In cases of alleged *benami* purchases, the source of the purchase-money is a very important criterion for determining the real ownership.

There is no presumption of advancement where a husband purchases almost all the property in the name of the wife, more so where there is a second wife and her children left unprovided for.

Per *Kumaraswami Sastri, J.*—Where a purchase is *benami* and monies have to be raised, the person who lends money would require a recital as to ownership, and it is the invariable practice in such cases to get the attestation of the real owner. But attestation does not by itself import consent to, or knowledge of, the contents of a document, and the real owner is not bound by such a recital on account of his attestation.

Where a person makes a payment in assertion of a hostile title and for the protection of his own interests, in order to save property which he claims to be his from passing out of his hands, the mere fact that the other party is benefited will not, if it is found that the person making the payment has no title, entitle him to be re-imbursed.

The interest contemplated by s. 69 of the Contract Act is an existing interest which the payment is intended to protect and not an interest which is created by the payment itself.

Section 70 of the Contract Act has no application where the person making the payment makes it for himself and not for the person against whom the claim for re-imbursement is made.

Section 101 of the Transfer of Property Act does not create a security where there was no security before.

A person purchased from his own self-acquisitions properties *benami* in the name of his wife. A suit was brought on a pro-note executed by the husband and the wife and a decree was obtained against both of them personally and against their son to the extent of the family properties. In execution of the decree, the properties purchased *benami* were sold. The son, who claimed that the mother, since deceased, was the real owner of the properties and had be-

Benami transaction—concld.

queathed the same to him, executed a mortgage of the properties to the plaintiff who was aware of the *benami* nature of the purchases. With the help of the money advanced by the plaintiff he next applied under O. XXI, r. 89, C. P. C., to set aside the Court sale. This was accordingly done. The father had subsequently also sold portions of the same properties to third persons, for the purpose of discharging other similar joint debts incurred by himself and his deceased wife. In a suit to enforce the mortgage executed by the son, impleading the son, the father and the purchasers from him as parties:

Held, per *Kumaraswami Sastri, J.*—(1) that the son having made a payment in assertion of a hostile title and for the protection of his own interests in order to save property, which he claimed to be his, from passing out of his hands, the mere fact that the father was benefited would not, if it was found that the son had no title, entitle him to be re-imbursed;

(2) that since, however, title to property sold in Court auction vested in the auction-purchaser from the moment of sale even prior to confirmation and, therefore, in the present case title passed out of the real owner and the *benamidar* at the Court sale, the setting aside of that sale must be treated as a re-purchase by the son, and the mortgage to the plaintiff, in so far as the consideration went to set aside the sale, must be treated as money borrowed to re-purchase the properties;

(3) that where property is sold in execution of a decree against the real owner and the *benamidar* re-purchases the property or raises money for the purpose of setting aside the sale, it would be contrary to all principles of equity and justice to hold that the real owner who took no steps to discharge the decree and who allowed the property to be sold could step in and claim the property free from any obligations to re-pay the money borrowed by the *benamidar* for the purpose of setting aside the sale;

(4) that, therefore, the plaintiff was entitled to a charge on the properties to the extent to which the mortgage-money went to set aside the Court sale;

Per *Spencer, J.*—that the son as reversionary heir of the father was sufficiently interested in the preservation of the property to be entitled to redeem it under s. 91 of the Transfer of Property Act, or to apply to have a Court sale set aside under O. XXI, r. 89, C. P. C., that he was entitled to an equitable lien for the amount of the money so utilised, that he acted neither speculatively nor officiously in paying money that the father as well as himself were bound to pay, and that the plaintiff having obtained an assignment of the son's rights through the suit mortgage-deed, was entitled to recover the amount by way of charge on the redeemed properties. **M** MOLLAYA PADAYACHI *v.* KRISHNASWAMY AIYAR, 47 M. L. J. 622; (1925) A. I. R. (M.) 95; 21 L. W. 336 **855**

Bengal Municipal Act (III of 1884), ss. 6 (11), 339, 340—*Market—Part-proprietor, whether can apply for license—"Owner," meaning of—Refusal to grant license—Declaration, suit for, whether maintainable.*

A part-proprietor of a market is entitled to apply for a license under Ch. X of the Bengal Municipal Act.

The word "owner" in s. 340 of the Bengal Municipal Act means any owner or part-owner and is not to be confined as meaning the entire body of owners.

Bengal Municipal Act—concld.

Where a Municipality refuses to grant a license to a part-proprietor on the ground that a part-proprietor is not entitled to apply for a license, the unsuccessful applicant is entitled to get a declaration from the Civil Court that the view taken by the Municipality is wrong and that he is a person who is legally entitled to apply for a license. **C** NRIPENDRA KUMAR DUTTA *v.* CHAIRMAN OF HABIGUNJ MUNICIPALITY **533**

Bengal Survey Act (V of 1875), ss. 41, 62—*Order under s. 41, operation of—Civil Court, whether can adjudicate on question of title.*

Under s. 41 of the Bengal Survey Act the Collector must determine the boundaries according to actual possession and cause them to be secured by boundary marks. If the order of the Collector is not challenged it must be regarded as an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector, and the order must be regarded as final so far as the question of possession is concerned. Such an order, however, does not bind the Civil Court upon the question of title, and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession. **C** SUJJAD AHAMMAD CHOWDHURY *v.* SACHINDRANATH ROY **1012**

Bengal Tenancy Act (VIII of 1885), s. 5 (5)—*Tenancy, nature of, determination—Presumption.*

The presumption arising under s. 5 (5) of the Bengal Tenancy Act, though of considerable importance in a case where the origin of the tenancy is not known, is of little consequence where the terms of grant are known and are not ambiguous. In cases where the terms of the grant are equivocal, the Court must rely upon the attendant circumstances and evidence of subsequent conduct is also admissible. What has got to be determined, if possible, is whether the right acquired was the right to hold the land for purpose of collecting rent or bringing it under cultivation by establishing tenants on it or the right to hold the land for purposes of cultivating it by oneself or by members of one's family or by hired servants or with the aid of partners.

Where the outstanding features of a *kabuliyat* were that there was nothing stated as to the granting of sub-leases or collecting of rent from sub-tenants, nor was there anything as to establishment of tenants on the land, and the grantee was described as a *raiyat* enjoying right of occupancy and was required to make the land fit for cultivation by cutting jungle and erecting embankments:

Held, that the conditions and circumstances were more consistent with an intention to confer on the grantee the right to hold the land for cultivation by himself or by members of his family or by hired servants or with the aid of partners than that he should be permitted to establish tenants on the land for purposes of cultivation. **C** JOGESH CHANDRA ROY *v.* TAZAR ALI **757**

——— **s. 7**—*Enhancement of rent, suit for—Plaint, what must show—Fair and equitable rent—Question, when can be entered into.*

In order to claim enhancement of rent under s. 7 of the Bengal Tenancy Act the plaintiff must come to Court with the allegation either that the customary rate of rent exists and the defendant is paying rent at a rate lower than the customary rate, or that no customary rate exists and the Court is asked to proceed

Bengal Tenancy Act—contd.

to enhance the rent up to the limit which it thinks to be fair and equitable.

Until the Court finds that there is no customary rate in existence, it cannot proceed to enhance the rent up to the limit that the Court finds fair and equitable under sub-s. (2) of s. 7, Bengal Tenancy Act. C JOGESH CHANDRA ROY *v.* IZZAT ALI, 40 C. L. J. 585; (1925) A. I. R. (C.) 454 **97**

——— **ss. 15, 16**—*Co-sharer landlord—Rent suit.*

A co-sharer landlord may, in the presence of the other co-sharers, who are incompetent to realise their rent, sue for his rent and recover it although there has been no separate collection before. C NIBARAN CHANDRA ROY *v.* NABIN CHANDRA ROY, 40 C. L. J. 504; (1925) A. I. R. (C.) 297 **127**

——— **ss. 21, 178, 179**—*Landlord and tenant—Construction of lease—Fixed rate tenancy—Contract, freedom of.*

Section 178 of the Bengal Tenancy Act was enacted in order to safeguard the interests of *raiyats.* The scope of that section is to prevent certain contracts between landlord and tenant, the effect of which may be to place the *raiyat* out of the protection afforded to him by the Bengal Tenancy Act. Therefore, no contract between a landlord and tenant can override the express terms of the Act.

An agreement the effect of which is to prevent a tenant who is a settled *raiyat* of a village from acquiring a right of occupancy under s. 21 of the Bengal Tenancy Act falls within the purview of s. 178 of the Act and is void.

Where the effect of a *kabuliyat* and an agreement executed simultaneously was that the plaintiff let out certain land to the defendant as a *kaimi jama* which appeared to be heritable, and there were covenants in the *kabuliyat* which restrained the tenant from excavating a pond or tank and cutting trees, and the tenant agreed to pay additional rent for any additional area that may be found by measurement in his possession but was not to be entitled to claim reduction of rent for diminution in area, and also undertook to pay in future any sum that might be assessed by the original *maliks* of the land or by the Government:

Held, (1) that the effect of the documents was to create a permanent *mukarrari* tenancy and that the lease was, therefore, governed by s. 179 of the Bengal Tenancy Act;

(2) that it was, therefore, open to the parties to enter into a contract on any terms agreed upon by them, for instance, that the defendant should vacate the land on receipt of a certain sum agreed upon by the parties. C KASEM SHEIKH *v.* TARAKESWAR DUTTA **793**

——— **s. 50**—*Permanent tenancy—Presumption, applicability of.*

The presumption arising under s. 50, cl. (2) of the Bengal Tenancy Act can be availed of only in a suit or proceeding under the Act.

Where the plaintiff sues for recovery of possession alleging that the defendant is a trespasser and the defendant claims to be a tenant, until the fact that the defendant is a tenant is made out the suit cannot be said to be one under the Bengal Tenancy Act. The fact has to be made out independently of s. 50 that the suit is against the tenant and until that is made out s. 50 has no application. Where a tenure is claimed to be a permanent one the question is one

Bengal Tenancy Act—contd.

of the true inference from the facts and the burden of proof is on the tenant.

The mere fact that a tenancy has been held by the predecessor-in-interest of the tenants for several generations and that the rent paid has been uniform for over 50 years, may be sufficient for holding that the tenancy is heritable but is not sufficient in law in the absence of any other circumstance, to show that the rent was fixed for ever or that the tenancy was a permanent one. C SATISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY **636**

——— **s. 52 (6)**—*Abatement of rent—Reduction in area settled—Burden of proof.*

In a suit for rent where the defendant claims abatement of rent, he must prove what the area settled with him was and the reduction therein. He can claim abatement only to the extent of the reduction proved by him. C CHANDI CHURAN *v.* HAMID ALI **692**

——— **ss. 69, 70, 71**—*Appraisement or division of crops—Jurisdiction of Collector—Final order—Form of order—Burden of proof—Procedure.*

Where a landlord has the opportunity of appraising the crops and falsifies accounts in order to obtain a higher amount of rent, he is not entitled to get any decree except on proof of the actual produce of the land and if he fails to prove that, he must be content with the admissions made by the defendants.

Where, however, the landlord could not make an estimate of the crops or was prevented from doing so by the tenants his claim cannot be thrown out simply because he has not been able to prove the actual produce of the lands in the direct possession of the tenants. In such circumstances the tenants should not be permitted to take advantage of their own wrongful acts and their failure to declare the true and proper produce of the lands in their actual possession. In such cases they have special means of knowledge and the onus of proving what is in their knowledge must rest upon them.

Clause 5 of s. 70 of the Bengal Tenancy Act does not require that a separate decree, apart from the order itself, should be prepared by the competent Revenue Authority. It simply requires that the order shall be final and shall, on application by the landlord or the tenants to the Civil Court, be enforceable as a decree.

In a case of appraisement the Collector does not take possession of the crops nor does he make it over to the landlord. He simply prepares an estimate of the crops under s. 69 of the Bengal Tenancy Act and then reduces it into a money value and declares how much is due to the landlord and how much to the tenant. In such a case the Collector's order must clearly specify the amount due from one party to the other so that the former may, in execution of the order in the Civil Court, receive his dues from the latter. Again, in a case of division of crops, where the tenant has made himself liable to the landlord by removal of the crop or otherwise, such as is provided in s. 71, the Collector's order must clearly state the amount payable to the landlord by the tenant, so that the former may receive the same in execution of the order in the Civil Court. But where there is a simple division of crops on the spot, each party is entitled to receive from the Collector who takes possession of the crops, his share therein. The party taking his share from the Collector will not be liable to the opposite party and there can be no order to pay anything to the other party. If a party does not choose to take his share, his share will remain in deposit with the Collector.

Bengal Tenancy Act—contd.

The only order that the Collector can pass is to deposit the share to the credit of that party. The order is capable of execution against the Collector if he does not give to the party his share. The sale-proceeds in the Treasury to the credit of a party can be withdrawn any moment he likes. There will not be any necessity of execution

A decree is prepared only when some liability is fixed upon a party; when no liability is fixed no decree can be prepared and in fact in some cases in the Civil Court no decree is prepared.

The Collector's jurisdiction arises only when the rent is payable under the *bhaoli* system; and if this is disputed and a system of cash or *nakdi* rent is set up, the Collector will have no jurisdiction under s. 69 of the Bengal Tenancy Act and he must leave the question to be determined by a competent Civil Court. Where it is admitted that *bhaoli* rent is payable the Collector has jurisdiction under s. 69 to appraise or divide the crops and has a right to determine as to whether the system of payment of landlord's share is by appraisement or by division. **Pat** BHUNESHWARI KUER *v.* SUKHDEO SINGH, 6 P. L. T. 419 **566**

——— **ss. 105, 105A**—*Suit for settlement of fair and equitable rent—Duty of Judge—Rate mentioned in* kabuliyat, *whether binding—Question of principle decided—Appeal, whether lies.*

Where the decision of the Special Judge arising out of a suit under s. 105 of the Bengal Tenancy Act does not merely settle a rent but involves some question of principle as to the basis upon which rent is to be settled it is appealable to the High Court.

The provisions of s. 105 of the Bengal Tenancy Act are applicable not only where no rent has been fixed but also where the rent has been fixed by an agreement of parties.

Where the landlord has invoked the provisions of s. 105 of the Bengal Tenancy Act he cannot contend that the Judge is necessarily bound in fixing the rent to adhere to the rate mentioned in the *kabuliyat*. The Judge must take this rate into account; but if he finds that a strict adherence to the rate mentioned in the *kabuliyat* would make the rent in excess of what he considers a fair and equitable rent, he is bound by the terms of the section to so adjust the rent, irrespective of any contract between the parties, as to make it just and equitable. **C** PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA, 29 C. W. N. 353; (1925) A. I. R. (C.) 656 **693**

——— **s. 148A**—*Suit for rent by co-sharer landlord—Plaint, when in accordance with law.*

In a rent suit by a co-sharer landlord, the plaint mentioned the rent payable annually both on the whole and in different shares, together with the amount believed to be due for the period in suit to the plaintiff and to other co-sharers. It was also alleged that the other landlords refused to let the plaintiff know what was due to them:

Held, that there was a sufficient compliance with the law as set out in s. 148-A of the Bengal Tenancy Act. **C** JAGABANDHU NANDI *v.* ABDUL HAMID MEA, 28 C. W. N. 757; (1925) A. I. R. (C.) 82 **214**

——— **s. 153**—*Rent-suit—Plea of non-joinder of necessary parties and absence of separate collection—Appeal, whether lies.*

Where a rent-suit is tried by an officer specially empowered under s. 153 of the Bengal Tenancy Act, the decision in the suit does not become appealable merely because the defendant takes the plea of non-joinder of necessary parties and also urges that there was no separate collection of rent by the plaintiff. **C** WAJUDDI PRAMANIK *v.* MUHAMMAD BOLAI **576**

——— **s. 153 (b)**. *See* C. P. C., 1908, s. 115 **760**

——— **s. 158-B**—*Rent-suit by one of several co-sharers—Procedure—Parties—Execution of decree—Sale—Auction-purchaser, position of.*

Section 158-B of the Bengal Tenancy Act requires that in order to enable one or more co-sharer landlords to sell a tenure all the remaining co-sharer landlords should be made parties to the suit and also that when one or more co-sharer landlords, having obtained a decree in such a suit, applies for execution of a decree by sale of the tenure, notices of the application for execution should be given to all the co-sharers. The provisions of this section must be strictly followed in order to give complete title to the auction-purchaser in such a sale. Where all the co-sharer landlords are not made parties to the suit an auction-purchaser in execution of a decree obtained in the suit does not purchase the holding free from all incumbrances. **C** SURENDRA NATH *v.* JABED ALI **747**

——— **s. 167**—*Encumbrance, annulment of—Service of notice, proof of.*

It is imperative on a person asking for the annulment of an encumbrance under s. 167 of the Bengal Tenancy Act to prove due service of notice.

The mere production of the order-sheet of the Collector is not sufficient to prove due service of notice within the meaning of s. 167 of the Bengal Tenancy Act. **C** KRISHNA KAMINI DASI *v.* PRATAPENDRA CHANDRA **790**

——— **s. 173**—*Civil Procedure Code (Act V of 1908), s. 47—Order under s. 173, Bengal Tenancy Act—Appeal, whether lies—Auction-purchaser, position of.*

Where a question decided under s. 173 of the Bengal Tenancy Act is one which is covered by s. 47 of the C. P. C. an appeal lies against the order made by the Court though no provision for such an appeal is made in the Bengal Tenancy Act itself. No appeal, however, lies at the instance of the auction-purchaser against an order passed under s. 173 of the Bengal Tenancy Act, the reason being that the auction-purchaser is not one of the parties to the suit within the meaning of s. 47 of the C. P. C. **C** AZAM KHAN *v.* UMED ALI **750**

Bombay Land Revenue Code (Bom. Act V of 1879), ss. 118, 121—*Allotment by Survey Officer—Suit for declaration of title—Civil Court, jurisdiction of.*

A suit for a declaration that an allotment by the Assistant Survey Officer of the fields in dispute to the estate of the defendant is wrong is not barred by ss. 118 and 121 of the Bombay Land Revenue Code and a Civil Court has jurisdiction to entertain the suit. **B** NARSINGJI MEHRAMANSINGJI *v.* BAI ACHAT, 23 Bom. L. R. 1264; (1925) A. I. R. (B.) 151 **204**

Bombay Prevention of Prostitution Act (XI of 1923), ss. 3, 10 (1)—*Police Officer not specially authorised—Arrest without complaint, legality of—Court, whether can try accused—Report when validly made—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 190.*

The arrest of a woman under s. 10 (1) of the Bombay Prevention of Prostitution Act by a Police Officer who is neither specially authorised in this behalf by the Commissioner of Police, nor has received any

Bombay Prevention of Prostitution Act—concld.

complaint against her, is illegal, and the Court has no jurisdiction to take cognizance of the offence without a proper complaint within the meaning of s. 4 (1) (*h*) of the Cr. P. C. being filed in the ordinary way.

Per *Fawcett, J.*—To bring a report within cl. (*b*) of s. 190, Cr. P. C., it must be a report which is validly made in accordance with the law governing a Police investigation and the committing of an accused to a Magistrate's Court. **B** CHANDRI BAWOO *v.* EMPEROR, 26 Bom. L. R. 1225; (1925) A. I. R. (B.) 131; 26 Cr. L. J. 441 **57**

Bombay Rent (War Restrictions) Act (II of 1918), s. 10 (a)—*Decree evicting tenant—Application for restoration of possession—Notice of motion lodged with Prothonotary—Limitation*—Terminus a quo.

On the 9th September 1921, a decree was passed against the applicant directing him to give over possession of the premises in suit to the landlord on or before the 31st December 1921. Possession was as a matter of fact given up on that date. On the 4th October 1922, the applicant moved the Court for an order restoring him to the occupation of the premises on the original terms and conditions of his lease on the ground that the premises were not reasonably and *bona fide* required by the landlord for his own occupation. It appeared that notice of the motion was given on August 25, 1922, and a copy was lodged with the Prothonotary on the same day:

Held, that the application was barred by time.

It is only when the motion is brought on that an application can be said to be made to the Court. The notice of motion is not a proceeding in Court, it is merely an expression of an intention to apply to the Court given to the other party for his information. Similarly the copy of the notice of motion lodged with the Prothonotary does not amount to an application, it is only an intimation to the Court that an application is intended to be made. **B** NAZARALLY *v.* V. V. KANEMAR VENKAPIYA, 25 Bom. L. R. 13; (1924) A. I. R. (B.) 289 **432**

Buddhist Law, Burmese—*Adoption*—Appathitta *child, right of.*

Where there is no natural or *kittima* child, the *appathitta* child is allowed half the estate of the adoptive parent and the other half goes to the relatives of the deceased. **R** MAUNG GYE *v.* MAUNG AUNG PYO, 2. R. 661; (1925) A. I. R. (R.) 178 **286**

——— *Pre-emption—Co-heirs—Sale of undivided share—Offer to co-heirs—Second offer, whether necessary.*

If a person wishes to sell his share in an undivided ancestral estate, he must first offer it to all the co-heirs.

The offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and if these conditions are carried out, there is no necessity for a second offer to the heirs when they have once refused to buy. **R** MAUNG MAUNG *v.* MAUNG SHWE GOE, 2 R. 678; (1925) A. I. R. (R.) 194 **295**

——— *Pre-emption, who can claim—Younger son, whether co-heir.*

Under Burmese Buddhist Law it is only amongst co-heirs that the right of pre-emption can exist.

A younger son is not a co-heir along with his mother and cannot, therefore, exercise the right of pre-emption with respect to property left by his

Buddhist Law, Burmese—concld.

deceased father. **R** MAUNG SAN TIN *v.* MA PHET PU, 2 R. 659; (1925) A. I. R. (R.) 192 **284**

Burden of proof. *See* CARRIAGE OF GOODS **1003**
——— *See* FOREIGNERS ACT, 1864, s. 3 A **138**
——— *See* LANDLORD AND TENANT **850**
——— *See* RAILWAYS ACT, 1890, s. 72 **114**
——— *Execution and registration of document—Plea of ante-dating.*

The onus of showing that a document duly executed and registered was ante-dated is on the person who sets up such a case. **M** KRISHNAMURTHY AIYAR *v.* KRISHNAMURTHI AIYAR **882**

Burma Habitual Offenders' Restriction Act (II of 1919), ss. 4, proviso (a), 7, 13—*Criminal Procedure Code (Act V of 1898), ss. 110, 112, 117, 118—Order of restriction—Procedure—Preliminary order, contents of—Period of restriction not specified, effect of—Order under Code, conversion of, to one under Act—Reasons—District Magistrate, duty of.*

Section 117 of the Cr. P. C. lays down the procedure to be followed at the hearing of a case under Ch. VIII of the Code after the preliminary order has been recorded and after the accused has been brought before the Court. The same procedure with necessary modifications and additions must be followed where it is intended to take preventive action under s. 7 of the Burma Habitual Offenders' Restriction Act, 1919.

Proviso (*a*) to s. 4 of the Burma Habitual Offenders' Restriction Act, makes it essential that the preliminary order required under s. 112 of the Cr. P. C. shall set forth the substance of the information received and shall state the term during which the order of restriction shall be in force. If the term during which a proposed restriction is intended to be in force is not specified in such preliminary order no order under s. 7 of the Act can be passed.

The District Magistrate is the only Magistrate empowered under s. 13 of the Burma Habitual Offenders' Restriction Act to convert an order under s. 118 of the Cr. P. C. to one under s. 7 of the Act but he has no power to intervene where there has been no proper preliminary order under s. 112 of the Code, and where the original order has not been made under s. 118 of the Code.

Even in the case of an order properly made under s. 118 of the Code, it is the duty of the District Magistrate to have some good reason for the change over to the Burma Habitual Offenders' Restriction Act. Rule 12 of the Rules framed under that Act indicates the class of reason which would justify such a change. **R** PARSODAN *v.* EMPEROR, 2 R. 524; (1925) A. I. R. (R.) 69; 26 Cr. L. J. 417 **33**

Calcutta High Court Appellate Side Rules, rr. 50, 51, 52, *operation of.*

Note 1 to r. 50 of Ch. IX of the Appellate Side Rules of the Calcutta High Court and r. 50 itself apply to all appeals from appellate decrees. Rule 52 does not make any alteration as to the contents of the paper-book to which r. 50 relates. It only modifies the previous rule No. 51 which requires printed copies of the paper-book to be prepared by the Registrar at the cost of the appellant. In the case of appeals referred to in r. 52 no printed paper-book is prepared, but instead of that typed copies of the paper book are prepared without any charge being levied from the parties but the contents of the paper-book remain the same in both classes of appeals. **C** ABDUL KADIR *v.* PROSANNA KUMAR **770**

Cantonments (House Accommodation) Act (II of 1902), s. 6, *scope of—Vendor and purchaser—House in Cantonment—Agreement to comply with requisition of Cantonment Authorities for transfer—Undertaking to waive protection of s. 6 (c), validity of—Purchaser, whether bound to give undertaking.*

Section 6 of the Cantonments (House Accommodation) Act does not contain any prohibition against a transfer by an owner of a house of his right to continue in occupation of the house. All that the section says is that no notice requiring the vacation of a house shall be issued under the section if the house is occupied by the owner. But the owner may agree that if the house is required by the Military Authorities, he would deliver possession thereof to them.

A Cantonment Magistrate is not, therefore, prohibited from entering into such an agreement with an intending purchaser of a house, and such an agreement would not defeat the provisions of the Cantonments (House Accommodation) Act.

Defendant agreed to buy a house from the plaintiff. One of the terms of the contract was as follows:—"Tenure Cantonment land. You will have to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to your name." Plaintiff applied to the Cantonment Magistrate for leave to transfer the house to the defendant. The Cantonment Magistrate replied that leave would be given provided the purchaser gave an undertaking that the house would always be available for occupation by a Military Officer on duty at the station and that he will not claim to live in it as owner. Defendant refused to give this undertaking:

Held, that the obligation to vacate and rent the house to a Military Officer was an incident of land held on Cantonment tenure, and that as the defendant knew that the tenure was that of Cantonment land he must be held to have bought the land subject to the incidents of that tenure, and having undertaken to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name he was bound to sign the undertaking in the form required by the Cantonment Magistrate. **B** ARDESHIR FRAMJI *v.* TRICAMDAS GORDHANDAS, 25 Bom. L. R. 938; (1921) A. I. R. (B.) 258 **442**

Carriage of goods—*Risk Note Form "B"—Suit for damages for non-delivery—Wilful neglect—Burden of proof.*

In a suit for damages against a Railway Company for non-delivery of goods consigned under Risk Note Form "B," the burden lies on the plaintiff to prove that the loss was due to the wilful neglect of the Railway Company or its servants.

Where there is no evidence to prove that the loss of goods was caused by the wilful neglect of the Company or its servants, the plaintiff must fail. **M** MADRAS & SOUTHERN M. R. CO. *v.* GUNDAPU GOPALAKRISHNAMMA **1003**

Cause of action *arising partly out of jurisdiction—Defendant residing out of jurisdiction—Leave to bring defendant on record—Letters Patent, (Bom.), cl. 12—Jurisdiction.*

Plaintiffs sued at Bombay the firm of defendant's father carrying on business at Ambala in the Punjab for recovery of amount due in respect of certain business transactions. The writ of summons having issued, the defendant's Attorneys wrote to the plaintiffs' Attorneys stating that the suit was not properly filed as the

Cause of action—concld.

defendant's father who was the owner of the firm had died long ago and that defendant was the present sole owner and asked that a fresh writ should be served after amending the plaint. The plaintiffs thereupon obtained an order for amendment of the plaint and the name of the defendant was brought on the record. It appeared that although the defendant resided at Ambala and part only of the cause of action arose in Bombay, no leave under cl. 12 of the Letters Patent was obtained:

Held, that plaintiffs ought to have obtained leave under cl. 12 of the Letters Patent before the defendant was brought on the record and that no such leave having been obtained, the Court had no jurisdiction to entertain the suit. **B** RAMPRATAB BRIJMOHANDAS *v.* GAVRISHANKAR KASHIRAM, 25 Bom. L. R. 7; (1924) A. I. R. (B.) 109 **464**

C. P. Land Revenue Act (II of 1917), s. 188—*Land separately held by co-sharers*—Lambardar, *whether can grant lease.*

Section 188 of the C. P. Land Revenue Act gives no authority to the *lambardar* to grant a lease of land already separately held by the other co-sharers and thus to oust them. **N** DANGU *v.* NARAYAN, 7 N. L. J. 241; (1925) A. I. R. (N.) 181 **73**

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXI, r. 53 (1)—*Decree, whether includes decree of Revenue Court—Attachment of decree—Procedure.*

Under the definition of a decree as given in s. 2 of the C. P. C. a decree may include not only a Civil Court decree but also a Revenue Court decree.

The proper way to attach a decree of a Revenue Court in execution of a decree of a Civil Court is that provided for in O. XXI, r. 53 (1) of the C. P. C. Where the Court proceeds to attach and execute such a decree as if it were a decree other than that covered by O. XXI, r. 53 (1), it commits an irregularity.

The provisions contained in the rules comprised within the Schedules to the C. P. C. are mere rules of procedure and non-compliance with any of those provisions amounts to a mere irregularity. **A** FATEH LAL *v.* SHER SINGH, L. R. 6 A. 63 Civ.; (1925) A. I. R. (A.) 264 **660**

—— —— **ss. 2 (2), (14), 47, O. IX, r. 8**—*Execution of decree—Objection, dismissal of, for default—Appeal, whether lies.*

Whenever a Court delivers a decision in default of the plaintiff that decision is an order and not a decree and is not subject to appeal.

From an order of an Executing Court, dismissing an objection of the judgment-debtor in default of appearance, no appeal is allowed either under the Oudh Rent Act or under the C. P. C. **O** MOHAMMAD ZAKA ULLAH *v.* GULKANDI, 10 O. & A. L. R. 1207; L. R. 6 A. (O.) 31; 1 O. W. N. 854; 28 O. C. 124 **393**

—— **s. 2 (11), O. XXII, r. 4**—*Defendant, death of—Legal representative, appointment of—Representation to estate not taken out—Plaintiff, duty of.*

The widow or brother of a deceased defendant is not necessarily his legal representative who must be his executor or administrator, or a person who has intermeddled with his estate and so made himself executor *de son tort.*

Where no representation has been taken out of a deceased defendent's estate the only course of the plaintiff is to take proceedings to have an administrator appointed. **R** BARNETT BROS. LTD. *v.* FOWLE, 3 Bur. L. J. 347; (1925) A. I. R. (R.) 186 **325**

Civil Procedure Code—1908—contd.

——— ss. 10, 22, O. XXXIX—*Proceedings with regard to same subject-matter in Courts subordinate to different High Courts—Procedure—Stay of proceedings—Injunction restraining party from continuing proceedings, when to be issued.*

The C. P. C. carefully avoids the chance of any clash in the decisions of two Courts either subordinate to the same High Court or subordinate to different High Courts with respect to the same point at issue arising between the same parties. When the suit or proceedings are in Courts subordinate to the same High Court the matter can be effectively dealt with by that High Court. Where, however, the matters are pending in Courts subordinate to two High Courts, one of such High Courts has no control over the Courts subordinate to another High Court and the matter can be dealt with under s. 10 or s. 22 of the Code. In addition to these provisions there is power vested in the Court to issue injunctions against persons who are either within the jurisdiction of the Court or have submitted to its jurisdiction, and the provisions contained in s. 10 or 22 of the Code are supplemented by those contained in O. XXXIX relating to injunctions and those which lie in the inherent power of the Court.

Whereas under s. 10 of the C. P. C., a party must make an application for stay to the Court in which the subsequent suit or proceeding is instituted; under s. 22 the High Court has jurisdiction to make an order that a matter pending before it or before a Court subordinate to it shall proceed, and such order is final, and it is not open to any other Court in India to dispute it and to allow a suit or proceeding to proceed in any other Court than that indicated in such order.

Although a Court will not issue an injunction against a person not within its jurisdiction, it will, in the ends of justice, when a person has submitted to its jurisdiction, restrain such person from doing anything which it considers is improper and will amount to an abuse of the process of the Court.

An application for the grant of Letters of Administration in respect of an estate was made by the petitioner before the District Judge of Patna in the Province of Bihar and Orissa. The respondent was served with notice of the application and he submitted to the jurisdiction of the Patna Court. Subsequently, however, he made an application for grant of Letters of Administration in respect of the same estate before the District Judge of Mathura in the United Provinces. The application before the District Judge of Patna was eventually dismissed and an appeal was lodged against such dismissal in the Patna High Court and the appellant filed an application in the High Court praying for an injunction restraining the respondent from proceeding with his application before the Mathura Court:

Held, that the respondent having submitted to the jurisdiction of the Patna Court and having entered appearance as respondent in the appeal pending in the Patna High Court, the latter Court had jurisdiction to issue an injunction restraining him from proceeding with his application in the Mathura Court.

Pat LALOO LAL *v.* RADHEY LAL **852**

——— s. 11—*Matter directly and substantially in issue—Subject-matter of previous litigation different*—Res judicata.

Plaintiff sued for a half share of certain groves by partition. It appeared that there had been a previous litigation of the same nature between the parties but it related to another grove:

Held, that as the groves now in suit were different from the grove which formed the subject-matter of the previous litigation, it could not be said that the matter now in issue between the parties was directly and substantially in issue between them in the former litigation and the matter was not *res judicata.*

A BHAUN PRATAP SINGH *v.* BHAGWAN SINGH, (1924) A. I. R. (A.) 922; L. R. 5 A. 406 Civ. **76**

——— s. 11—Res judicata—*Change of law, effect of—Plea not permitted to be taken in previous suit, whether operates as* res judicata.

Where a suit is not *res judicata* on the date when it is filed, no change in the law can make it *res judicata* after it is filed.

An alienee from a judgment-debtor sued an attaching creditor under O. XXI, r. 63 of the C. P. C., to establish his right to the attached property. The defendant contended that the sale in favour of the plaintiff was fraudulent and voidable under s. 53 of the Transfer of Property Act. The Court found that the sale was not an absolute sham, but held, following the then prevailing view, that a plea of fraudulent transfer was not open to a defendant and decreed the plaintiff's suit. The attaching creditor thereupon filed the present suit for a declaration that the sale in favour of the claimant was a fraudulent transfer. The rulings on the basis of which the plea of fraudulent transfer had been disallowed in the previous suit had since been overruled by a later Full Bench judgment. On defendant's plea that the decree in his favour in the prior suit was *res judicata* in the present suit:

Held, that in the absence of any decision in the previous suit on the question whether the sale was a fraudulent transfer or not, no question of *res judicata* on that point could arise in the present suit.

M RAMAKKAL *v.* GOVINDANAYAKANPALAIYAM **574**

——— s. 11—Res judicata—*Decision arrived ex parte, effect of.*

Plaintiff filed a suit to recover rent of certain property to which 2nd defendant was a party. One of the allegations in the plaint was that the 2nd defendant had no right to share in the management of the property. The 2nd defendant was *ex parte* and a decree was passed in favour of the plaintiff. Subsequently, the plaintiff brought another suit to recover the rent of the same property from another tenant. To this suit also the 2nd defendant was a party. The tenant pleaded that he held the property under a renewal obtained from the 2nd defendant:

Held, that the question of the 2nd defendant's right to share in the management of the property had become *res judicata* by virtue of the decision in the previous suit, and the tenant, therefore, could not avail of the plea put forward by him.

M CHERIAKKATAVAN *v.* VEETTIL PONMILERI **562**

——— s. 11—Res judicata—*Decision in previous suit not based on finding in dispute—Unnecessary finding—Defendant merely* pro forma *party, effect of.*

In order that the decision on a particular issue should operate as *res judicata* in a subsequent suit between the same parties in which that issue is again raised, it is not necessary that the decision of the issue should have been the basis of the decree in the previous suit. It is enough that the issue was finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally) for

determination, that is to say, the decision of the issue should have been necessary for the determination of the suit, though it may not have been ultimately made the basis of the decree. If the determination of the issue was inconsistent with the decree it cannot be said that it was necessary for the determination of the suit and a finding on the issue will, in such a case, be treated as having been unnecessary and will not operate as *res judicata*. If, however, there was a real contest between the parties in the previous suit it is immaterial that the defendant was described as a *pro forma* defendant and that the contest was opened by him and not by the plaintiff. **C** TARITBARANI DASI *v.* BASUMATI DEVI **953**

——— **s. 11**—Res judicata—*Decision on issue not arising on pleadings.*

Where a particular issue does not arise on the pleadings of the parties and is not framed in express words and the parties are not aware that they have to adduce evidence in support or rebuttal of such issue, a decision arrived at on such issue does not operate as *res judicata*. **A** LALLU SINGH *v.* RAGHUNANDAN, L. R. 6 A. 114 Rev. **690**

——— **s. 11**—Res judicata—*Finding in proceeding between decree-holder and judgment-debtor, whether binding on subsequent decree-holder.*

A decree-holder is not bound by the result of previous proceedings, to which he was not a party, between the judgment-debtor and another decree-holder regarding the title of the judgment-debtor to certain properties, nor can he take advantage of findings arrived at in those proceedings which are favourable to him. **M** ATMAKUR CHINNA CHENCHAYYA *v.* KHANDA KONDIAH, 20 L. W. 798; (1925) A. I. R. (M.) 300 **454**

——— **s. 11**—Res judicata—*Question of title decided in rent suit.*

The decision in a rent suit in which the title of a person is in issue for the purpose of deciding his right to receive a share of the rent, operates as *res judicata* in a subsequent civil suit by him relating to the property. **C** GOPAL CHANDRA DUTT *v.* SURENDRA NATH DUTT **804**

——— **s. 11**—Res judicata—*Specific Relief Act (I of 1877), s. 9—Possessory suit, decision in, whether operates as* res judicata—*Relevancy of decision—Evidence Act (I of 1872), ss. 13, 40, 41, 42, 43.*

Where the contention is that an issue should not be re-tried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question must be determined with reference to the provisions of s. 11 of the C. P. C., and it is not open to either party to rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from the provisions of s. 11.

A judgment in a case under s. 9 of the Specific Relief Act does not come either under s. 41 or under s. 42 of the Evidence Act and it is relevant only under ss. 13, 40 and 43 of the Act, that is to say, as evidence of a transaction or instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree in order either to found a further claim or to determine whether cognizance should or should not be taken of a suit or whether a trial should or should not be held. The use to which a decree passed in such a suit may be put in a subsequent suit between the parties is only to show that a right to possession was asserted and it was denied and a suit was instituted and was either decreed or dismissed.

Proceedings under s. 9 of the Specific Relief Act do not possess the character of finality which is essential to invest a decision with a character which will make it operative as *res judicata*. **C** CHHADEK KARIKAR *v.* SAYAD ALI KAVIRAJ **979**

——— **s. 11, O. XXI, r. 63**—*Claim suit—Judgment-debtor impleaded as party—Finding as to title, whether* res judicata *between claimant and judgment-debtor.*

In a suit under O. XXI, r. 63 of the C. P. C., the claimant objector, who was the plaintiff, impleaded the execution-creditor and also the judgment-debtor as parties to the suit, and prayed for a declaration that the property in dispute which had been purchased by him from the judgment-debtor belonged to him and was not liable to be attached in execution of the decree obtained by the execution-creditor against his judgment-debtor. The judgment-debtor admitted the plaintiff's claim but the execution-creditor contested it and the suit was dismissed, it being held that the sale in favour of the plaintiff was not valid. In a subsequent suit between the plaintiff and the representative of the judgment-debtor:

Held, that the validity of the sale-deed in favour of the plaintiff had been put in issue in the previous suit and that the question having been decided against the plaintiff the finding operated as *res judicata* between the plaintiff and the representative of the judgment-debtor. **M** CHINNAKOZHANDAI NAINAR *v.* ANANTA VIJAYA NAINAR, 20 L. W. 979; (1925) A. I. R. (M.) 319 **689**

——— **s. 11, O. XXIII, r. 1**—*Mortgage—Redemption, suit for—Money paid into Court—Mesne profits, whether can be claimed in suit—Withdrawal of claim—Separate suit, whether maintainable.*

Where in pursuance of a decree in a redemption suit the mortgage-money is paid into Court by the plaintiff, mesne profits from the date of the payment cannot be claimed in the suit itself.

A Court will not pass a hypothetical decree with reference to a cause of action that may never accrue for one or other of several reasons.

Where a claim for mesne profits is made in a redemption suit, but is subsequently withdrawn, a separate suit to recover mesne profits from the date of payment up to the date of delivery of possession would not be barred by the provisions of s. 11 or O. XXIII, r. 1 of the C. P. C. **C** SUDHANYA KUMAR BOSE RAY *v.* SUSHILABALA BOSE RAY **547**

——— **s. 11, O. XXXIV, rr. 7, 8**—*Mortgage—Redemption, suit for—Possession not obtained by mortgagor—Second suit for redemption, whether maintainable*—Res judicata.

Where in spite of a previous suit for redemption the right of redemption of the mortgaged property still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption is not barred. An order of the Court which would have the effect of extinguishing the right of redemption would, however, bar a second suit for redemption and it is not necessary that the order should also *purport* to extinguish the right of redemption.

A decree in a redemption suit directed the mort-

gagee to withdraw the amount which had already been deposited by the mortgagor and to deliver possession of the mortgaged property. The mortgagor made an application for delivery of possession of the property to him, but after making this application he gifted the property to the plaintiff, and the application for delivery of possession was subsequently dismissed. Plaintiff, thereafter, brought another suit to redeem the property from the defendant who had continued in possession of it:

Held, that the decree in the previous suit was not a decree as contemplated by r. 7 of O. XXXIV of the C. P. C., but was a combined decree under r. 8 of the Order and as it permitted the mortgagee to withdraw the money which was already in deposit, it had the effect of extinguishing the mortgage and a second suit for redemption was not, therefore, competent. **A** RUDRAPAL SINGH *v.* MATABADAL SINGH, L. R. 6 A. 241 Civ. **480**

——— **s. 11, Exp. IV**—*Matter which ought to have been raised—Test—Suit for rent—*Ex parte *decree—Subsequent suit*—Res judicata—*Statute, estoppel against.*

The decision in a previous suit for rent, whether *ex parte* or *inter partes*, operates as *res judicata* in a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objections were taken by a party.

When a matter which ought to have been raised was not raised, it must be taken to be a matter which also ought to or must have been heard and finally decided in the previous suit.

One of the tests for determining whether a question should be regarded as one that ought to have been raised in the previous suit is whether by raising the question the decree which was passed in the previous suit could have been defeated, varied or in any way affected.

There can be no estoppel against a Statute and what is illegal in law cannot be legalised by operation of the doctrine of *res judicata*. **C** SHIB CHANDRA *v.* LAKHI PRIYA GUHA, 40 C. L. J. 507; 29 C. W. N. 253; (1925) A. I. R. (C.) 427 **123**

——— **s. 11. Expl. VI**—*Hindu joint family—Partition, suit for, by one member of family*—Res judicata.

A suit for partition by a member of a joint Hindu family, to which all the members of the family are made parties and in which all matters in dispute between the members of the family are decided, must be regarded as a suit brought by the plaintiff in his representative capacity under Expl. VI, s. 11 of the C. P. C.; and all matters decided in the suit operate as *res judicata* between the different members of the family **O** NAGESHAR *v.* DARSHAN **792**

——— **s. 24**—*"Suit," whether includes execution proceeding—Transfer of execution proceedings—Jurisdiction of Court to which proceedings transferred.*

The word "suit" in s. 24 of the C. P. C., includes an execution proceeding and a Court to which an execution proceeding is transferred under the section has jurisdiction to continue the proceeding. **A** MUHAMMAD HABIBULLAH *v.* TIKAM CHAND, L. R. 6 A. 103 Civ.; (1925) A. I. R. (A.) 276; 47 A. 57 **746**

——— **s. 34**—*Interest—Transaction not unfair—Contract rate, pendente lite.*

Where there is no question of any unfair dealing a creditor is entitled to interest at the contract rate not only up to the time fixed for payment but also during the time that the suit has been pending. **C** JOGENDRA NATH ROY *v.* NAWAB MURTAZA BEGUM, 29 C. W. N. 118; (1925) A. I. R. (C.) 268 **218**

——— **s. 34**—*Money-decree—Interest till realisation.*

When a suit for the balance of purchase-money of a house has been decreed, it is equitable to allow interest on the decretal amount from the date of the decree to the date of realisation. **L** WASAWA MAL *v.* GHULAM JILANI, 6 L. L. J. 421; (1925) A. I. R. (L.) 128 **327**

——— **s. 36.** *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 52, 53 **291**

——— **ss. 39, 41**—*Transfer of decree—Certificate of execution—Jurisdiction.*

The Court to which a decree is transferred for execution under s. 39 of the C. P. C., has jurisdiction only up to the time that it issues the certificate prescribed by s. 41 of the Code. It has no jurisdiction to deal with the matter after having certified the result of execution proceedings, when the application for execution must be made to the Court which passed the decree. **A** SHIAM LAL *v.* KOERPAL, 22 A. L. J 1039; L. R. 6 A. 28 Civ.; (1925) A. I. R. (A.) 179 **390**

——— **s. 39, sub-s. 1, cl. (d)**—*Transfer of decree—Discretion of Court.*

The jurisdiction of a Court in transferring a decree from itself for execution to another Court is not limited by the fact that there is no property within the jurisdiction of that Court sufficient to satisfy such decree, as under cl. (*d*) of sub-s. (1) of s. 39, C. P. C., the Court can make an order of transfer if it considers for any other reason that the decree should be executed by the other Court. **O** MOHAMMAD SADIQ ALI KHAN *v.* SHARF JAHAN BEGAM, 10 O. & A. L. R. 1467; 1 O. W. N. 409 **411**

——— **s. 41, O. XXI, r. 2**—*Limitation Act (IX of 1908), Sch. I Art. 182 (5)—Oudh Civil Digest, r. 172 (a)—Execution of decree—Transfer of decree for execution—Jurisdiction of Court to which decree transferred—Certificate, absence of, effect of—Certification of part payment, application for, to Court not having jurisdiction, effect of—Limitation, extension of.*

The Court to which a decree is transferred for execution is not divested of its jurisdiction until it sends the certificate under s. 41 of the C. P. C., to the Court which passed the decree. Before such certificate is sent, any application for certification of a part payment must be made to the Court to whom the decree was transferred for execution and not to the Court which passed the decree. Such an application made to the Court which passed the decree will not operate to extend the period of limitation for execution of the decree under Art. 182 (5) of Sch. I to the Limitation Act.

The part satisfaction referred to in r. 172 (*a*) of the Oudh Civil Digest must be such that no further satisfaction of the decree in that Court would be possible. The rule does not apply to a case where the parties have entered into an agreement by which full satisfaction can be obtained by the decree-holder on a future date.

A rule made by the High Court if it is in conflict with the provisions of a section of the C. P. C., is

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ultra vires. O MOHAMMAD SHAKIR *v.* JUGUL KISHORE, 10 O. & A. R. 1277; 1 O. W. N. 794; 28 O. C. 169 **455**

——— **s. 47.** *See* BENGAL TENANCY ACT, 1885, s. 173 **750**

——— **s. 47**—*Execution of decree—"Between parties to the suit," meaning of—Decree for specific performance of contract on payment of purchase-money—Contest between judgment-debtor* inter se *as to right to receive purchase-money, decision of—Suit, separate, whether maintainable.*

The expression "between the parties to the suit" in s. 47, C. P. C., imports between parties opposed to each other in the suit, but does not necessarily mean between parties who are plaintiff and defendant respectively in the suit.

A suit for specific performance of a contract for the sale of immoveable property was decreed against the vendor and a subsequent purchaser from him. In execution of the decree, a contest arose between the judgment-debtors as to which of them was entitled to receive the amount of the purchase-money from the decree-holder and it was decided that the money should be paid to the subsequent purchaser from the vendor. The vendor then brought a suit against the subsequent purchaser to recover the amount of the purchase-money paid to him by the decree-holder:

Held, that the order of the Execution Court deciding that the purchase-money should be paid to the subsequent purchaser fell within the purview of s. 47 of the C. P. C., and that a separate suit in respect of the same question was barred by the provisions of that section. M SISTLA VENKATA SASTRI *v.* ZERNINI VENKATAGOPALUDU, 20 L. W. 742; (1925) A. I. R. (M.) 353 **209**

——— **s. 47**—*Suit to enforce obligation created by decree, whether maintainable—Suit to recover money from partner—Limitation.*

In India no action lies on an executable judgment, the only remedy of the decree-holder being by way of execution. This principle is embodied in s. 47 of the C. P. C.

Ordinarily the Courts in India pass judgments which are to be enforced in execution, and even when they create a new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it, but when they do so, a suit to enforce the obligation is maintainable.

A claim to recover a sum of money due from one of the partners in a firm must form part of the enquiry in the action for winding up the partnership, and no separate suit will lie for such relief after a suit for an account is barred by limitation. M RAMASAMI *v.* MUTHIAH CHETTIAR, 47 M. L. J. 829; 21 L. W. 75 (1925) A. I. R. (M.) 279 **991**

——— **s. 47, O. XXI, rr. 35, 98**—*Transfer of Property Act (IV of 1882), s. 52—Execution of decree—Scope of decree, determination of—Duty of Court—Purchaser* pendente lite, *position of—Delivery of possession—Resistance—Procedure.*

Where a question arises in execution proceedings as to what is included in the decree, the Execution Court must go into the question and decide it.

A purchaser *pendente lite* is bound by the decree passed in the suit and his purchase cannot affect any rights obtained by the decree-holder under the decree. If such a purchaser refuses to vacate the property after a decree has been passed, delivery of possession may be made to the decree-holder by removing the purchaser under O. XXI, r. 35 of the C. P. C., and in case of his resistance to the execution of the decree an order may be passed under r. 98 of O. XXI. C GOLAM NABI CHAPAWALA *v.* F. W. NEEDHAM **1004**

——— **s. 47, O. XXI, rr. 53, 61, 63, O. XXXIV, r. 6**—*Mortgage decree—Execution of decree—Objection by judgment-debtor that that property not liable to sale, dismissal of—Appeal whether lies—Procedure.*

In the course of the execution of a decree under O. XXXIV, r. 6 of the C. P. C. certain items of property were attached and proclaimed for sale. The judgment-debtor objected to the sale of some of the items of the property on the ground that he did not possess any saleable interest in them. The objection was dismissed on the ground that it was not *bona fide* and was made very late. On appeal:

Held, (1) that the order of the Executing Court dismissing the objection was open to appeal;

(2) that the Executing Court should have inquired into the merits of the objection and should not have dismissed it on the ground of its having been preferred at a late stage and not being *bona fide.* O LACHMAN PRASAD *v.* MIRNALUNI DEBI, 10 O. & A. L. R. 1392; 1 O. W. N. 857; 28 O. C. 175 **997**

——— **s. 47, O. XL, r. 4**—*Execution of decree—Order against person not party—Appeal, whether lies—Order against Receiver—Second appeal, whether competent.*

No appeal lies against an order passed in execution proceedings against a person who is not a party to those proceedings.

An order passed against a Receiver directing him to pay back the amount realised by him from the sale of the attached property is appealable but no second appeal lies in such a case. A JWALA PRASAD *v.* CHUTTAN, L. R. 6 A. 36 Civ.; (1925) A. I. R. (A.) 328 **161**

——— **ss. 50, 146, O. IX, r. 13**—Ex parte *decree—Death of defendant after decree—Legal representative, whether entitled to make application to set aside decree—Procedure.*

Where a defendant dies after an *ex parte* decree has been passed against him, his legal representative is entitled to make an application to set aside the *ex parte* decree under O. IX, r. 13 of the C. P. C., and is not bound to wait till he is actually brought on the record as legal representative under s. 50 of the Code. O DEOKI *v.* JUGUL KISHORE, 10 O. & A. L. R. 1001; 27 O. C. 299; 1 O. W. N. 699; (1925) A. I. R. (O.) 370 **529**

——— **s. 53.** *See* HINDU LAW—DEBT **181**

——— **s. 60 (c)**—*'Agriculturists,' meaning of.*

An agriculturist is not a person who obtains his livelihood otherwise than by cultivating himself or through his servants, even if he may have some sort of interest in a field or two. O LACHMAN DASS *v.* PARTAPI, 10 O. & A. L. R. 1275; (1925) A. I. R. (O.) 365 **700**

——— **s. 60 (n)**—*Execution of decree—Attachment—Right to future maintenance.*

A dispute between one *M.* and his wife with regard to the dower-debt due to the latter was referred to arbitration and the arbitrators made an award which declared that the property of *M.* should, from the date of the award, be construed to be the property

of his wife but that *M.* should be allowed to remain in possession of the property and to manage it and to collect the income. Out of the income *M.* was to pay a certain sum to his wife, the balance being retained by himself by way of maintenance and also to enable him to pay his debts. A creditor of *M.* obtained a simple money-decree against him in respect of a debt incurred by *M.*, and in execution of that decree sought to attach and sell *M.'s* right of possession as a life-tenant in the property acquired by him under the award:

Held, that what was reserved to *M.* under the award was something more than a mere right of future maintenance within the meaning of s. 60 (*n*) of the C. P. C. and was not, therefore, exempt from attachment under the provisions of that section. **A** MAHFUZ ALI KHAN *v.* RADHA KISHEN, 23 A. L. J. 149; L. R. 6 A. 133 Civ.; (1925) A. I. R. (A.) 297 **477**

——— **s. 64.** *See* LIMITATION ACT, 1908, SCH. I, ARTS. 137, 138 **349**

——— **s. 92.** *See* COURT FEES ACT, 1870, SCH. II, ART. 17 **801**

——— **s. 92**—*Collector's sanction for suit with certain prayers--Suit omitting some prayers, maintainability of.*

Where a Collector sanctioned the institution of a suit under s. 92, C. P. C., for removal of a trustee, for setting aside certain alienations by him and for recovery of the properties from the alienees, but the plaint as ultimately filed omitted the latter two reliefs and asked only for the removal of the trustee:

Held, that the suit was not maintainable and that the plaint must consequently be rejected. **M** ALLABAKSH MIRA MOHADEEN *v.* FAKRUDDIN, 21 L. W. 71; (1925) A. I. R. (M.) 636 **1045**

——— **s. 92**—*Interest in trust—Suit in respect of place of worship—Worshippers, whether competent to sue.*

In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries, and must, as such, be held to possess a sufficient interest to support a suit under s. 92 of the C. P. C. **L** NARINJAN SINGH *v.* KIRPAL SINGH, 5 L. 455; 1 L. C. 139; (1925) A. I. R. (L.) 189 **111**

——— **s. 92**—*Public trust—Grant, whether to Archakas or deity—Long enjoyment, effect of—Scheme—Provision for continued supervision by Court, undesirability of—Scheme, whether* ultra vires.

In considering the question whether the grant of an *inam* was to a temple or to the *Archakas* thereof personally, burdened with the performance of daily worship, the evidence of user and enjoyment, however long uninterrupted and unquestioned, would be evidence of the grant only, in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any ambiguity in the grant. Where the grant is clearly to the "manager for the time being of the temple" and referred to as *Devadagam*, subsequent decree, transactions, and other dealings amongst members of the family of the *Archakas*, indicating that the properties are being treated as their own, are not of any evidentiary value in the absence of the parties or persons interested in setting up the rights of the temple as distinguished from the *Archakas*.

It is undesirable that Courts should assume themselves the continued supervision of institutions for the management of which they are called upon to frame schemes. Under such schemes the Courts of Law constitute themselves in some manner as temple committees as the whole burden of such functions for all time is thrown upon the Courts. It is very undesirable that the Courts should be burdened with such tasks. Even in the interests of institutions themselves, it is doubtful if such provisions are calculated to promote their improvement or efficiency. Decrees of Courts making such provisions in the schemes framed by them are really *ultra vires* having regard to the express provisions of s. 92 of the C. P. C. **M** AYINAVILLI NARAYANAMURTHI *v.* BULUSU ACHAYYA SASTRULU, 20 L. W. 687; 47 M. L. J. 714; (1925) A. I. R. (M.) 411 **188**

——— **s. 92, O. XXII, r. 3**—*Scheme suit—Appeal—Death of one appellant--Abatement.*

A suit once instituted by two or more plaintiffs duly authorised under s. 92 of the C. P. C. does not abate in consequence of one of the plaintiffs dying during the continuance of the suit, and the case of one of two or more appellants dying after the filing of an appeal against a decree in such a suit is *a fortiori* a case of abatement not resulting from the death of a party. **M** GULAM GOUSE *v.* DOST MUHAMMAD KHAN, 47 M. L. J. 745; 20 L. W. 882; (1925) A. I. R. (M.) 244 **666**

——— **s. 96**—*Findings neither implied nor embodied in decree—Appeal by successful party, whether lies.*

Findings which are neither necessarily implied nor embodied in the decree have no operative force and do not constitute *res judicata* between the parties and a successful party cannot appeal merely against such findings.

Where a suit for partition was dismissed but findings were recorded on certain issues raised between the defendants *inter se*:

Held, that an appeal by one of the defendants against such findings was incompetent. **M** PARIGI VENKOBACHARLU *v.* SAMJI RADHABAYAMMA, 47 M. L. J. 612; (1924) M. W. N. 867; (1924) A. I. R. (M.) 858 **868**

——— **s. 96 (3), O. I, r. 10**--*Compromise decree—Appeal, when competent—Addition of parties—Court, discretion of.*

When a consent decree has been made as between some of the parties to a suit, the other parties, who have not assented to the compromise, are entitled to appeal against the decree, provided they have been prejudicially affected thereby.

The Court has very wide powers, under the C. P. C., in respect of addition or transfer of parties. This discretionary power must be exercised in such a way as to achieve the ends of substantial justice. **C** NIRODE CHANDRA BANERJEE *v.* PROFULLA CHANDRA BANERJEE, 40 C. L. J. 535; (1925) A. I. R. (C.) 421 **168**

——— **s. 98.** *See* LETTERS PATENT (MAD.), CL. 36 **1016**

——— **s. 102.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 42 **498**

——— **s. 104, Sch. II**—*Arbitration Act (IX of 1899), reference under--Order staying suit—Appeal, whether competent.*

Unless the provisions of the Arbitration Act, 1899, are contrary to any of the provisions of the Second Schedule to the C. P. C., that Schedule must apply to a reference made under the Act, and consequently any order passed in such proceedings is

open to appeal under s. 104 of the Code. A KACHAURI MAL-KALYAN MAL v. WALI MUHAMMAD-ABDUL LATIF, 22 A. L. J. 1031; L. R. 5 A. 756 Civ.; (1925) A. I. R. (A.) 154; 47 A. 179 **341**

——— **s. 105**—*"Affecting the decision of the case," meaning of—Order setting aside abatement—Appeal, whether lies.*

An order setting aside an abatement and allowing substitution of the legal representatives of the deceased party is not one which affects the decision of the case and cannot be questioned in appeal from the final decree whether such order is passed before or simultaneously with the decree.

The phrase "affecting the decision of the case" in s. 105 of the C. P. C. means affecting the merits of the case or affecting the decision of the case with reference to its merits. C MOHAMED NURUL AMIN v. MONOHAR SORAN DEB, 40 C. L. J. 588; (1925) A. I. R. (C.) 473; 29 C W. N. 675; 52 C. 472 **100**

——— **s. 105**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Order setting aside final decree while retaining preliminary decree, whether "order affecting decision of the case"—Order whether can be challenged in appeal from final decree —Final decree, application for—Proceeding in suit or in execution—Limitation.*

An application to set aside an *ex parte* final decree following an *ex parte* preliminary decree in a mortgage-suit was allowed. The notes paper of the Judge, however, showed that he had called for written statement and draft issues. On the plaintiff contending at the time of re-hearing that not only the final decree but also the preliminary decree which was also *ex parte* had been set aside by the order:

Held, that the prayer in the application and the order thereon and not the notes paper ought to be considered and that the final decree alone was set aside by the order.

An application for a final decree in a mortgage suit is a proceeding in a suit and not in execution, and, therefore, only one application is permissible and it must be put in within three years of the preliminary decree.

An order setting aside an *ex parte* final decree while retaining the *ex parte* preliminary decree in a mortgage suit is an order "affecting the decision of the case" within the meaning of s. 105, C. P. C., and its propriety can be challenged in an appeal against a decree finally passed in the suit. M ATHAMSA ROWTHER v. GANESAN, 47 M. L. J. 641; (1924) M. W. N. 884; 35 M. L. T. 131; (1924) A. I. R. (M.) 890; 20 L. W. 954 **808**

——— **s. 107, O. XXII, rr. 4, 9**—*Abatement against one respondent—Appeal, whether abates* in toto.

Plaintiffs, uncle and nephew, sued to recover possession of certain land, claiming it as tenants-in-common. The nephew having died, his widow was joined as his legal representative. The suit having been decreed, defendants appealed to the District Court and during the pendency of the appeal the widow of the nephew died in November 1919. No steps were taken to bring her legal representative on the record up to March 1921. The Appellate Court held that the appeal had abated *in toto*. The defendant filed a second appeal to the High Court:

Held, that under O. XXII, r. 4, sub-r. (3) read with s. 107 (2) of the C. P. C., the appeal would abate as against the deceased respondent only and not *in toto*. B SHANKARBHAI MONOHARBHAI v. MOTI LAL RAMDAS SAHA

26 Bom. L. R. 1217; (1925) A. I. R. (B.) 122; 49 B. 118 **197**

——— **s. 110**. *See* LIMITATION ACT, 1908, s. 5 **191**

——— **s. 110**—*Appeal to Privy Council—Long consensus of opinion—Question, whether substantial question of law.*

Where there is a long consensus of opinion on a question of law the matter cannot be treated as a substantial question of law within the meaning of s. 110 of the C. P. C. so as to justify an appeal to the Privy Council. Pat RAMNIRANJAN v. GOBARDHAN, 1 P L. R. 314; (1924) A. I. R. (Pat.) 271 **8**

——— **s. 110**—*Appeal to Privy Council—Substantial question of law, what is.*

In order that a question of law may be treated as substantial within the meaning of s. 110 of the C. P. C., it must be debateable or of general interest or without previous decisions of their Lordships of the Privy Council to guide the Indian Courts. O HARI KISHUN DASS v. MOHAMMAD SAFI JAN, 10 O. & A. L. R. 962; 1 O. W. N. 608 **409**

——— **s. 115**—*Bengal Tenancy Act (VIII of 1885), s. 153 (b)—Rent suit tried by Munsif specially empowered—Appeal, whether lies—Revision.*

Where a second appeal is dismissed on the ground that no appeal lies to the High Court, the decree of the lower Appellate Court stands good as between the parties and is the only decree which is capable of execution. It is also capable of revision by the High Court.

No appeal lies against the decision, in a rent-suit of a Munsif specially empowered under s. 153 (*b*) of the Bengal Tenancy Act, where the value of the suit does not exceed Rs. 50. C SURENDRA KRISHNA ROY v. ABBAS ALI **760**

——— **s. 115**—*Interlocutory order—Revision—High Court, interference by.*

In exceptional cases the High Court has jurisdiction to interfere in revision with interlocutory orders.

A Judge cannot assume as a matter of law that which in fact has no existence in law and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of a Statute deprive himself of the jurisdiction which properly belongs to him and if he refuses jurisdiction in such a case the High Court may interfere in revision and set the matter right. C RAJANI KANTA BAG v. RAJA BALA DASI, 29 C. W. N. 76; (1925) A. I. R. (C.) 320; 52 C. 128 **870**

——— **s. 115**—*Revision pending suit—Suit, reference of, to arbitration.*

Where the matter to be revised arises out of the proceedings of a pending suit, there can be no revision till the suit has been decided. A SHAH MUHAMMAD FAKHRUDDIN v. RAHIMULLA SHAH, L. R. 6 A. 22 Civ.; 47 A. 121 **502**

——— **ss. 115, 151**—*Appeal—Filing wrong decree by mistake—Substitution of right decree whether permissible—Court, inherent power of—Revision.*

In an appeal against a decree to set aside an award, the appellant filed by mistake another decree between the same parties in opposite capacities. It appeared that both the parties had the same names. The appellant asked the Court to allow him to substitute the right decree. The Court held that there was no provision of the C. P. C. permitting the same and rejected the appeal. In revision:

Held, that the Court had inherent jurisdiction under s. 151 of the C. P. C. to allow the appellant

to substitute the decree and in refusing to do so had failed to exercise jurisdiction vested in it by law and its order must be set aside. **R** MAUNG PO THAIN *v.* MAUNG PO THIN, 3 Bur. L. J. 325; (1925) A. I. R. (R.) 188 **196**

——— **ss. 115, 151, O. VI, r. 16**—*Under-proprietary and occupancy land, suit for possession of—Order directing striking out of claim with regard to occupancy land, legality of—Revision, whether lies.*

Plaintiff sued for possession of certain properties, part of them under-proprietary interest and part occupancy interest, in different plots of land. The suit was decreed by the First Court but on appeal the Appellate Court was of opinion that a suit for the recovery of occupancy land even as against strangers did not lie in the Civil Court and passed an order that the plaintiff should strike out from the plaint the claim for possession of the occupancy lands. On revision:

Held, (1) that the order of the lower Appellate Court amounted to an order in a "case" within the meaning of s. 115 of the C. P. C., inasmuch as it finally settled the matter whether a suit for possession of occupancy land did lie in the Civil Court or not, and that, therefore, the order was open to revision;

(2) that the lower Appellate Court had no jurisdiction to pass the order as the order was not necessary for the ends of justice or to prevent any abuse of the process of the Court within s. 151, C. P. C., nor could the pleading with regard to the occupancy land be considered as unnecessary within the meaning of O. VI, r. 16 of the C. P. C., inasmuch as the view which the lower Appellate Court had taken was disputed by the plaintiff. **O** MALUKA *v.* PATESHUR SINGH, 10 O. & A. L. R. 1062; 1 O. W. N. 754 **703**

——— **ss. 115, 151, O. IX, rr. 8, 9**—*Plaintiff's Pleader instructed to apply for adjournment—Adjournment refused—Dismissal of suit, nature of—Application to set aside dismissal—Dismissal, whether can be set aside as matter of grace—Illegality—Revision.*

Where a plaintiff's Pleader has instructions to apply only for an adjournment, and the adjournment is refused, it is a case of non-appearance of the plaintiff, and the dismissal of the suit, in consequence, is for default of appearance.

Order IX, r. 9 of the C. P. C. gives no power to a Court to set aside a dismissal of a suit for default of appearance of the plaintiff as a matter of grace, nor has the Court any inherent power to set aside the dismissal on this ground.

A party who goes to law is entitled to insist that the law shall be followed and that an order not in accordance with the law shall not be allowed to be in force.

When an order is passed wholly without jurisdiction the High Court is bound to interfere in revision and not to allow the order to remain in force. **M** MANICKAM PILLAI *v.* MAHUDAM BATHUMAL, 20 L. W. 829; 48 M. L. J. 152; (1925) A. I. R. (M.) 209 **499**

——— **s. 115, O. VII, r. 10, O. XLIII, r. 1 (a).** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23 **1002**

——— **s. 115, O. XXI, r. 90**—*Execution of decree—Sale—Application to set aside sale—Procedure—Duty of Court.*

If a litigant believing that he has certain valid grounds to urge against certain proceedings going on in his case, puts forward his grievance in the form of a petition, justice and equity require that the matter should be disposed of one way or the other by formal orders dealing with the points raised. It is not intended that the Courts should be so technical as to throw away the application practically without any orders.

Courts are bound to dispose of matters coming up for consideration before them by an adjudication in some form or other whether the same be an order or a judgment or a decree.

A summary rejection of an application to set aside an auction-sale on the ground of fraud, without an enquiry or an adjudication thereon, is not warranted by law. Such an order is liable to be set aside in revision. **N** MADHORAO *v.* MANOHARLAL, (1925) A. I. R. (N.) 289 **779**

——— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit, permission for, after conclusion of trial—Irregularity—Revision.*

It is the duty of the High Court to see that justice is properly done and that a subordinate Court does not pass any orders transparently for the purpose of avoiding the trouble of writing a judgment.

After the evidence of both the parties to a suit had been recorded and a date was fixed for arguments the plaintiff made an application to the Court for permission to withdraw the suit with leave to bring a fresh suit on the same cause of action and the Court granted such leave. On revision:

Held, (1) that the Trial Court had exercised its jurisdiction with gross irregularity and that palpable injustice was done to the defendant by the order passed by the Trial Court;

(2) that in such circumstances the High Court was entitled to interfere in revision and to set aside the order of the lower Court. **O** RABBUL ARFIN *v.* BABU RAZA, 10 O. & A. L. R. 1130; 8 O. W. N. 861 **324**

——— **s. 115, O. XXIV, r. 4**—*Examination of witness on commission, refusal to order—Revision—Interference by High Court.*

There is nothing in law to prevent the High Court from interfering in revision with an interlocutory order refusing to issue a commission for the examination of a witness, if the High Court is of opinion that the order complained of is one which is calculated to do irreparable injury to a party to the suit.

There is nothing in the C. P. C., which authorises a Court to fix a place where a certain person should be brought for examination on commission, nor is there anything restricting its power in that direction.

Plaintiff applied for a commission for the examination of a witness, who was a man of advanced age and in feeble health and unable to undertake a journey, but whose evidence was material to the case set up by the plaintiff. The Court directed the issue of a commission but fixed the place of examination of the witness at a distance from his house where it was impossible for the witness in his state of health to appear. On revision:

Held, that in the circumstances of the case the order of the Court amounted to a refusal to issue a commission and was likely to do irreparable injury to the plaintiff and the order must, therefore, be set aside with a direction that the witness should be examined at his house. **C** ANANDA CHANDRA PRODHAN *v.* SUK CHAND PRODHAN, **619**

——— **ss. 148, 149, O. VII, r. 11**—*Court-fee payable on plaint, deficiency in—Time allowed for making up deficiency, whether can be extended—Defici-*

ency made up after expiry of period allowed, effect of—Discretion of Court—Appellate Court, interference by.

Where a plaintiff has been given time to make up the deficiency in the Court-fee payable on his plaint, but fails to do so, the Court has jurisdiction to extend the time for payment fixed by its original order.

Where after the expiry of the period originally allowed to a plaintiff for making up a deficiency in the Court-fee leviable on the plaint, the deficiency is made up by the plaintiff and the Court accepts the payment and directs that the plaint should be registered, it must be presumed that the Court acted regularly, and in the exercise of its discretion extended the time originally allowed for payment of the deficiency.

Where, however, the order of the Court is not carried out and no further extension of time is granted, the Court must reject the plaint irrespective of the fact whether the claim made in the plaint or any portion of it has or has not become barred by time.

It is of the utmost importance that questions such as the one arising under s. 149 of the C. P. C. should be left to the discretion of the Court which has to determine them in the first instance, and the exercise of that discretion should not be interfered with by an Appellate Court unless a very strong case for interference is made out. **Pat** RAGHUNANDAN SAHAY *v.* RAM SUNDER PRASAD, (1924) Pat. 355; 6 P. L. T. 4; 3 Pat. L. R. 22; (1925) A. I. R. (Pat.) 299; 4 Pat. 190 **172**

——— **s. 151.** *See* C. P. C., 1908, s. 115 **196**

——— **s. 151, O. XLVI, r. 1**—*Plaint returned by two Courts on ground of want of jurisdiction—Reference, application for, whether maintainable—Inherent power of Court.*

Plaintiff filed a suit in the Court of the Subordinate Judge but was told to go to the Court of the Munsif. When he went to the Court of the Munsif the latter declined jurisdiction in the case. On an application to the High Court for a reference under O. XLVI, r. 1 of the C. P. C.:

Held, that the application for reference did not lie but that the High Court could take action under s. 151 of the C. P. C. and pass such orders as may be necessary for the ends of justice. **O** JAFAR HUSAIN KHAN *v.* CHOUTHI, 10 O. & A. L. R. 1191; 2 O. W. N. 81; 12 O. L. J. 189 **702**

——— **O. I r. 10.** *See* C. P. C., 1908, s. 96 (3) **168**

——— **O. I, r. 10**—*Order striking out defendant's name—Appeal, whether lies.*

It is open to a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint disclosed no cause of action against him. **Pat** RAMJI PANDEY *v.* ALAF KHAN, 3 Pat. 859; (1925) A. I. R. (Pat.) 121 **90**

——— **O. II, r. 2**—*Sale by widow of half of husband's estate to son-in-law—Subsequent devise of other half to daughter—Suit to set aside sale—Daughter and son-in-law in joint possession—Subsequent suit for possession of share bequeathed, whether competent.*

A widow in possession of her deceased husband's estate sold one-half of the estate to her son-in-law, and bequeathed the remaining half to her daughter. The widow died, and the daughter entered into joint possession of the whole estate along with her husband. A collateral of the deceased husband brought a suit for possession of that portion of the estate which was sold to the son-in-law. The daughter was not impleaded. Subsequently the collateral brought another suit against the daughter for possession of the property bequeathed to her:

Held, that as the defendant was in joint possession with her husband of the undivided estate at the time the previous suit was brought against him, the present claim should have been joined with the earlier suit and was now barred under O. II, r. 2 of the C. P. C. **L** MAULA BAKHSH *v.* JIWI, (1923) A. I. R. (L.) 556 **202**

——— **O. II, r. 2**—*Transfer of Property Act (IV of 1882), s. 68 (c)—Mortgage—Failure of mortgagor to deliver possession—Suit for possession, dismissal of—Suit to recover mortgage-money, whether maintainable—Cause of action, what is.*

A cause of action for a suit is the bundle of essential facts which it is necessary for the plaintiff to prove in order to succeed.

Where a mortgagee is entitled to possession of the mortgaged property and the mortgagor fails to deliver possession the mortgagee becomes entitled to either of two reliefs, *viz.*, recovery of possession or recovery of the mortgage-money. In suing for either of these reliefs he is to prove the same facts, *viz.*, that a mortgage-deed had been executed and that the mortgagor had failed to secure him in possession. Proof of these facts would entitle the mortgagee not only to possession but also to a decree for money. He is bound, therefore, to sue for both reliefs in the alternative in the same suit and where he sues for possession of the property and fails, he cannot subsequently bring a suit against the mortgagor for recovery of the mortgage-money. **O** SHEO RATAN SINGH *v.* RAM SINGH, 10 O. & A. L. R. 1165; 1 O. W. N. 749; 28 O. C. 82 **391**

——— **O. VI, r. 17**—*Agra Tenancy Act (II of 1901), ss. 164, 165—Suit for profits under s. 164—Plaint indicating s. 165—Amendment of plaint.*

The nature of a suit is indicated by the allegations made in the plaint, and not by quoting a section in the plaint which does not apply.

Where the plaint in a suit for profits which falls properly under s. 164 of the Agra Tenancy Act, quotes s. 165 of the Act, the irregularity should be allowed to be cured by an amendment. **A** CHANDRA SEN *v.* MOHAR SINGH, L. R. 5 A 335 Rev. **700**

——— **O. VI, r. 17**—*Amendment of plaint—Encroachment—Suit for injunction—Possession, prayer for, addition of.*

Plaintiff, who was the *zemindar*, sued the defendant, a cultivator, for a perpetual injunction restraining him from using a certain piece of land over which he had encroached. After the issues were framed, but before the trial of the suit, the plaintiff applied for amendment of the plaint by adding a prayer for possession of the portion encroached upon, but the application was rejected on the ground that the addition of the prayer for possession would change the nature of the suit:

Held, that the real question in controversy between the parties was whether the plaintiff had lost his possession in such a way that he could not oust the defendant and that this was a fit case in which the application for amendment should be allowed as the amendment would not affect the grounds of the claim. **O** WARIS ALI *v.* ABBAS ALI, 10 O. & A. L. R. 1185; 1 O. W. N. 757 **344**

——— **O. VI, r. 17**—*Amendment of pleadings.*

A High Court Vakil, like any one else, may make a mistake or omission in his pleadings and if he has really done so he is as much entitled as any one else to put the matter right by amendment in order that the real question in controversy between him and his opponent may be decided. So far from being slow to grant leave to amend pleadings or from pinning the parties to the strict letter of their pleadings, it is the duty of the Court to assist parties in bringing out clearly the real questions in issue between them. The questions in controversy between the parties, however, which should be brought out clearly and decided are, save in exceptional cases, the questions in controversy when the parties join issue, that is, when the defendant puts in his written statement. They do not include new questions which the defendant neither wished nor intended then to dispute but which at a later stage in the proceedings, either because he has changed his mind or something has happened after he filed his written statement, he thinks it profitable to dispute. **M** SUBRAMANIA IYER *v.* HITCHCOCK, 22 L. W. 26 **900**

——— **O. VI, O. VII**—*Plaint, what is—Document setting forth cause of action—Institution of suit, date of.*

A document purporting to be a plaint setting forth a cause of action, and drawn up substantially in accordance with the rules contained in O. VI and O. VII of the C. P. C. is a plaint though it may contain some imperfections.

The date of the institution of a suit should be reckoned from the date of the presentation of a plaint, or from the presentation of a document purporting to be a plaint notwithstanding its imperfections. **S** MITSUI BUSSAIN KAISHA LTD. *v.* TOTARAM-BHAGWANDAS, 17 S. L. R. 260; (1925) A. I. R. (S.) 21; 26 Cr. L. J. 189 **893**

——— **O. VII, r. 7.** *See* POSSESSION, SUIT FOR **95**

——— **O. VII, r. 11.** *See* C. P. C., 1908, s. 148 **172**

——— **O. VIII, rr. 3, 5**—*Denial, what constitutes—Admission, whether can be retracted.*

Rules 3 and 5 of O. VIII of the C. P. C., must be read together. The words "stated to be not admitted" in r. 5 must be taken to mean "specifically stated to be not admitted."

A defendant who deliberately and under no mistake or misapprehension admits a material fact in his written statement cannot be allowed, at a later stage in the proceedings, to change his front and make a new case for himself by denying that fact. **M** SUBRAMANIA IYER *v.* HITCHCOCK, 22 L. W. 26 **900**

——— **O. VIII, r. 5**—*Pleadings—Failure to deny allegation, effect of.*

The provision contained in r. 5 of O. VIII of the C. P. C., which is applicable expressly to allegations in the plaint and to a defendant's failure to deny them, cannot be extended to an oral pleading of the defendant, so as to justify an inference from the absence of a reply thereto by the plaintiff that the latter accepts it as true. **N** LAXMAN *v.* BABUSA **768**

——— **O. IX, rr. 2, 3, 4.** *See* LIMITATION ACT, 1908, SCH. I, ARTS. 181, 182

——— **O. IX, rr. 3, 8**—*Contract Act (IX of 1872), s. 43—Dismissal of suit for default in absence of some defendants, effect of—Fresh suit, whether maintainable—Joint tenants, liability of, for rent, nature of—Suit against some tenants dismissed, whether can be continued against others.*

Under r. 8 of O. IX of the C. P. C. the law contemplates a partial or a total dismissal of a suit for the default of the plaintiff, and in either case it precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But a fresh suit in respect of the same cause of action against defendants who were absent on the date of the dismissal of the suit is not barred.

The liability of joint tenants for the payment of rent is joint and several and the effect of section 43 of the Contract Act is to exclude the right of any one of joint tenants to claim to be sued along with his co-tenants, and a judgment obtained against some only of the joint tenants, which remains unsatisfied, is no bar to a second suit on the contract against the other joint tenants. **A** PARBHU DAYAL SINGH *v.* TIRBHUWAN SINGH, L. R. 6 A. 71 Rev. **788**

——— **O. IX, rr. 3, 8, 9, O. XXXIII r. 15**—*Application for leave to sue in* forma pauperis—*Dismissal for default — Fresh application, maintainability of.*

The dismissal of an application for leave to sue in *forma pauperis* for default of appearance does not amount to an "order refusing to allow the applicant to sue as a pauper" within the meaning of O. XXXIII, r. 15, C. P. C., and does not operate as a bar to a fresh application.

Assuming that O. IX, C. P. C., is applicable to an application under O. XXXIII, where it is not proved that the dismissal of the previous application was not under r. 3 but under r. 8, r. 9 of the Order cannot be invoked as a bar to the maintenance of a later application.

It is incumbent on the party who relies on the bar of O. IX, r. 9, C. P. C., to show that the dismissal of the previous suit or application was under r. 8 of the Order. **M** CHINNAMMAL *v.* PAPATHI AMMAL **982**

——— **O. IX, r. 13, O. XVII, rr. 2, 3**—*Adjournment of case—Default in appearance—Procedure.*

Where one of the parties to a suit fails to appear on the date to which the case is adjourned, the case falls under O. XVII, r. 2 and not under O. XVII, r. 3 of the C. P. C, and must be disposed of under one of the modes laid down in O. IX of the Code and cannot be considered to have been disposed of on the merits. **O** PUTTU LAL *v.* CHHUTKO, 10 O. & A. L. R. 1040; 1 O. W. N. 656; (1925) A. I. R. (O.) 360 **528**

——— **O. XIV, r. 2, O. XV, r. 3**—*Issue of law, whether can be tried first—Court, power of.*

Both O. XIV, r. 2 and O. XV, r. 3 of the C. P. C., give ample power to the Court to try issues of law first. The power under O. XIV, r. 2, can be exercised at the issue stage, but O. XV, r. 3, empowers the Court to proceed to determine issues of law at a stage subsequent to the issue stage and it is for the Court to decide at its discretion as to which course to adopt. **Pat** LACHMI NARAIN SINGH *v.* KUP NARAIN, 2 Pat. L. R. 303 **29**

——— **O. XV, r. 3.** *See* C. P. C., 1908, O. XIV, r. 2 **29**

——— **O. XVII, r. 2**—*"Make such other order as it thinks fit," scope of—Party taking time to produce evidence—Failure to appear—Court, duty of—Decree—Application for re-hearing—Revision.*

Where a party has taken time to produce evidence and, on the date fixed for hearing of that evidence, he is absent, the Court is bound to proceed under O. XVII, r. 2 of the C. P. C. and cannot proceed under r. 3.

Civil Procedure Code—1908—contd.

The words "make such other order as it thinks fit" in r. 2 of O. XVII, C. P. C., do not authorise a Court to pass a judgment on the merits.

A Court must be presumed to have passed such an order as it could pass according to law, whatever section it may have mentioned in its order.

On the failure of the defendant to produce his evidence on the date fixed for the purpose, the Court decreed the plaintiff's suit for redemption. The defendant treating the order as one passed *ex parte* applied for re-hearing. This application was dismissed, the Court holding that the application did not lie and the defendant ought really to appeal from the decree. On appeal to the District Judge, that Court came to the same conclusion and dismissed the appeal. The defendant applied in revision to the High Court:

Held, that the decree passed was an *ex parte* decree, and inasmuch as the District Judge refused to exercise the jurisdiction vested in him of hearing an appeal from the refusal of the Trial Court to grant an application for re-hearing, the High Court could interfere in revision. **A** RAM ADHIN *v.* RAM BHAROSE, 22 A. L. J. 1041; L. R. 5 A. 740 Civ.; (1925) A. I. R. (A.) 182; 47 A. 181 **27**

——— **O. XVII, rr. 2, 3**—*Adjournment of case—Failure of defendant to appear—Order of Court, nature of—Application to set aside order, whether competent—Revision—High Court, whether will interfere—*Ex parte *proceedings—Court, duty of.*

When a defendant does not appear on the date to which the hearing of the case has been adjourned at his request, and the Court proceeds to dispose of the suit, the order of the Court must be presumed to have been passed under O. XVII, r. 2 of the C. P. C. in the absence of anything to the contrary.

Where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge and the District Judge comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts.

Where a party absents himself, whether on an adjourned date or not and whether he has taken time to produce any particular evidence or not, the provisions of O. XVII, r. 2, C. P. C., become applicable.

A Court by purporting to decide a case before it as a *contested case*, where, *as a matter of fact*, the contest has ceased owing to the absence for the time being of a party, cannot deprive the absent party from showing to the Court that he had a very good reason for his absence.

Where a defendant has filed a written statement denying some of the allegations of the plaintiff and issues have been framed on the pleas raised, the Court is bound to consider the issues and decide them even if the proceedings are *ex parte*. **A** GANESHI LAL-HARNARAIN *v.* DEBI DAS, (1925) A. I. R. (A.) 267; 47 A. 140 **470**

——— **O. XXI, r. 2**—*Satisfaction of decree, application to record—Receipt given by decree-holder—Discretion of Court.*

Where a judgment-debtor has obtained from the decree-holder a receipt reciting satisfaction of the decree on a promise by the former which he has never attempted to discharge, it is within the discretion of the Court to refuse to record satisfaction of the decree under O. XXI, r. 2 of the C. P. C. **M** GANGADHARA MUDALIAR *v.* EKAMBARA MUDALIAR, 20 L. W. 849; (1925) A. I. R. (M.) 206 **676**

Civil Procedure Code—1908—contd.

——— **O. XXI, r. 36.** *See* RANGOON SMALL CAUSE COURT ACT, ss. 17, 23 **501**

——— **O. XXI, r. 90.** *See* HINDU LAW **1014**

——— **O. XXI, r. 90.** *See* LIMITATION ACT, 1908, s. 18 **622**

——— **O. XXI, r. 90**—*Court sale, setting side of—Low price—Onus of proof.*

On an application to set aside a Court sale under O. XXI, r. 90, C. P. C., it is necessary to prove that there was material irregularity or fraud in publishing or conducting the sale and that the irregularity or fraud so proved caused substantial injury to the parties who seek to set aside the sale, the onus of proof being on the person seeking to set aside the sale. The mere fact that the price fetched under the sale is low is by itself no ground to set aside the sale unless there has been irregularity or fraud by reason of which the price fetched was low. **M** GANAPATHI PILLAI *v.* MALAIPERUMAL CHETTIAR, 20 L. W. 736; (1925) A. I. R. (M.) 202 **342**

——— **O. XXI, r. 90**—*Execution of decree—Sale, proceeding to set aside—Sale, whether can be set aside by compromise.*

The procedure for setting aside an execution sale is prescribed in O. XXI, r. 90 of the Civil Procedure Code and it is not open to the parties to adopt any other method of having the sale set aside.

An execution sale cannot be set aside by a compromise between some of the parties to the proceeding in which the sale took place in the absence of the remaining parties. **C** BHUPENDRA NATH LASKAR *v.* RAI CHARAN PURKAIT **529**

——— **O. XXII, r. 2**—*Appeal—Death of one of several respondents, effect of—Abatement.*

Where during the pendency of an appeal by the plaintiff in a suit for ejectment against several sets of tenants who hold distinct plots of land which are separately described in the plaint, some of the tenant respondents die and their legal representatives are not brought on the record within the period of limitation, the appeal does not abate *in toto*, it abates only with respect to the interests of the deceased tenants and those respondents who were joint with the deceased respondents. **C** GOPIKA RAMAN ROY *v.* ATAL SINGH **678**

——— **O. XXII, r. 3, O. XLI, r. 4**—*Partnership suit—Decree against partners—Appeal—Legal representative of deceased appellant not brought on record, effect of—Abatement.*

Ordinarily, to a partnership action, all the partners must be made parties, since an account cannot be taken in the absence of any partner. A plaintiff, therefore, in a partnership action is liable to have his suit dismissed if he does not make all the partners parties to his suit.

Where, however, plaintiff prays for and obtains a decree for a lump sum against all the other partners of the firm, the defendants putting forward a common case, and there are no disputes among the latter themselves or any rights or obligations to be determined or adjusted, *inter se*, the omission in an appeal by the defendants, to bring on record the legal representatives of one of the deceased appellants is not fatal to the sustainability of the appeal. **M** GANGULU NAIDU *v.* NAMINENI CHENGAMA NAIDU, 47 M. L. J. 871; (1925) A. I. R. (M.) 237 **397**

——— **O. XXII, r. 4**—*Appeal—Death of respondent—Legal representative, failure to substitute—Abatement.*

Civil Procedure Code—1908—contd.

Where in an appeal against a joint decree the appellant fails to bring on the record the legal representatives of one of the joint decree-holders who dies during the pendency of the suit, the appeal abates under O. XXII, r. 4 of the C. P. C., as against the heirs of the deceased decree-holder only, but the result of such abatement is that the appeal becomes imperfectly constituted and, in the absence of a necessary party, the Court cannot proceed to decide the appeal on the merits. A DAYA RAM OJHA v. RAM NARAIN 563

——— O. XXII, r. 4—*Death of some of several defendants—Abatement, extent of—Application to set aside abatement—Procedure.*

Where some of the defendants to a suit die during the pendency of the suit and their legal representatives are not brought on the record within limitation, but an application is subsequently made for setting aside the abatement, it is desirable that the case of each of the deceased defendants should be dealt with on its merits and that it should be held with regard to each of them whether the suit has abated and if so, whether there is no just cause for setting aside the abatement.

In a suit for ejectment against several tenants some of the defendants died during the pendency of the suit and their legal representatives were not brought on record within limitation. It was found that in their written statements the defendants had stated with precision exactly what plots they were individually and separately in possession of, so that it was possible to grant to the plaintiff, if he succeeded on the merits, a decree for ejectment with regard to specific plots against each set of tenants:

Held, that under the circumstaces the result of the death of some of the defendants was that the suit had abated with regard to the interests of the deceased defendants alone and could be proceeded with with respect to the interest of the surviving defendants. C TARA PRASANNA SINGH v. RANJIT LAL 553

——— O. XXII, r. 4—*Pre-emption suit, appeal in—Death of one of respondents—Appeal, whether abates—Payment of consideration money, effect of.*

Where, in a pre-emption suit, the vendee appeals against a decree allowing the claim of four plaintiff-pre-emptors, and the appeal is decreed in ignorance of the fact that one of the respondents was dead, and the suit is dismissed, the whole appeal abates and consequently the appellate decree is a nullity.

The fact that the consideration money has been paid by all the pre-emptors jointly without specification of shares in terms of the decree of the Court of first instance, in the said Court, before the appeal is heard, makes no difference, so far as the question of abatement is concerned. A WAJID ALI KHAN v. PURAN SINGH, 22 A. L. J. 994; L. R. 6 A. 39 Civ.; (1925) A. I. R. (A.) 108; 47 A. 100 66

——— O. XXII, r. 4, *scope of—Death of party—One of several legal representatives already on record—Suit, whether abates—Belated knowledge of death of deceased—Abatement, when can be set aside.*

The fact that one of the legal representatives of a deceased respondent is already on the record, but not as such, does not relieve the appellant from the duty of applying for the substitution of the legal representatives of the deceased.

Rule 4 of O. XXII, C. P. C., does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement.

The Court will set aside an abatement where it appears that the appellant lives at a distance from the residence of the deceased respondent and the application is made within time from the date of the knowledge of the death of the deceased. Pat LILO SONAR v. JHAGRU SAHU, 3 Pat. L. R. 97; 3 Pat. 853; (1925) A. I. R. (Pat.) 123; 6 P. L. T. 313 25

——— O. XXII, rr. 4, 9. *See* C. P. C., 1908, s. 107 197

——— O. XXII, rr. 4, 9, O. XLIII, r. 1 (k)—*Appeal—Death of respondent—Application for substitution not filed within limitation—Procedure—Order refusing application filed after expiry of period—Appeal, whether lies—Ignorance of death—Negligence and delay, absence of.*

When during the pendency of an appeal a respondent dies and no application for substitution of his legal representatives is made within the period prescribed by law, the appeal abates automatically under the provisions of O. XXII, r. 4 of the C. P. C., and an application which is thereafter made for substitution of the legal representatives of the deceased must be treated as an application for setting aside the abatement and then for substitution. An order rejecting such an application is open to appeal under the provisions of O. XLIII, r. 1 (*k*) of the Code, which is applicable to the abatement or dismissal of an appeal as well as to the abatement or dismissal of a suit.

Once the respondents to an appeal are served with notice of the appeal it is not the duty of the appellant to be on the lookout and to be always enquiring as to whether the respondents are alive or dead.

One of the respondents to an appeal who was a *pardanashin* lady residing in the interior of a district other than that in which the appellant lived and who had been served with notice of the appeal, died before the appeal came on for hearing, and an application for substitution of her legal representatives was made after the expiry of the period prescribed for such an application. The appellant alleged that he had become aware of the death of the respondent only a week before the application was made:

Held, (1) that the application must be treated as an application to set aside the abatement under O. XXII, r. 9 of the C. P. C., as the appeal had abated automatically on the expiry of the period prescribed for making an application for substitution;

(2) that under the circumstances of the case the abatement should be set aside as the appellant had not been guilty of any negligence or delay. Pat HARI SARAN SINGH v. MOHAMMAD ERADAT HUSSAIN, 2 Pat. L. R. 279; (1925) A. I. R. (Pat.) 162 1010

——— O. XXII, r. 9—*Suit against defendant through trustee—Appeal by defendant himself—Expenses, payment of, by trustee—Death of appellant—Failure to bring legal representative on record—Abatement.*

A suit against one *D*, through one *M* the trustee of *D*'s estate, having been decreed, *D* himself filed an appeal through Counsel but died during the pendency of the appeal and no one was brought on the record as his legal representative. *M* paid the expenses of the appeal and an application was made on his behalf stating that the suit had been against the estate of *D* and that the appeal also had been filed on behalf of that estate and praying that *M* may be shown in the appeal as representing the estate. *M* was not,

however, brought on the record as a party to the appeal. At the hearing, an oral application was made on behelf of *M* that *N*, the son of *D*, should be brought on the record as the legal representative :

Held, (1) that as *D* alone had preferred the appeal and nobody had been brought on the record as his legal representative, the appeal had abated :

(2) that the payment of the expenses of the appeal by *M* did not necessarily make him a party ;

(3) that the application for bringing *N* on the record was untenable, having been made after the lapse of a considerable time since the death of *D*. **L** DAULAT RAI *v.* LILA RAM, (1923) A. I. R. (L.) 470 **82**

——— **O. XXIII, r. 1**—*Application for leave to withdraw suit with liberty to bring fresh suit, disposal of—Procedure.*

Where an application is made for leave to withdraw a suit with liberty to bring a fresh suit, but the Court sees no reason to grant such leave, it should simply refuse the application and proceed with the suit, or give the plaintiff an opportunity of accepting or refusing an unconditional withdrawal. It has no jurisdiction to pass an order on such application granting leave to withdraw the suit but refusing leave to bring a fresh suit. **A** NATHJI *v.* LANGURIA, L. R. 6 A. 62 Civ.; (1925) A. I. R. (A.) 272 **548**

——— **O. XXIII, r. 3**—*Compromise by some of parties to suit—Court. whether can reject compromise.*

Where some only of the parties to a suit join in a petition of compromise the other parties are entitled to object to the compromise being recorded, and if they show good cause the Court has discretion to refuse to grant a decree in terms of the compromise. **C** GOPIKA RAMAN ROY *v.* ATAL SINGH **678**

——— **O. XXX, r. 10**—*Suit against firm, nature of—Person carrying on business under another name, suit against—Defendant dead at time of suit.*

There is no such thing as a firm known to the law.

A suit against a firm is essentially a suit against the partners constituting the firm. If a suit is brought against a firm in the firm's name and a decree is passed for the plaintiff, it is a decree against all the partners constituting the firm assuming that they were all alive at the date of the suit and decree. If a partner dies before suit and the suit is against the firm in the firm's name, the suit is one solely against the surviving partners and judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets.

When a person carries on business in a name other than his own and a suit is brought against him in the name in which he carries on business, the suit is essentially one against him and he is the sole defendant in the suit. If he dies before suit, and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person. **B** RAMPRATAB BRIJMOHANDAS *v.* GAVRISHANKAR KASHIRAM, 25 Bom. L. R. 7; (1924) A. I. R. (B.) 109 **464**

——— **O. XXXIV, r. 1**—*Transfer of Property Act (IV of 1882), s. 91—Attaching creditor—Right of redemption.*

The statutory right given by cl. (*f*) of s. 91 of the Transfer of Property Act can be exercised only by a judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property, but an auction-purchaser in execution of such a decree sheds his character as attaching creditor by such a purchase and is not entitled to redeem.

In O. XXXIV, r. 1, C. P. C., the expression "having an interest either in the mortgage security or in the right of redemption" does not include a person who has a mere statutory right to redeem given to him under cl. (*f*) of s. 91 of the Transfer of Property Act, and the expression "in the right of redemption" means and refers only to an interest in the estate itself which is called the equity of redemption. **M** SUBRAMANIA CHETTIAR *v.* SINNAMMAL, 20 L. W. 761; (1925) A. I. R. (M.) 266 **312**

——— **O. XXXIV, r. 6.** *See* HINDU LAW **963**

——— **O. XXXIV, r. 6.** *See* PROVINCIAL INSOLVENCY ACT, 1907, ss. 24, 44 **543**

——— **O. XXXIV, r. 11**—*Redemption suit—Decree for possession and recovery of surplus profits—Execution of decree barred—Fresh suit, whether lies.*

Where in a suit for redemption of a usufructuary mortgage the plaintiff alleges that the mortgage has been satisfied out of the usufruct and he claims possession of the property and of the surplus amount received by the mortgagee out of the profits, and a decree is passed for possession and the surplus amount, the decree is purely one for recovery of possession and recovery of money. After the passing of such a decree the rights of the mortgagor and mortgagee become merged in the decree and the mortgage is no longer subsisting. The mortgagor's remedy in such a case is to take possession of the mortgaged property by execution of the decree and to realise the surplus by execution. If he allows this remedy to become barred by time it is no longer open to him to evade the Law of Limitation and bring a new suit for redemption with a view to seek the same relief. **A** SURAJPAL SINGH *v.* SAHIB SINGH, L. R. 6 A. 104 Civ.; (1925) A. I. R. (A.) 323 **749**

——— **O. XXXVIII, r. 6**—*Suit on mortgage—Attachment before judgment, application for—Properties other than mortgaged properties, whether liable.*

Where it appears in a suit on a mortgage that the mortgaged property is not a sufficient security and the mortgagee will have to claim a personal decree eventually, he can obtain attachment before judgment of properties other than the mortgaged properties if he satisfies the Court that circumstances entitling him to such an attachment exist **Pat** JOTIRMOYEE DEBI *v.* RAGHUNATH PATHAK, 3 Pat. 966; (1925) Pat. 63; (1925) A. I. R. (Pat.) 291 **94**

——— **O. XXXIX, r. 1 (b)**—*Injunction—Plaintiff, what must prove.*

No injunction can be granted under O. XXXIX, r. 1 of the C. P. C. unless the plaintiff proves by definite evidence that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors. **L** KALIAN SINGH *v.* SHANNO, (1924) A. I. R. (L.) 718; 6 L. L. J. 298 **88**

Civil Procedure Code—1908—contd.

——— **O. XL, r. 1**—*Receiver, appointment of—Mortgage-suit—Right to receive rents and profits, whether essential.*

Sub-rule (2) of r. 1 of O. XL of the C. P. C. refers to the case of removal of a person other than a party to the suit, and it does not debar the Court from removing one of the parties to the suit from the possession of the property.

There is nothing in r. 1 of O. XL of the C. P. C., which excludes mortgage-suits from its operation and a Receiver can, therefore, be appointed in a mortgage-suit.

Order XL, r. 1 of the C. P. C. gives the widest power to a Court to appoint a Receiver of any property whenever it appears to the Court to be just and convenient. The existence in the plaintiff of a right to receive rents and profits is not an essential prerequisite for the exercise of this power.

A Receiver can be appointed in a mortgage suit where the security is insufficient for the realisation of the decree by its sale alone. **L** PARAS RAM *v.* PURAN MAL-DITTA MAL, 1 L. C. 21 **737**

——— **O. XL, r. 1**—*Receiver, appointment of—Suit for partition—Party to suit when can be appointed.*

It is a settled rule that one of the parties to the cause shall not be appointed Receiver without the consent of the other party unless a very special case is made.

This rule is no doubt subject to exception in partnership and partition cases but the exception is limited to such cases where there is no charge of misconduct against a party and it is not unsafe to trust him. **Pat** BHAGWAN DAS *v.* SHEONANDAN PRASAD SAHU, 3 Pat. 961; (1925) A. I. R. (Pat.) 293 **93**

——— **O. XL, r. 4.** *See* C. P. C., 1908, s. 47 **161**

——— **O. XLI, r. 5.** *See* REGISTRATION ACT, s. 77 **192**

——— **O. XLI, r. 17**—*Counsel instructed to apply for adjournment—Adjournment refused—Dismissal of appeal, nature of—Appeal, whether lies.*

The mere attendance in Court of a Counsel on behalf of the appellant who is not prepared to argue the case does not amount to an appearance of the appellant within the meaning of O. XLI, r. 17 of the C. P. C., and the consequent dismissal of the appeal must be regarded as a dismissal in default and is not open to appeal.

A Counsel on behalf of an appellant made an application for adjournment of the hearing of the appeal and on the adjournment being refused stated that he was not in a position to argue the appeal. The Court then referred to the judgment of the lower Court as clear and well-reasoned and remarked that there was nothing on the face of it to suggest that any mistake had been made either in law or in fact. It wound up with the remark "The appellant's Counsel being unable to argue the appeal I have no alternative, therefore, but to dismiss the appeal with costs:"

Held, that the order dismissing the appeal was really one dismissing it in default and was not appealable. **O** MURLIDHAR *v.* FAQIR BAKHSH, 10 O. & A. L. R. 1419; 1 O. W. N. 736; 28 O. C. 166 **811**

——— **O. XLI, r. 27**—*Appeal—Additional evidence, admission of—Discretion of Court.*

Both under the general law and under O. XLI, r. 27 of the C. P. C., an Appellate Court may for a substantial cause, admit additional evidence in appeal, but the question is one of discretion. **Pat** JITAN DUSADH *v.* JAWAHIR SINGH, (1925) A. I. R. (Pat.) 504 **459**

Civil Procedure Code—1908—contd.

——— **O. XLI, r. 27**—*Appeal—Additional evidence, admission of—Evidence, whether can be admitted on application of party—Procedure.*

Under O. XLI, r. 27, C. P. C., an Appellate Court has power to receive additional evidence in appeal not merely of its own motion but also on the application of parties.

When the application is by a party to receive additional evidence, the Appellate Court can make an order upon the application even without hearing the appeal, although in most cases it would be desirable to hear the application and the appeal together if possible. **M** BRAHMA SUBBAYA *v.* KANALA, 20 L. W. 840; 48 M. L. J. 32; (1925) A. I. R. (M.) 181 **385**

——— **O. XLI, r. 27**—*Appeal—Additional evidence, admission of—Reasons recorded in judgment.*

Where an Appellate Court does not record at the time when it admits additional evidence, the reasons for the admission of such evidence, but records those reasons in its judgment, this amounts to a substantial compliance with the provisions of O. XLI, r. 27 of the C. P. C. **A** RAM CHARAN *v.* LAL BIHARI **676**

——— **O. XLI, r. 33.** *See* POSSESSION, suit for **95**

——— **O. XLI, r. 33**—*Appellate Court, powers of—Grounds for varying decree under appeal.*

Per *Fawcett, J.*—Under O. XLI, r. 33, C. P. C., the Appellate Court has power to vary the decree under appeal, not only for error, but also on grounds which have come into existence since it was passed. **B** SHANKARBHAI MONOHARBHAI *v.* MOTILAL RAMDAS SAHA, 26 Bom. L. R. 1217; (1925) A. I. R. (Bo) 122; 49 B. 118 **197**

——— **O. XLI, r. 33**—*Appellate Court, powers of—Interference in favour of non-appealing respondent—Principles applicable—Discretion of Court—Grounds for not filing appeal.*

The powers of the Appellate Court under O. XLI, r. 33, C. P. C., may be exercised notwithstanding that the appeal is as to part only of the decree. They may be exercised in *favour* of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or memorandum of objections, but not *against* a party not before the Appellate Court, without hearing him and without affording him an opportunity to show cause or argue against it.

Where a respondent when called upon to support the judgment of the lower Court supports it, or is able to do so, not on the ground on which the lower Court has based it, but on more fundamental grounds which may go to the very root of the case of the appellant, it becomes necessary for the Court of Appeal for the purpose of deciding the appeal to give its decision on those more fundamental grounds. If in coming to a conclusion on such fundamental grounds, the Court finds that the result of giving effect to its decision on the fundamental question or questions involved would be to render illogical or illegal that portion of the decision of the lower Court which has not been appealed against, then subject to the Court not making an order against a party behind his back the Court is empowered to make the decision as a whole logical and consistent. The question, however, is one for the judicial discretion of the Court. In any case in which there are grounds justifying a party in not filing an appeal or memorandum of objections, judicial discretion may properly be exercised in his favour.

Where a party does not file an appeal or memorandum of objections against the decree owing to

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judicial authorities being against him, which authorities are subsequently overruled, there is sufficient excuse for not filing the appeal or memorandum of objections.

The provisions of r. 33 of O. XLI, C. P. C. should not be read and construed as subject to the provisions of r. 22 of the said Order and the Court Fees Act, Limitation Act, etc., **M** SUBRAMANIA CHETTIAR *v.* SINNAMMAL, 20 L. W. 731; (1925) A. I. R. (M.) 266 **312**

——— **O. XLVII, r. 1**—*"Error apparent on the face of the record," scope of—Judgment delivered by putting wrong construction on Privy Council decision—Review, whether justified—Court, power of.*

The words "error apparent on the face of the record" in O. XLVII, r. 1 of the C. P. C. are wide enough to cover a case where judgment has been given by putting a wrong construction on a decision that the Court was bound to follow and imagined that it was following, and the Court is, in such circumstances, justified in granting a review of its previous judgment.

In granting an application for review the Court can, in addition to setting aside the judgment under review, deliver another judgment on the merits. **C** BRINDABAN CHANDRA GHOSH *v.* DAMODOR PROSAD PANDAY, 29 C. W. N. 148; (1925) A. I. R. (C.) 301 **65**

——— **O. XLVII, r. 1**—*New evidence, requirements of—Other sufficient cause—Petition for review, whether can be admitted.*

Where the new evidence relied on by a petitioner for review does not comply with the requirements of O. XLVII, r. 1 of the C. P. C. the petition for review cannot be admitted on the ground of other sufficient reason. **A** RAM NARESH SINGH *v.* JAGAR NATH SINGH, (1924) A. I. R. (A.) 759; L. R. 5 A. 392 Civ. **180**

——— **O. XLVII, r. 1**—*Review, grounds for—Point considered and decided—Error, whether ground for review.*

When a point of fact or law has been brought to the notice of the Court trying the case and has been referred to in its judgment and decided by it, no ground for review is furnished by the fact that such decision is considered erroneous by the party against whom it was given. **O** MADHO PRASAD *v.* SUKH DIN, 10 O. & A. L. R. 1044 **752**

Colonization of Government Lands (Punjab) Act (V of 1912), s. 19. *See* TRANSFER OF PROPERTY ACT, 1882, s. 68 **802**

Companies Act (VII of 1913), ss. 162, 163—*Petition for winding up—Disputed debt, enforcing of—Abuse of process of Court.*

A petition for winding up of a Company which is put in by a creditor in order to obtain an unfair advantage over other creditors at a time when the Company is not known to be insolvent or with a view to bring pressure to bear upon the Company and enforce payment of a disputed debt amounts to an abuse of the process of the Court and should be dismissed. **M** PYDA SATYARAJU *v.* GUNTUR COTTON, JUTE & PAPER MILLS CO., 47 M. L. J. 710; 21 L. W. 136; (1925) A. I. R. (M.) 199 **333**

——— **ss. 229, 230, 233**—*Presidency Towns Insolvency Act (III of 1909), s. 52—Floating charge created by Company—Applicability of s. 52—Agent for sale—Liquidation—Principal whether has priority—Debt before conversion into limited Company, whether binding.*

Section 52 of the Presidency Towns Insolvency Act has no application to cases of floating charges created by a Company which has since gone into liquidation.

Where it appears that a Company in liquidation had acted as agents for sale of goods under an agreement by which goods were to be sold by the Company and the sale-proceeds were to be paid over to the principal and the unsold goods returned to the principal, the principal has priority in respect of the unpaid price of goods.

The liability of a Company incurred before it was turned into a limited Company and not undertaken by the latter, cannot be discharged by the limited Company on its liquidation. **M** *In the matter of* MORRISONS (INDIA) LTD., 20 L. W 861; (1925) A. I. R. (M.) 271 **626**

——— **s. 235,** *scope of—Contract of tenancy between Company and Director—Arrears of rent, whether recoverable.*

Section 235 of the Companies Act is intended to provide a summary procedure for the recovery of money or property misapplied or retained by a Director or other Officer of the Company or money or property which such Officer or Director has become liable for by misfeasance or breach of trust in relation to the Company. It is not in terms meant to be applied for the purpose of enforcing sums due under contracts between the Company and other persons, whether such persons happen to be Directors or not.

Therefore, the provisions of s. 235 of the Companies Act cannot be invoked for the purpose of enforcing payment for the arrears of rent due by a Director to a Company. **L** SRI RAM *v.* NUR MUHAMMAD, 5 L. 461; (1925) A. I. R. (L.) 194 **126**

Compromise—*Consent given under misapprehension—Court, power of, to refuse to act on compromise—Counsel, power of, to compromise, limits on.*

Where a decree has once been passed and entered on a compromise, a fresh action is necessary to have the compromise set aside. But before a decree is passed there is power in the Court to refuse to put its seal on what has been done under some misapprehension as to the true state of affairs.

Where no limitation is placed on Counsel's authority, he may bind his client by agreeing to a compromise. If, however, Counsel is only empowered to compromise on certain terms, he is thereby impliedly prohibited from settling on other terms, and if notwithstanding that prohibition, he does effect a settlement on such other terms, that settlement does not bind his client. **B** JAMSHEDJI NAOROJI *v.* SORABJI NAOROJI, 25 Bom. L. R. 1137 **504**

——— decree. *See* C. P. C., 1908, s. 96 (3) **168**

——— *Undue influence and coercion—Decree based on compromise challenged—Procedure.*

The proper remedy in a case where a decree passed in accordance with a compromise is assailed on the ground of undue influence, coercion and compulsion is not by way of motion or application for review of judgment but by a regular suit to set aside the decree. **A** DWARKADHISH PRASAD SINGH *v.* KESHAVA PRASAD SINGH, L. R. 6 A. 26 Civ.; (1925) A. I. R. (A.) 266 **557**

Construction of document. *See* VENDOR AND PURCHASER **1038**

——— *Document to be read as a whole—Court, duty of—Intention of parties, conjectures as to, not permissible.*

Construction of document—contd.

It is a cardinal principle of construction that a deed must be read as a whole and that it must be read as far as possible so as to make the different clauses which it contains consistent with each other.

The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. **A** GULZARI LAL *v.* HAR PRASAD, L. R. 5 A. 260 Civ.; (1925) A. I. R. (A.) 97 **99**

——— *Gift—Estate taken—Principles applicable.*

Where the question arises as to the *quantum* of estate conferred upon the donee by a deed of gift the construction of the document essentially depends on the words used therein and the special circumstances under which it came into existence. The true guide in all cases is the intention of the donor to be discovered from the language used by him. If the words employed are clear and unambiguous, whether the donee is a male or a female, effect must be given to their plain meaning.

When the operative words of a document are clear and unambiguous, the fact that in the later part of the document there are additions or omissions cannot warrant the deed being construed in such a way as to render the operative words ineffective.

A deed of gift ran as follows:—"Deed of gift executed in favour of *M*. daughter of *R*..... .....As we have this day gifted away to you and put you in possession of the following..... .....you and your male issue shall enjoy the said lands with all kinds of rights.....you shall yourself pay the *Sircar kist* due for the lands. To this effect we have executed this deed of gift in favour of *M*:"

Held, (1) that *M*. took an absolute estate in the property gifted and the deed did not operate to convey any interest in favour of any one else;

(2) that the provision about enjoyment with regard to the male issue must be regarded as an idle attempt to derogate from the grant and did not vest any interest in the male issue. **M** NAGARAJA IYER *v.* NATESA IYER **993**

——— *Language of document not in suit, whether can be considered.*

To construe the words of a particular document which is in suit, the language of other documents not in suit cannot be called in aid. **C** PRASANNA KUMAR RAY *v.* ARUN CHANDRA SINGHA, 29 C. W. N. 353; (1925) A. I. R. (C.) 656 **693**

——— *Mortgage—Deed of further charge—Redemption, suit for, by transferee of mortgagor—Amount payable on redemption.*

The predecessor-in-title of the plaintiff mortgaged the property in suit to the defendant for a certain sum. Sometime afterwards the mortgagor executed a second deed in favour of the mortgagee which was described as a *tamasuk zar mazid* and provided that at the time of redemption the money due under it shall first be paid and then the original mortgage money, and that until this money was paid neither the mortgagor nor his heirs would be entitled to redemption. No details of the property were given in the deed but a reference was made to the previous mortgage deed and to the description of the property contained in it. In a suit for redemption by the plaintiff:

Held, that no further charge on the mortgaged property was created by the subsequent deed, and that the original mortgagor was only under a personal liability to pay the amount due under that deed, which did not involve the plaintiff, who was a transferee from the original mortgagor, in any liability, and that the plaintiff was, therefore, entitled to redeem the property on payment of the amount due under the original mortgage-deed. **O** KANDHAIYA BAKHSH *v.* RAM CHARITAR, 10 O. & A. L. R. 1065; 1 O. W. N. 678 **328**

——— *Sale of* zemindari—*Maintenance granted in perpetuity to vendor—Charge on property*—Khewat, *entry in, value of.*

A *zemindar* sold his *zemindari* to the defendant and, after the sale was completed, the defendant executed a document in favour of his vendor whereby, in consideration of the sale having been made to him, he agreed to pay to the vendor and his descendants a certain sum as maintenance in perpetuity. The vendor sold the right of maintenance to the plaintiff who brought a suit to recover arrears of maintenance as *nankar* from the defendant. At the time when the agreement for maintenance was executed the allowance was entered in the *khewat* as *nankar* and was treated as an inferior and under-proprietary right. In column 5 it was also described as being "*mustasna az bai*:"

Held, (1) that the agreement did not create a charge on the property sold and that no order could be made for the payment of the maintenance out of the profits of the *zemindari*;

(2) that the value to be ascribed to the entry in the *khewat* was that of *contemporanea ex positio* and nothing higher and that the construction of the agreement itself being clear the Courts could not be compelled to follow a contemporaneous but incorrect construction adopted in the *khewat*. **O** CHHOTEY LAL *v.* IQBAL NARAIN, 10 O. & A. L. R. 1203; L. R. 6 A. (O.) 28 **331**

Contract Act (IX of 1872), s. 11. *See* U. P. COURT OF WARDS ACT, 1899, ss. 9, 15, 34 **409**

——— **s. 11**—*Contract of sale by minor—Suit for cancellation of sale—Decree conditional on re-payment—Court, equitable power of—Test.*

Notwithstanding the fact that a contract of sale entered into by a minor has been declared to be destitute of legal effect, the Court has the equitable power wholly distinct from the existence of a contractual or non-contractual relation of the parties, to make a decree for cancellation of the sale-deed conditional upon re-payment of the purchase-money. In each case the test must be the conduct of the parties.

The very request for equitable relief puts upon the Court the obligation of looking carefully into the conduct of the petitioner in each case. **A** MUHAMMAD SAID *v.* BISHAMBHAR NATH, 21 A. L. J. 586; 45 A. 644; (1924) A. I. R. (A.) 156 **79**

——— **s. 17.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 55 **597**

——— **s. 23.** *See* TRANSFER OF PROPERTY ACT 1882, ss. 6 (*h*) 53 **459**

——— **s. 23**—*Bond executed in consideration of debt due and withdrawal of prosecution, legality of—Public policy.*

Where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a bond given by the debtor as security for the debt constitutes a valid and enforceable agreement.

Contract Act—contd.

Where there is good consideration for a bond, the mere fact that the creditor on recovering the bond gave up a non-compoundable criminal prosecution against the debtor does not invalidate the agreement contained in the bond to pay a debt which was justly due. L RAM GOPAL v. GANESHI LALL, (1925) A. I. R. (L.) 364 **610**

——— **ss. 23, 65**—Chit *fund transaction—Lottery —Suit for refund of amount paid, maintainability of.*

A *chit* fund conducted by the defendant consisted of 500 tickets, of a rupee each, and was to continue for 50 months. Two prizes to be of Rs. 25 each were to be drawn each month; a winner of one prize in the series paid annas 8 only as monthly subscription after winning; a winner of two prizes paid nothing subsequently. The prize winners were to be determined by lot. At the end of the 50 months, all the subscribers who had won no prizes were to be paid back the whole of the money they had subscribed, namely, Rs. 50 each. The fund was discontinued after 27 months. Plaintiff, who was one of the subscribers sued to recover the amount of the subscription paid by him:

Held, Per *Krishnan, J.*—(1) that the arrangement regarding the giving of prizes was clearly a lottery, and any suit brought, to recover the prize money, must fail as being one to enforce an illegal contract;

(2) that, however, the main contract between the parties was to pay back the total sum of the subscriptions collected intact in a lump sum at the end of the period, the prize arrangement being added on to it as a collateral arrangement to the main contract;

(3) that the contract to re-pay the subscriptions at the end of the period was separable from the arrangement to give prizes and the illegality of the latter did not necessarily attach to the former;

(4) that the suit was, therefore, maintainable.

Per *Odgers, J.* (*Contra*).—(1) that the *chit* fund was a lottery or distribution of prizes by lot or chance and was, therefore, illegal under the law;

(2) that part of the plaintiff's subscriptions had gone in paying the prize winners and the lottery could not and ought not to be separated from the contract to return the subscription at the end of the period fixed;

(3) that there having been a partial carrying into effect of an illegal purpose in a substantial manner, though there remained something not performed, the money paid under the illegal contract could not be recovered back;

(4) that s. 65 of the Contract Act was inapplicable to the case. M NAGAPPA PILLAI v. ARUNCHALAM CHETTY, 47 M. L. J. 876; (1925) A. I. R. (M.) 281 **1016**

——— **s. 24.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 68 **802**

——— **s. 30**—*Contract for sale of cotton—Stipulation to pay profit or loss in case of failure to take delivery—Construction—Intention of parties.*

In a suit to recover damages for breach of contract entered into by the plaintiff with the defendant's father, it appeared that the contract was for the sale of cotton which the plaintiff was in a position to give delivery of, if the defendant was ready to take delivery on the due date, and that certain silver *todas* were given as earnest for the fulfilment of the contract by the defendant. The contract further provided that if the defendant failed to take delivery he was to pay the loss according to the prevailing market rate and he was to get the profit if the price was above that agreed upon between the parties:

Held, that the contract was not a wagering transaction as there was no intention on the part of the parties not to give or take delivery or to deal in difference only.

Per *Fawcett, J.*—The onus of establishing the plea that the contract sued on is a wagering one falling under s. 30 of the Contract Act is on the defendant.

Where plaintiff's conduct is shown to be otherwise unexceptional the Court should lean towards a construction favouring the validity of the contract rather than its illegality. B BALVANT VISHNU v. MISHRI LAL, 26 Bom. L. R. 1194; (1925) A. I. R. (B.) 115 **177**

——— **s. 30**—*Suit to recover money as price of shares sold—Wagering contract—Burden of proof.*

Where in a suit for money alleged to be due on account of shares sold by the plaintiff to the defendant upon the Stock Exchange, the defendant pleads that the transaction was a dealing in differences and partook of the nature of a wagering contract, the onus of proving that there was a mutual understanding that shares should not be delivered lies upon the defendant who asserts the same, and the onus is particularly heavy where both parties are themselves members of the Stock Exchange, for the reason that it is of the nature of dealings between stock-brokers that they should settle differences periodically between themselves on a settling day and pay the balances due and that shares should not be actually transferred between the two as they would be between a member of the Stock Exchange who sells shares and a member of the public who purchases them. M G. SIRUR v. A. M. BHAMIA, 20 L. W. 971; (1925) A. I. R. (M.) 320 **410**

——— **s. 37**—*Transfer of Property Act (IV of 1882), s. 40—Contract of pre-emption—Time for performance not limited—Contract, whether can be enforced against representatives of parties.*

Per *Lindsay, J.*—The obligation which arises under a contract subsists until the contract is performed or until non-performance of it is excused or justified under operation of law.

A contract for pre-emption is enforceable between the representatives of the parties if the parties have died before performance, and having regard to s. 40 of the Transfer of Property Act, the contract is enforceable against a person who has taken property affected by the contract with notice of the contract or who has taken it gratuitously.

A contract for pre-emption is not void or unenforceable merely because no time is limited for performance.

Per *Sulaiman, J.*—It is of the essence of a contract that the liabilities which it imposes must be imposed on definite persons within a definite time, and the rights created by it must of themselves be definite. By a definite time is meant a period not unlimited in its duration. If a contract is supposed to bind an indefinite class of persons, generation after generation and to bind them for an indefinite length of time, it completely loses its character of an obligation *in personam*. If no period of time is fixed by the parties themselves, the Court would not be justified in filling up the gap and fixing a time which it considers reasonable.

Under the provisions of s. 37 of the Contract Act a contract of pre-emption can be enforced against the

personal representatives of the promisor in case of his death before performance, unless a contrary intention appears from the contract, but where a contract does not specify any period of time within which it has to remain in force, it is too vague, indefinite and uncertain to be capable of being enforced except in the lifetime of the parties thereto. A MOHAMMAD JAN v. FAZAL UDDIN, 22 A. L. J. 400; 46 A. 514; (1924) A. I. R. (A.) 657; L. R. 5 A. 761 Civ. **482**

——— s. 39—*Repudiation by one party, how long subsists—Anticipatory breach—Intention.*

A repudiation of a contract must be deemed subsisting until it is withdrawn, and, until withdrawn, the other party to the contract is entitled at any time before the date for performance to accept it.

Anticipatory breach of a contract is a matter of intention and the intention of one party to breach the contract must be acted upon by the other party before the contract can be put an end to. L JHANDOO MAL-JAGAN NATH v. PHUL CHAND-FATEH CHAND, 5 L. 497; 7 L. L. J. 19; (1925) A. I. R. (L.) 217 **118**

——— s. 43. *See* C. P. C., 1908, O. IX, R. 8. **788**

——— s. 43—*Contract for purchase of immoveable property—Joint contract by major and minor vendee—Contract, whether can be enforced against major vendee.*

A contract for the purchase of immoveable property entered into by a major and a minor may be enforced against the major alone under s. 43 of the Contract Act, provided there is a joint promise to pay, and the jointness of the transaction may be inferred in a case where although the share of each vendee is specified in the agreement of sale, the portion of the purchase-money to be paid by each vendee is not so specified. L SAIN DAS v. RAM CHAND, 4 L. 334; 5 L. L. J. 469; (1924) A. I. R. (L.) 146 **701**

——— s. 62—*Novation—Parties.*

It is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. M PERI RAMASAMI v. CHANDRA KOTTAYA, 47 M. L. J. 810; (1925) A. I. R. (M.) 261 **297**

——— s. 62—*Novation, what amounts to—New contract illegal, effect of—Old contract, rights under, whether affected—Abandonment, proof of.*

In the case of a novation the consideration for the new contract is the discharge of the old contract.

An agreement enforceable by law is a contract. If an agreement is held or declared by law to be in contravention of the provisions of any Statute, it is not a contract, and, therefore, it cannot serve as *novatio*. What is essential for a novation is the wiping out of the original contract as well as the creation of a new valid contract.

Where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction.

Where the question is whether one party is set free by the action of the other, the matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. The Court requires as clear evidence of the waiver as of the existence of the contract itself and will not act upon less. An abandonment of the old agreement must be clearly made out. There must be clear and precise evidence of a mutual intention to determine and abandon the contract.

Where the intention to substitute a new contract is frustrated by the fact that the new ontract is a nullity, the original contract may be enforceable. Much more so, where the agreement itself is a contravention of the Statute and does not ripen into a contract in the legal sense of the term.

In the absence of proof of an express abandonment, the rights under the old contract cannot be taken away. N GANPAT v. MAHADEO, (1925) A. I. R. (N.) 26 **264**

——— ss. 69, 70. *See* BENAMI TRANSACTION **855**

——— ss. 70, 72. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 41. **549**

——— s. 73—*Contract for lease of immoveable property—Lessor, failure of, to give possession—Damages for breach of contract.*

Where a lessor of immoveable property breaks the contract of lease through inability to give possession, he is legally bound to pay damages to the lessee which must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the lessor liable to damages. L MUHAMMAD ABDUL LATIF v. LADHA RAM, 5 L. 527; (1925) A. I. R. (L.) 262 **421**

——— s. 73—*Sale of goods—Breach of contract by vendee—Vendor, remedy of—Damages, measure of.*

Where a vendor is obliged to re-sell the goods on account of the breach of contract by the vendee to accept and pay for the goods, he (the vendor) is entitled to claim damages to the amount of the difference between the contract-price and the market price on due date. L MEHR CHAND v. FIRM JUGAL KISHORE-GULAB SINGH, 6 L. L. J. 415 **317**

——— ss. 73, 151, 161—*Railways Act (IX of 1890), s. 72—Carriage of goods—Late delivery—Liability of Railway Company—Negligence—Burden of proof—Damages, measure of.*

Under s. 72 of the Railways Act, a Railway Company, in the absence of a special contract between the consignor and the Railway, occupies the position and suffers from the liabilities of a bailee imposed by ss. 151 and 161 of the Contract Act. In such a case the loss or non-delivery in proper time of goods entrusted to the Railway Company for carriage is *prima facie* evidence of negligence and the burden of disproving the negligence lies on the Railway Company, and the latter cannot shake off its statutory liability by pleading pressure of work or avoidable accident.

Where a Railway Company fails to deliver goods in the ordinary course and the goods come to a fallen market, the difference between the market value of the goods at the time they would have been sold if they had been carried according to the contract and their market value at the earliest period at which they could have been brought to the market after delivery to the consignee will be the measure of damages recoverable.

Under the Explanation to s. 73 of the Contract Act in estimating the loss or damage arising from a breach of contract the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Where, for

Contract Act—concld.

instance, delivery of goods is contributed to by the inaction or negligence of the consignor this fact must be taken into consideration in fixing the date with reference to which the market value of the goods must be ascertained for the purpose of assessing damages for late delivery. C FIRM ARJUNDAS HARIRAM *v.* SECRETARY OF STATE FOR INDIA 786

——— **s. 74**—Chit *fund—Bond by* chit *holder to stake-holder—Provision for payment of future instalments on default in payment of one instalment, whether penal.*

Where the holder of a *chit* in a *chit* fund became entitled to a *chit* amount as the bidder of the highest amount of premium, and he executed a bond in favour of the stake-holders for due and proper payment of the future instalments of *chit* and the bond provided that if default should be made in the payment of any one instalment, the whole of the balance due for all the future instalments was to be payable:

Held, that the stipulation as to payment of the whole of the balance was penal and ought to be relieved against.

Where the real agreement between the parties is to the effect that the whole amount is on the date of the bond a debt due, but that the creditor for the convenience of the debtor allows it to be paid by instalments, intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable is not penal. But if, on the other hand, the debt itself is an instalment debt, arising or becoming due or payable by the debtor on the respective dates fixed for the instalments, the stipulation that on default being made in payment of any instalment, the whole of the balance should become due and payable is in the nature of a penalty.

The question whether the parties to a contract treated the amounts for which the bond is given as *debita in præsenti* although *solvenda in futuro* is a question of intention to be gathered from the terms of the document itself.

Scope of s. 74 of the Contract Act and illustrations (*g*) and (*f*) to the section discussed. M RAMALINGA ADAVIAR *v.* MENAKSHISUNDARAM PILLAI, 47 M. L. J. 833; 21 L. W. 54; (1925) A. I. R. (M.) 177 261

——— **s. 74**—*Compound interest, stipulation for, on default of payment of interest—Penalty.*

A bare stipulation to pay compound interest at the rate provided for in the bond on default of payment of interest is not penal. M ANJAPERUMAL KONAR *v.* PICHAMUTHU NADAR, 20 L. W. 968; 47 M. L. J. 910; (1925) A I. R. (M.) 332 394

——— **s. 74**—*Penalty—Interest, higher rate of, payable on default.*

A mortgage-deed provided for the payment of one instalment of principal together with the interest thereon every year, and in default, there was a provision for a certain rate of interest, the default rate being slightly higher than the rate provided for in the body of the document and compound interest was stipulated for:

Held, that having regard to the unusual nature of the document the provision for a higher rate of interest on default was not by way of penalty. M VISHNU CHOTLA VENKATASUBBIAH *v.* TALLAPRAGADA LAKSHMIPATHI, 20 L. W. 801; (1925) A. I. R. (M.) 302 392

——— **s. 200.** *See* PROVINCIAL INSOLVENCY ACT, 1920, ss. 27, 56 439

Contribution, *suit for—Suit against two defendants—Contest by one of them—Contribution, basis of.*

A suit was brought against two defendants by a plaintiff to declare a certain deed to be fraudulent and voidable in consequence. One of the defendants put in a written statement and failed to appear subsequently. The other defendant contested the suit and a decree was passed against both of them. The contesting defendant satisfied the decree as to costs and brought a suit to recover half the amount of the costs from the other defendant:

Held, that the defendant who became *ex parte* after filing his written statement was liable only to contribute costs of the prior suit on the basis of *ex parte* pleadings and not on the basis of contentious pleadings. O MAHARAJ DIN *v.* BALBHADDAR PARSHAD, 10 O. & A. L. R. 1326; 2 O. W. N. 8; 12 O. L. J. 265; (1925) A. I. R. (O.) 403 481

Co-sharers—*Adverse possession—Denial of title, proof of—Recital in previous judgment summarising defence, value of.*

The ordinary presumption of law is that the joint possession of co-sharers is continued until there is some overt act of ouster or separation.

In a suit by a co-sharer for possession of certain property by partition the defendants set up title by adverse possession and in proof of their allegation relied upon a recital in a previous judgment in which the defence was summarised as stating that the plaintiffs had not been in actual possession or receipt of rent of the property:

Held, that in the absence of the written statement of the defendants filed in the previous suit the recital in the judgment summarising the defence could not be relied on as an overt and public denial of the plaintiff's title as co-sharer, inasmuch as it was impossible to say exactly what the assertion made by the defendants in that case was or precisely to what extent they denied the title of the plaintiff and set up title in themselves. O RAM NIDH *v.* JANKI, 10 O. & A. L. R. 937; 1 O. W. N. 674 387

——— *One co-sharer, whether entitled to build on joint land—Suit for demolition and joint possession, maintainability of.*

One co-sharer out of many has no right to build on what is joint land without the consent of the others, and if he does so, the other co-sharers are entitled to sue for the demolition of the building and for joint possession of the site. A RAM LAL *v.* MUHAMMAD AMIR MUSTAFA KHAN, L. R. 6 A. 274 Civ. 849

———, *rights of—Exclusive user, whether justified—Remedy.*

One co-sharer has no justification to change, without the consent of his co-sharers, the state of possession of the joint property as enjoyed by the co-sharers.

Where a co-sharer is unreasonable and obstructs another co-sharer in making beneficial use of the joint property the remedy of the latter is to seek partition and not to take forcible possession of the joint property to the exclusion of his co-sharers. C ASHUTOSH ROY *v.* CHAIRMAN OF THE COMRS., RAMPORE BOALIA MUNICIPALITY, 29 C. W. N. 463 796

Costs—*Separate sets of defendants—Separte sets of costs.*

Where the interests of parties arrayed on the same side are different they are not bound to engage the same Pleaders and are entitled to separate sets of costs. O MOHAMMAD HASAN *v.* ALI HYDER, 10 O. & A. L. R. 1229; 12 O. L. J. 1; 1 O. W. N. 803; 28 O. C. 8; (1925) A. I. R. (O.) 337 509

Court Fees Act (VII of 1870), s. 7 (iv), (c), Sch. II, Art. 17 (iii)—*Declaration that certain property not saleable in execution, suit for—Court-fee payable.*

A suit for a declaration that certain property belongs to the plaintiff and is not liable to be sold in execution of a mortgage-decree obtained against another person, involves no consequential relief and falls within the purview of Art. 17 (*iii*) of Sch. II to the Court Fees Act. The plaint in such a suit requires a Court-fee stamp of Rs. 10 only. **O** SRI RAM *v.* MATHURA PRASAD, 10 O. & A. L. R. 996; 1 O. W. N. 582 **349**

——— **s. 7 (v), Sch. I, Art. 1**—*Cross-objection*—Ad valorem—*Court fee.*

In a cross-objection claiming possession of an immoveable property, an *ad valorem* Court-fee is payable on the value of the subject-matter in dispute and not on five times the land revenue in accordance with s. 7 (*v*) of the Court Fees Act. **A** BISHEN SAHAI *v.* CHHOTEY LAL, 22 A. L. J. 911; L. R. 5 A. 712 Civ.; (1925) A. I. R. (A.) 119; 47 A. 89 **270**

——— **s. 7 (v), Sch. I, Art. 1**—*Decree for possession of land on payment of money—Appeal by defendant—Court-fee payable.*

Where a plaintiff obtains a decree for possession of a certain land on payment of a sum of money, and the defendant appeals on the ground that the plaintiff is not entitled to the land at all, the land itself is the subject-matter of the appeal, and for the purposes of valuation, the rules laid down in the various sub-clauses of clause (*v*) of s. 7 of the Court Fees Act as applying to various kinds of immoveable properties should be applied and the defendant should value his appeal for the purposes of Court-fees, quite irrespective of the condition imposed by the decree on the plaintiff to recover the land.

If the plaintiff appeals in such a case and contends that the amount payable by him is too large, and that it should be reduced by any particular amount, the subject-matter of the dispute in the appeal would be the difference between what he admits is due and what the lower Court has declared to be due.

The words "the value of the subject-matter" in Sch. I, Art. 1 of the Court Fees Act mean the same thing as "the value of the subject-matter" as set out in various sub-clauses of clause (*v*), s. 7. **M** GARAPATI BUTCHI SEETHAYAMMA, *In re*, 47 M. L. J. 919; (1925) M. W. N. 15; (1925) A. I. R. (M.) 323 **405**

——— **s. 17**—*Pre-emption, suit for—Decree on payment of certain sum—Appeal by vendee claiming dismissal of suit or enhancement of decretal amount—Alternative reliefs—Court-fee payable.*

In a suit to pre-empt the sale of a house the plaintiff asserted that the ostensible price mentioned in the sale-deed, *viz.*, Rs. 10,000, was fictitious and claimed a decree on payment of Rs. 5,100. The suit was decreed on payment of Rs. 6,800. The vendee appealed claiming that the suit should be dismissed or else that the plaintiff should be required to pay him an additional sum of Rs. 3,200. The appeal was valued at Rs. 6,800 and Court-fees were paid accordingly:

Held, that the reliefs claimed in appeal were alternative reliefs based on the same cause of action and only one of them could be granted, that they were not two distinct subjects within the meaning of s. 17 of the Court Fees Act, and that the correct fee, therefore, was one calculated not on the aggregate of the two values but on the higher of the two. **L** TEK CHAND *v.* TARA CHAND, 5 L. 114; (1924) A. I. R. (L.) 494 **556**

Court Fees Act—concld.

——— **Sch. I, Art. 1, Sch. II, Art. 1**—*"Amount or value of subject-matter in dispute," meaning of—Cross-objection as to costs—Court-fees payable.*

The words "the amount or value of the subject-matter in dispute" in Art. 1 of Sch. I of the Court Fees Act mean, in reference to a cross-objection as to costs, only the amount or value of the sum claimed as costs.

A cross-objection which relates to costs only must be stamped *ad valorem* under Art. 1 of Sch. I of the Court Fees Act and cannot be treated merely as a petition under Art. 1 of Sch. II to the Act. **R** MA SHIN *v.* MAUNG SHWE HNIT, 3 Bur. L. J. 279; 2 R. 637; (1925) A. I. R. (R.) 145 **257**

——— **Sch. II, Art. 17**—*Civil Procedure Code (Act V of 1908), s. 92—Scheme suit—Prayer for temporary mandatory injunction for deposit of money by defendant—Court-fee payable.*

Where in a suit under s. 92, C. P. C., for removal of a trustee, for appointment of fresh trustee and for framing a scheme, the plaintiffs prayed for the issue of a temporary mandatory injunction to compel the defendant to deposit in Court a sum of money alleged to be due from the defendant to the trust:

Held, (1) that the prayer for an injunction to compel the defendant to deposit the money was really one to direct accounts and enquiries and the suit was, therefore, substantially one under s. 92, C. P. C.;

(2) that the Court-fee payable was only Rs. 50 under Art. 17 of Sch. II to the Court Fees Act. **M** RAMANUJA NAIDU *v.* MUTHU K. R. V. ALLAGAPPA CHETTY, 47 M. L. J. 65 ; 20 L. W. 716; 35 M. L. T. 124; (1924) A. I. R. (M.) 882 **801**

——— **Art. 17 (6)**—*Partition suit—Declaration of title and possession—Court-fee payable.*

If in a partition suit, in the forefront of his prayer in the plaint, the plaintiff asks for a declaration of title and possession, he is claiming in the guise of a partition suit a declaration of his title and must pay an *ad valorem* Court-fee.

The mere fact that a petitioner is too poor to pay Court-fees or there are other circumstances justifying leniency, furnishes no ground to the Court for neglecting an express decision of the High Court and the provisions of the Court Fees Act, or for depriving of its dues the Government Revenue in the interest of which the Court Fees Act was passed. **Pat** KANHAYA LAL *v.* BALDEO LALL **538**

——— **Art. 17 (6)**—*Suits Valuation Act (VII of 1887), s. 8—Partition suit—Jurisdiction, value for purposes of, how determined.*

Ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not merely the subject-matter of the share which is to be partitioned. It is the entire value of the property which determines jurisdiction and not the value of the share which the plaintiff claims in the property. The mere fact that in a suit for partition a question as to the title of the plaintiff is raised and it is necessary to determine such a question before a partition can be directed would make no difference to the suit being one for partition. In such a suit the plaintiff may be liable to pay *ad valorem* Court-fees upon the value of the share that he claims, but the suit will still be one for partition and the jurisdiction of the Court would be determined by the value of the entire property which is sought to be partitioned. **C** RAJANI KANTA BAG *v.* RAJA BALA DASI, 29 C. W. N. 76; (1925) A. I. R. (C.) 320; 52 C. 128 **870**

Criminal Procedure Code (Act V of 1898), s. 35 (1)—*Concurrent sentences, when can be passed.*

Under s. 35 (1) of the Cr. P. C. a Criminal Court has power to direct sentences to run concurrently only when the accused is convicted at one trial of two or more distinct offences. The Court has no power to order sentences to run concurrently with sentences passed in other trials. **A** DULLI *v.* EMPEROR, L. R. 6 A. 10 Cr; 26 Cr. L. J. 570; (1925) A. I. R. (A.) 305; 47 A. 59 **714**

——— **ss. 37, 195, 407 (2)**—*Bench of Honorary Magistrates with Second Class powers—Order granting sanction—Appeal, when lies.*

An appeal against an order granting sanction to prosecute passed by a Bench of Honorary Magistrates exercising the powers of a Magistrate of Second Class lies to the District Magistrate to whom the Bench of Honorary Magistrates is subordinate. **O** AHMAD HUSAIN *v.* RAHIMAN. 26 O. C. 358; 9 O. & A. L. R. 511; (1924) A. I. R. (O.) 239; 26 Cr. L J. 423 **39**

——— **ss. 54 (7), 491**—*Extradition Act (XV of 1903), s. 23—Arrest without warrant, when justified—"Credible information," "Reasonable suspicion," what amounts to—Police Officer, duty of—Person liable to be extradited, when can be arrested—Procedure after arrest.*

Petitioner's brother was arrested without a warrant by the Calcutta Police acting on the basis of two telegrams received from the Jodhpur State Police requesting the arrest and stating that the person whose arrest was requested was "wanted for embezzlement of money to the value of a couple of lacs of rupees." On an application being made by the petitioner under s. 491 of the Cr. P. C. for a writ of *habeas corpus*:

Held, (1) that the Criminal Appellate Bench of the High Court had jurisdiction to entertain and dispose of the application under s. 491 of the Cr. P. C.;

(2) that the arrest of the petitioner's brother was unlawful as the assertion contained in the telegrams from the Jodhpur State Police did not constitute "credible information" or create a "reasonable suspicion" as required by clause *seventhly* of s. 54 of the Cr. P. C.

Per *Mukerji, J.*—Section 54 *seventhly* of the Cr. P. C. gives a Police Officer personal authority and involves a personal responsibility and reasonable suspicion and credible information must be based upon definite facts which the Police Officer must consider himself before he acts under the section and he cannot delegate his discretion or take shelter unto the plea or judgment of another officer or authority.

The wording of clause *seventhly* of s. 54 of the Cr. P. C. clearly indicates that the arresting Police Officer has to exercise his own judgment and form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend upon the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information.

The last portion of clause *seventhly* of s. 54 of the Cr. P. C. contemplates cases in which there is a present liability and not cases in which there may be liability in future for apprehension or detention. The issue of some sort of process for extradition under the law would create such a liability although the process may not have arrived and is not available for execution.

Even where all the conditions necessary to satisfy the requirements of clause *seventhly* of s. 54 of Cr. P. C. are made out and the arrest is validly or lawfully made the person arrested must forthwith be produced before a Magistrate in order that the detention may conform to the provisions of s. 23 of the Extradition Act. **C** SUBODH CHANDRA ROY *v.* EMPEROR, 29 C. W. N. 98; 40 C. L. J. 489; (1925) A. I. R. (C.) 278; 26 Cr. L. J. 625; 52 C. 319 **913**

——— **s. 94**—*Statements of witnesses at inquest inquiry—Accused's right to copies.*

An accused person may be given copies of statements made by witnesses at the inquest inquiry. If the record of the inquest proceedings is in the custody of the Court, the Magistrate may allow certified copies to be given on the application of the accused's Vakil. If the inquest report is not in Court, the Magistrate has power under s. 94, Cr. P. C., to call for it to be produced by the Police. **M** *In re* CHANLET, 20 L. W. 745; 26 Cr. L. J. 426; (1925) A. I. R. (M.) 424 **42**

——— **(as amended by Act XVIII of 1923), s. 106**—*Security for keeping peace—Order, when can be passed.*

No order can be passed under s. 106 of the Cr. P. C., 1898, as amended in 1923, where the only section under which the accused are convicted is a section of the Penal Code which is read with s. 149 of the Code. **Pat** CHHEDI SINGH *v.* EMPEROR, 3 Pat. 870; (1925) A. I. R. (Pat.) 117; 26 Cr. L. J. 426; 6 P. L. T. 330 **42**

——— **ss. 107, 112, 117, 123**—*Security proceedings—Strict compliance with law essential—Procedure—Rigorous imprisonment in default of security, legality of.*

The provisions of s. 112 of the Cr. P. C. ought to be complied with strictly.

A case under s. 107 of the Cr. P. C. should not be treated as a warrant case.

An order directing that in default of furnishing the required security the accused should undergo rigorous imprisonment is altogether illegal. **A** UTTAM CHAND SINGH *v.* EMPEROR, (1924) A. I. R. (A.) 695; L. R. 5 A. 24 Cr.; 26 Cr. L. J. 430 **46**

——— **ss. 110, 112, 117, 118.** *See* BURMA HABITUAL OFFENDERS' RESTRICTION ACT **33**

——— **s. 110**—*General repute—Evidence of witnesses living near accused, admissibility of—Magistrate, duty of.*

In proceedings under s. 110, Cr. P. C., evidence of general repute given by witnesses who live sufficiently near to the accused to be in a position to know his real reputation should not be rejected merely on the ground that they are not his immediate neighbours.

In proceedings under s. 110, Cr. P. C., it is not for the Magistrate to consider whether the Police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties. **R** EMPEROR *v.* PO YIN, 2 R. 686; 4 Bur. L. J. 6; (1925) A. I. R. (R.) 174; 26 Cr. L. J. 528 **368**

——— **s. 110**—*Security for good behaviour—Defence evidence reliable, effect of—Desire of Police to get rid of accused, whether can be taken into consideration.*

There is no legal bar to a prosecution for bad livelihood of men acquitted of the substantive offence of dacoity, but in weighing the evidence against them

this matter must be taken into consideration as indicating the desire of the Police to get rid of the presence of such men from villages, whether satisfactory evidence of the bad character be available or not.

Where in proceedings under s. 110 of the Cr. P. C. a large number of witnesses who are considered to be respectable and reliable by the Magistrate, depose that the accused are men of good character, there is no justification for an order requiring security to be passed against the accused. **O** BAHADUR *v.* EMPEROR, 10 O. & A. L. R. 1014; 27 O. C. 327; 26 Cr. L. J. 530 **370**

——— **s. 123**—*Procedure—Sessions Judge, duty of.*

Proceedings under s. 123 of the Cr. P. C. are not proceedings in confirmation but for orders, and under that section the Sessions Judge must pass a definite order binding over and is not merely required to confirm an order passed by the Magistrate. **O** BAHADUR *v.* EMPEROR, 10 O. & A. L. R. 1406; 1 O. W. N. 773; 26 Cr. L. J. 656 **944**

——— **s. 133**—*Magistrate, power of—Verdict, whether can be split up—Costs.*

Under s. 133, cl. 2 of the Cr. P. C., a Magistrate has only the power to order the removal of an obstruction, and the section does not provide for the re-construction of a *bundh* which has once been removed under it.

A Magistrate is not entitled to split up a verdict in order to give himself jurisdiction to deal with the matter under s. 133 of the Cr. P. Code.

There is no provision in Chap. X of the Cr. P. Code for the payment of costs by any party to a proceeding under s. 133 of the Code. **C** RAHIMUDDI JAMADAR *v.* SHER ALI, 40 C. L. J. 597; (1925) A. I. R. (C.) 399; 26 Cr. L. J. 517 **357**

——— **s. 144,** *action under, when to be taken—Nuisance—Remedy of complainant—Civil dispute—Duty of Court.*

It is not proper that Criminal Courts should take upon themselves to decide what are really civil disputes.

Action should be taken under s. 144 of the Cr. P. C. only in urgent cases of nuisance or apprehended danger. Action under the section should not be taken at the instance of a party who can easily remedy the consequences of the act complained of and whose complaint is really of a civil nature and can be properly adjudicated upon in proceeding in a civil suit. **A** HAJI ALI *v.* EMPEROR, 26 Cr. L. J. 560 **656**

——— **s. 145,** *proceedings under—Numerous claimants for possession—Joint trial, legality of.*

There is nothing to prevent a Magistrate from joining together numerous claims for possession in proceedings under s. 145 of the Cr. P. C. and dealing with the matter at one hearing.

The only objection which can really be taken to such a course is, if it can be shown, that the objector is adversely prejudiced by such proceeding. **Pat** GAGADHAR MULL *v.* THAKUR SINGH, 1 P. L. R. 135 Cr.; (1923) A. I. R. (Pat.) 545; 26 Cr. L. J. 424 **40**

——— **s. 145,** *proceedings under—Sale of crops—Deposit in Court—Proceedings dropped by consent—Disposal of sale-proceeds—Question of title, decision of—Procedure.*

During the pendency of proceedings under s. 145, Cr. P. C., the crops on the land were seized and sold and the proceeds deposited in Court. The proceedings were then dropped with the consent of the parties:

Held, that it was not thereafter competent to the Magistrate to decide which of the parties was entitled to the money and to hand it over to him; the proper order to make in the case was to direct the money to remain in deposit pending the decision in a Civil Court as to which of the parties was entitled to it. **M** NATESA NAICKER *v.* RAGHAVACHARIAR 20 L. W. 924; (1925) A. I. R. (M.) 327; 26 Cr. L. J. 512 **256**

——— **ss. 145, 146.** *See* LIMITATION ACT, 1908 s. 23, SCH. I, ART. 120 **631**

——— **ss. 145, 147**—*Proceedings under s. 145—Conversion into proceedings under s. 147.*

Where proceedings under s. 145 of the Cr. P. C. are instituted on the basis of a Police report which states that there is an imminent risk of a breach of the peace, but the Magistrate subsequently discovers that the question at issue is not one of possession under s. 145, but is one as to a right falling under s. 147 of the Cr. P. C., he has jurisdiction to convert the proceedings from these under s. 145 into these under s. 147. **C** ANATH BANDHU *v.* WAHID ALI, 26 Cr. L. J. 558 **654**

——— **ss. 145, 439**—*Preliminary order, absence of, effect of—Revision.*

Where a Magistrate fails to pass an order as required by sub-s. (1) of s. 145 of the Cr. P. C., subsequent proceedings under that section are vitiated and the final order is liable to be set aside in revision.

Subordinate Magistrates exhorted to study the Cr. P. C. **O** RAM BHUSHAN DAS *v.* RAM LAKHAN SAHU, 10 O. & A. L. R. 1361; 1 O. W. N. 701; 26 Cr. L. J. 630 **918**

——— **s. 149.** *See* PENAL CODE, 1860, ss. 151, 188 **823**

——— **s. 154.** *See* EVIDENCE ACT, 1872, ss. 32 (2), 35 **647**

——— **ss. 154, 157, 158**—*Evidence Act (I of 1872), s. 35—First Information Report, what amounts to—Statement recorded during investigation, whether first information—First Information Report, whether substantive evidence—Statement, oral, made to Police during investigation, whether can be proved.*

Section 154 of the Cr. P. C. contemplates that the First Information of the commission of an offence actually received by the Police should be recorded as such and not a statement made by a witness during investigation after the investigating officer has actually arrived on the scene and has himself seen what has happened.

A First Information Report taken down by a Police Officer amounts to an entry in an official record stating a fact in issue and made by a public servant in the discharge of his official duty and in the performance of the duty especially enjoined upon him under which such record is kept and, therefore, falls within the scope of s. 35 of the Evidence Act and is a relevant fact. But it is not a substantive piece of evidence and is no evidence of the existence of the facts which it mentions. It can be used merely by way of corroboration or contradiction and not any further.

Where a person who is alleged to have made an oral statement to the Police during the investigation of a case denies at the trial that he made any such statement, the alleged statement cannot be proved by the evidence of persons who claim to have heard it

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at the time when it was made, nor is such evidence admissible. A CHITTAR SINGH *v* EMPEROR, 23 A. L. J. 14; 26 Cr. L. J. 554; (1925) A. I. R. (A.) 303; 47 A. 280 **650**

——— **s. 159**—*Accused not identified immediately after arrest—Conviction, whether good.*

In no dacoity case, would a Court convict a person, who was not identified in the Jail or before a proper authority, immediately after the arrest, simply on the strength of identification conducted in the Court of the Committing Magistrate or the Sessions Judge. A KISHEN LAL *v.* EMPEROR, 22 A. L. J. 501; (1924) A. I. R. (A.) 645; L. R. 5 A. 177 Cr.; 26 Cr. L. J. 501 **245**

——— **ss. 164, 533**—*Confession, record of—Verification, failure to comply with formalities of, effect of—Irregularity.*

The failure to comply with the formalities as to verification at the end of the record of a confession is an irregularity which is cured by s. 533 of the Cr P. C. S EMPEROR *v.* MUHAMMAD BUX, 16 S. L. R. 143; 26 Cr. L. J. 609 **833**

——— **s. 171**—*Bigamy and abetment of bigamy—Jurisdiction.*

The offences of bigamy and abetment of bigamy are triable only in the district in which the second marriage or the abetment takes place. L AMIR CHAND *v.* EMPEROR, 6 L. L. J. 422; (1924) A. I. R. (L.) 732; 26 Cr. L. J. 525 **365**

——— **s. 172**—*Personal diary of Police Officer, entries in, whether admissible—List of stolen property supplied during investigation and list of names of suspects, admissibility of—Map prepared by Police Officer during investigation—Statements made by third persons, whether should be entered.*

Entries made in a personal diary kept by a Police Officer, who did not start the investigation of a case and did not take any part in the investigation, do not fall within the purview of s. 172 of the Cr. P. C., and are not, therefore, inadmissible in evidence by virtue of the provisions of that section.

A list of stolen property handed to a Police Officer in the course of investigation is not admissible in evidence and should not be placed before the Jury. The admission of such a list, however, would not of itself vitiate the trial unless it is shown that the accused have been prejudiced by such admission.

A map prepared by a Police Officer during the course of the investigation of a criminal case should not, on the face of it, contain statements which have been made to the Police Officer by some other person.

Where the names of certain persons are sent to the Police as being the names of those who are suspected of being concerned in the commission of an offence, and the evidence of the person who supplied these names to the Police is challenged in Court, the list of names supplied by him is admissible in evidence to corroborate the statement of the witness in answer to the challenge. C KALIA *v.* EMPEROR, 26 Cr. L. J. 579 **723**

——— **ss. 177, 526 (1) (i)**—*Complaint filed in wrong Court—Transfer of case—High Court, power of.*

Where an offence is being enquired into and tried by a Court contrary to the provisions of s. 177 of the Cr. P. C., the High Court has jurisdiction to direct the transfer of the case under s. 526 (1) (*i*) of the Code to a Court having jurisdiction to try the case. O MUBARAK ALI *v.* ABDUL HAQ, 10 O. & A. L. R. 960; 1 O. W. N. 615; 26 Cr. L. J. 577 **721**

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——— **s. 190.** *See* BOMBAY PREVENTION OF PROSTITUTION ACT, 1923, s. 3 **57**

——— **s. 195.** *See* CR. P. C., 1898, s. 195 **39**

——— **ss. 195, 238**—*Penal Code (Act XLV of 1860), s. 173—No complaint by public servant—Conviction under s. 173, Penal Code—Section 238, Cr. P. C., application of.*

A Magistrate has no jurisdiction to take cognizance of an offence under s. 173, Penal Code, except on the complaint in writing of the public servant concerned.

When the Cr. P. C. provides that the Court shall not take cognizance of a certain offence without complaint from a public servant, it is not open to a Magistrate to ignore this provision by the device of instituting the case with reference to some offence, of which he is entitled to take cognizance, and then convicting the accused for the prohibited offence with the aid of s. 238, Cr. P. C. A SRI NARAIN SINGH *v.* EMPEROR, 22 A. L. J. 1005; L. R. 5 A. 153 Cr.; (1925) A. I. R. (A.) 129; 26 Cr. L. J. 444; 47 A. 114 **62**

——— **s. 195 (1) (c)**—*Prosecution for forgery, when can be entertained—Penal Code (Act XLV of 1860), ss. 463, 467.*

A prosecution for forgery cannot be entertained except upon the complaint of the Court before which the forged document was produced in evidence.

Section 463 of the Penal Code is used in a comprehensive sense in s. 195 (1) (*c*) of the Cr. P. C., so as to embrace all species of forgery and includes a case falling under s. 467, Penal Code. L KHAIRATI RAM *v.* MALAWA RAM, 5 L. 550; (1925) A. I. R. (L.) 266; 26 Cr. L. J. 537 **377**

——— **ss. 195 (c), 476**—*Successor of Trying Judge, whether can order prosecution—Omission to make formal complaint, effect of—Complaint against person not party to suit—Court, jurisdiction of.*

Under s. 476 of the Cr. P. C., the power to order prosecution may be exercised by any Judge of the Court concerned and not only by the Judge who tried the case.

The fact that instead of making a formal complaint, the Court sanctioning the prosecution merely directs a copy of its order to be sent to the District Magistrate for necessary action does not vitiate the order inasmuch as the defect is merely formal.

For offences mentioned in s. 195 (*c*), Cr. P. C., the Court has jurisdiction to file a complaint only against parties to the suit. R MAUNG SHWE PHWE *v.* MA ME HMOKE, 3 Bur. L. J. 344; (1925) A. I. R. (R.) 195; 26 Cr. L. J. 500 **244**

——— **s. 198.** *See* PENAL CODE, 1860, s. 499 **361**

——— **s. 203**—*Complaint, dismissal of—Examination of complainant's witnesses.*

A complaint cannot be dismissed without examining the witnesses of the complainant who are present in Court to give evidence in support of the complaint. A complainant is entitled to have an opportunity of establishing the truth of his allegations by having the evidence of his witnesses tested by the Magistrate. C PUROSATTAM *v.* RAM DAS, 26 Cr. L. J. 561 **705**

——— **ss. 221, 298**—*Penal Code (Act XLV of 1860), ss. 141, 147—Charge, form of—Rioting—Common object, specification of—Enforcement of right—Prosecution, duty of—Trial by Jury—Charge to Jury—Omission to charge on vital points—Misdirection.*

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against

him, for unless he has this knowledge he may be seriously prejudiced in his defence. In framing charges it is always a sound rule for the Court to adhere to the language of the Statute as far as possible. A departure from the words of the Statute benefits nobody and only introduces complications in many instances.

In a charge of rioting, the common object of which is to enforce a right, or a supposed right, it is necessary for the prosecution only to show that the accused was not in actual possession at the time of the occurrence.

In a trial by Jury omissions on vital points in the Judge's charge to the Jury may amount to such misdirection as to vitiate the trial.

Where the Judge's direction as to the probabilities has the effect of putting the probabilities in favour of the prosecution too strongly before the Jury and upon a mere assumption of the facts which the Jury are not asked to find for themselves, it amounts to a misdirection which vitiates the trial. **C** CHHAKARI SHAIKH *v.* EMPEROR, 26 Cr. L. J. 567 **711**

——— **ss. 222 (2), 303 (1)**—*Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust, conviction for—Finding as to misappropriation of definite sum, whether necessary—Verdict not simple one of guilty or not guilty—Judge, duty of.*

The offence of criminal breach of trust involves entrustment or dominion over property and dishonest misappropriation, conversion, use or disposal thereof. It is not possible to find these elements unless one can form a conception as to what that property is. There must, therefore, be a definite finding of a certain definite sum traced to the accused in order to form the basis of his conviction.

In a case of criminal breach of trust in respect of a sum of over seven thousand rupees, the Jury returned a unanimous verdict of guilty but recommended the lightest punishment consistent with justice as in their opinion the amount misappropriated by the accused was much less than the amount stated in the charge. As to the amount embezzled they were not unanimous and they said they were not able to ascertain it definitely, but the majority of them were of opinion that it might be a thousand rupees or so out of the amount mentioned in the charge. The Judge agreed in the verdict. He, however, was of opinion that the amount embezzled was not a thousand rupees or so but nearly rupees five thousand. He accepted the verdict and convicting the accused under s. 408, Penal Code, sentenced him to undergo rigorous imprisonment for three years. On appeal:

Held, (1) that the verdict returned by the Jury was not a simple verdict of guilty or not guilty on the whole matter covered by the charge but a special or qualified verdict, to ascertain the exact scope and import of which it was the duty of the Judge to ask the Jury such questions as were necessary;

(2) that the Judge should have endeavoured to ascertain how the Jury arrived at the amount of "about a thousand rupees or so" which in their opinion the accused was guilty of having embezzled;

(3) that his omission to put questions to the Jury in this respect had deprived him of the opportunity of finding out whether the said amount or any part of it was included within the figure which he himself arrived at, so as to determine whether he really agreed with the verdict or not;

(4) that it could not under the circumstances be decided whether the verdict was a proper one or not, for it was not known upon what materials it was founded or what it really meant;

(5) that, therefore, the conviction must be set aside, it being left open to the prosecution, should they so desire, to proceed afresh against the appellant in respect of such gross sum or specific item or both as he may be charged with, in accordance with the provisions of the law.

The object of the amendment made by the introduction of sub-s. (2) to s. 222, Cr. P. C., was not to amend the Penal Code, but merely to get rid of a technical difficulty in framing a formal document, *viz.*, the charge. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Penal Code.

Under s. 303 (1), Cr. P. C., the Judge is always entitled to ask the Jury such questions as are necessary to ascertain what their verdict is. **C** KHIRODE KUMAR MUKERJI *v.* EMPEROR, 29 C. W. N. 54; 40 C. L. J. 555; (1925) A. I. R. (C.) 260; 26 Cr. L. J. 532 **372**

——— **ss. 233, 235, 239**—*Penal Code (Act XLV of 1860), s. 114—Charges of murder, arson and conspiracy—Joint trial of several accused—Prejudice to accused—Embarrassment to Jury—Retrial.*

The accused were charged at one trial with the offences of conspiracy to murder, murder and arson, in that they were alleged to have set fire to a house, barred the doors, burnt most of the inmates and killed such as tried to escape. It appeared that there was really no foundation for the charges of murder and arson as regards most of the accused according to the facts alleged by the prosecution. The Jury, however, found all the accused guilty on all the charges:

Held, that since a multitude of charges not having any proper foundation and obscuring the case which the accused had to meet were put forward, the accused were prejudiced in their defence and the Jury misled and confused, and that, therefore, the accused should be re-tried.

Per *Walmsley, J.*—The charges should be framed in such a way as to render it beyond doubt that there was neither prejudice to the accused nor embarrassment to the Jury.

Per *Mukerji, J.*—The provisions of s. 233 of the Cr. P. C. are mandatory.

The provisions of ss. 235 and 239, Cr. P. C., are merely enabling ones and if there is a risk of embarrassing the defence by a joinder of charges such joinder should not be resorted to.

Where a conspirator is present at the commission of the offence, he may, under the provisions of s. 114, Penal Code, be deemed to have committed the offence, but if that is the way in which the accused are all to be made responsible for the offences, they should be specifically charged with such offences as read with the provisions of s. 114, Penal Code. **C** ALIMUDDIN NASKAR *v.* EMPEROR, 26 Cr. L. J. 487; 29 C. W. N. 173; 40 C. L. J. 541; (1925) A. I. R. (C) 341; 52 C. 253 **231**

——— **ss. 236, 237, 238.** *See* PENAL CODE, 1860, ss. 109, 147, 149, 150, 188, 304 **818**

——— **s. 238.** *See* CR. P. C., 1898, s. 195 **62**

Criminal Procedure Code—contd.

——— **s. 239**—*Penal Code (Act XLV of 1860), ss. 148, 201, 304—Rioting and culpable homicide—Causing disappearance of dead body—Joint trial, whether legal.*

Where a riot results in the death of a person, and thereafter one of the rioters takes away the dead body and causes its disappearance, a joint trial of that rioter for an offence under s 201, Penal Code, along with a trial of all the rioters for offences under ss. 148 and 304 of the Code is illegal, as the offence under s. 201 cannot be said to have been committed in the same transaction in which the other offences were committed. **C** SURENDRA LAL DAS *v.* EMPEROR, 40 C. L. J. 559; (1925) A. I. R. (C.) 413; 26 Cr. L. J. 467 **147**

——— **s. 250**—*Case instituted upon information to Police—Compensation, order for, whether can be made—Order directing compensation, whether exempts complainant from criminal liability.*

Under s. 250 of the Cr. P. C. compensation can be awarded in a case instituted upon information given to a Police Officer.

A complainant does not escape liability for prosecution under s. 211 of the Penal Code by reason of an order directing payment of compensation having been passed against him under s. 250 of the Cr. P. C. **O** HAFIZ KHAN *v* EMPEROR, 10 O. & A. L. R. 1189; 1 O. W. N. 878; 26 Cr. L. J. 527 **367**

——— **s. 250 (3)**—*Order of compensation—Appeal, when competent.*

Section 250 (3), Cr. P. C., means that whenever a complainant or informant has been ordered under sub-s. (2) to pay compensation exceeding fifty rupees, the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50. **B** AUGUSTIN MANWAL *v.* DUMING PASCOL, 26 Bom. L. R. 1243; (1925) A. I. R. (B.) 129; 26 Cr. L. J. 480; 49 B. 440 **160**

——— **ss. 250, 537**—*Order of compensation when should be made—Defect, whether curable.*

An order directing the complainant to show cause why he should not pay compensation to the accused under s. 250 of the Cr P. C. should be made at the same time as the order discharging the accused. The failure to do so is not a defect curable by s. 537 of the Code. **C** SURESH CHANDRA GUPTA *v.* ABDUL JABBAR, 29 C. W. N. 127; (1925) A. I. R. (C.) 264; 26 Cr. L. J. 449 **129**

——— **ss. 263 (h), 537**—*Non-appealable case—Omission to record reasons for finding—Defect, whether fatal.*

Where in a non-appealable case there is clear evidence to justify the conviction, the omission on the part of the Court to comply with the provisions of cl. (*h*) of s. 263, Cr. P. C., merely amounts to an irregularity which can be cured under s. 537 of the Code. **B** NAMDEO LAKMAN *v.* EMPEROR, 26 Bom. L. R. 1236; (1925) A. I. R. (B.) 138; 26 Cr. L. J. 466 **146**

——— **ss. 266, 418**—*Sessions trial by Judicial Commissioner—Appeal, whether lies.*

An appeal lies from the decision of a Judge of the Court of the Judicial Commissioner of Sindh, holding a Sessions trial where the Judge has accepted the finding of the Jury. For the purposes of appeal such trial continues to be a trial by a Sessions Court notwithstanding the amendment of s. 266 of the Cr. P. C. **S** KHUDABUX *v.* EMPEROR, 26 Cr. L. J. 562 **706**

——— **ss. 275, 446**—*Accused, claim of, to be tried by Jury—Magistrate, duty of—Assessors—Nationality of accused.*

When an accused person claims that he should be tried under Ch. XXXIII of the Cr. P. C., the duty of the Magistrate inquiring into or trying the case is to satisfy himself that the complainant and the accused person are respectively European and Indian British subjects, or *vice versa* and that in view of such status of the accused and the complainant respectively it is expedient in the interests of justice that the case should be tried under the provisions of that Chapter.

When the Magistrate is so satisfied the trial must take place under the provisions of s. 446 of the Code *i. e.*, the accused must be tried by a Jury, the majority of whom shall if the accused so requires, be of the category within which the accused himself comes.

But when the trial before the Court of Session would in the ordinary course be with the aid of Assessors, the accused has the right under the proviso to s. 446 of the Code to be tried with the aid of Assessors, all of whom shall be Europeans or Americans or Indians according to the category within which the accused comes.

By "ordinary course", in s. 446 of the Cr. P. C., is meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Ch. XXXIII of the Code, or in the absence of a notification by the Local Government under the provisions of s. 269 of the Code. **L** BRAY *v.* EMPEROR, 5 L. 515; (1925) A. I. R. (L.) 236; 26 Cr. L. J. 540 **380**

——— **s. 288**—*Previous statements of witnesses, whether admissible—Value for purposes of conviction.*

Previous statements of witnesses made before the Committing Magistrate are admissible in evidence, and if the High Court is satisfied that they are true while the statements made subsequently before the Sessions Judge are false, it is open to the Court to rely upon the previous statements for the purpose of upholding the conviction. **A** TULLI *v.* EMPEROR, 22 A. L. J. 1075; L. R. 6 A. 33 Cr.; (1925) A. I. R. (A.) 185; 26 Cr. L. J. 450; 47 A. 276 **130**

——— **s. 297**—*Charge to Jury—Demeanour of witnesses, statement as to—Misdirection.*

The mere fact that a Sessions Judge states to the Jury his impression of the demeanour of some of the witnesses, does not amount to a misdirection, as the witnesses having appeared before the Jury, it is for the latter to judge whether the demeanour of the witnesses was such as to discredit in any way the evidence which they had given. **C** SHAMLAL SINGH *v.* EMPEROR, 26 Cr. L. J. 572 **716**

——— **ss. 298, 299**—*Evidence Act (I of 1872), ss. 24, 25—Trial by Jury—Judge and Jury, functions of—Confession, voluntary nature of—Misdirection—Inadmissible evidence, admission of, effect of—Confessional statement made to Police Officer, admissibility of.*

Under s. 298 (1) (*a*) of the Cr. P. C. it is the duty of the Judge in a trial by Jury to decide on the admissibility of the evidence, and he must discharge this duty irrespective of the question whether objection has or has not been taken to the evidence by the parties themselves. In the case of a confession he

Criminal Procedure Code—contd.

must decide whether the confession is admissible in evidence or not, that is to say, he must consider whether it has been duly recorded and whether it is free from the infirmities mentioned in s. 24 of the Evidence Act. In dealing with the question of its admissibility he has to determine whether it is voluntary or not.

Under s. 259 of the Cr. P. C. the Jury must weigh and value the evidence admitted by the Judge and in order to do so they also must themselves go into the question as to whether a confession admitted in evidence was made voluntarily, for a free and voluntary statement is some guarantee of its truth.

It is, therefore, the duty of the Judge to place before the Jury the facts and circumstances, *pro* and *con*, with regard to the question whether a confession was voluntary or not and to ask them to form their own conclusions as to the character of the confession. Where the consideration of the question as to whether a confession is voluntary or not is taken away entirely from the Jury, it amounts to a serious omission sufficient to vitiate the verdict of the Jury.

Where evidence of bad character of the accused's complicity in other crimes, confessional statements made to the Police and hearsay evidence are admitted, it must be assumed that such admission has prejudiced the accused, and in such a case the trial must be set aside. A verdict based on such inadmissible evidence cannot be upheld.

In a trial in respect of an offence under s. 395 of the Penal Code the Investigating Police Officer was allowed to depose that one of the accused pointed out to him the route taken by him and his comrades in going to the place where the alleged dacoity was committed and also the place where they divided the booty and where they had first met:

Held, that these were confessional statements and having been made to a Police Officer were inadmissible in evidence.

Where in his charge to the Jury in a case under s. 395 of the Penal Code the Judge failed to give any direction to the Jury with regard to the fact that there was opportunity of recognition and that none of the accused were recognised at the time of occurrence:

Held, that the omission was of vital importance and that the non-direction amounted in law to positive misdirection which vitiated the trial. **C** SHEIKH ABDUL *v.* EMPEROR, 26 Cr. L. J. 606 **830**

——— **(as amended by Act XVIII of 1923), ss. 337 (2A), 347,** *retrospective, operation of—Trial with approver—Committal to Sessions—Procedure.*

A case under s. 401 of the Penal Code, in which there was an approver, was being tried by a Magistrate with powers under s. 30 of the Cr. P. C. After evidence had been recorded and arguments were heard, but before judgment was pronounced, the amended Cr. P. C. of 1923 came into force. The Magistrate nevertheless pronounced judgment in the case:

Held, that having regard to the provisions of s. 337 (2A) and 347 of the Code, the jurisdiction of the Magistrate to try the case had been expressly taken away, and he was bound to commit the accused for trial before the Court of Session. **L** JIMUN SHAH *v.* EMPEROR, 26 Cr. L. J. 549; (1925) A. I. R. (L.) 378 **645**

——— **s. 339 (1)**—*Prosecution of approver—Certificate of Public Prosecutor, necessity of.*

Criminal Procedure Code—contd.

It is illegal to institute proceedings against an approver for the offence in respect of which pardon was tendered to him without the certificate of the Public Prosecutor. **B** EMPEROR *v.* MARIA BASAPPA, 26 Bom. L. R. 1240; (1925) A. I. R. (B.) 135; 26 Cr. L. J. 469 **149**

——— **ss. 340, 540**—*Right of accused person to be represented by Pleader and to cross-examine prosecution witnesses—Duty of Magistrate—Procedure—Witness called by Court—Cross-examination, right of.*

Where a witness is called under s. 540 of the Cr. P. C., both sides have a right to cross-examine that witness freely. It is entirely wrong to describe as cross-examination that which consists of certain questions being suggested by the defence to the Court and those questions being put by the Court.

The spirit of the law requires that if an accused person wishes to be represented by a Pleader he should be given an opportunity of being so represented and should also have an opportunity of cross-examining the witnesses for the prosecution.

Where at the commencement of a trial the accused desires to be given an opportunity to engage a Pleader and there has not already been a sufficiently long period given to him for this purpose, the Magistrate may proceed up to the end of recording his evidence of the prosecution witnesses and from that stage he should allow an adjournment in order to enable the accused to appoint a Pleader and that adjournment must be long enough to enable the Pleader to get proper instructions and to prepare himself for cross-examination. **A** PITA *v.* EMPEROR, L. R. 6 A. 17 Cr.; 26 Cr. L. J. 575; (1925) A. I. R. (A.) 285; 47 A. 147 **719**

——— **s. 342**—*Evidence Act (I of 1872), s. 118—"Accused," meaning of—Accomplice, when competent witness.*

An accused person when not being jointly tried with a co-accused is a competent witness for or against him.

The "accused" in cl 4 of s. 342 of the Cr. P. C. means the accused then under trial and under examination by the Court.

Section 118 of the Evidence Act makes no distinction between witnesses called for the prosecution and those called for the defence. **R** JOSEPH *v.* EMPEROR 3 Bur. L. J. 265; (1925) A. I. R. (R.) 122; 26 Cr. L. J. 492; 3 R. 11 **236**

——— **s. 342**—*Examination of accused, mode of—Duty of Court—Criminal trial.*

Per *Mukerji, J.*—Section 342 of the Cr. P. C. is for the benefit of the accused, the provisions embodied in the section being meant to enable the accused to explain the circumstances appearing against him in the prosecution evidence. The section is not, however, intended merely for the benefit of the accused. It is a part of a system for enabling the Court to discover the truth and it may happen that the explanation of the accused or his failure to explain is the most incriminating circumstance against him. The result of the examination may benefit the accused if a satisfactory explanation is offered by him; it may, however, be injurious to him if no explanation, or a false or unsatisfactory explanation, is given. The Court should, therefore, not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation but it must exercise that power in such a way that the accused

may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against the accused.

The word "generally," in s. 342 of the Cr. P. C. does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally, and should not be limited to any particular part or parts of it.

In examining an accused person under s. 342 of the Cr. P. C. the Court should always frame questions dealing with such salient points in a case as in its opinion call for explanation. Every precaution should, however, be taken not to entrap the accused to make incriminating answers, and all questions in the nature of cross-examination should be avoided.

The incompetency of a Tribunal in administering the law or the difficulty in administering it is no ground for whittling down its provisions.

Per *Newbould, J.*—What is necessary under s. 342 of the Cr. P. C. is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. A formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips, for instance, the question "What is your defence"?, is a sufficient compliance with the mandatory provisons of s. 342, since it enables the accused to explain any circumstances appearing in the evidence against him.

It is neither necessary nor desirable that there should be any detailed questioning of the accused under this section. The point at which the Court is bound to question the accused is after the witnesses for the prosecution have been cross-examined. From that cross-examination it will usually appear to the accused what are the circumstances appearing in the evidence which require explanation. If this is apparent, it is not necessary for the Court to tell the accused what those circumstances are.

In the Court of the Committing Magistrate the accused was asked "what is your defence?" He replied, "I am innocent. What I have to say, I shall say in the Sessions Court." In the Court of Session this statement was read out to him and he was then asked "Do you wish to say anything more?" He then made a statement from which it appeared that he was not altogether ignorant of some of the salient points appearing in the evidence against him:

Held, (Per *Mukerji, J.*) that the examination of the accused was perfunctory and was not a sufficient compliance with the provisions of s. 342 of the Cr. P. C.

(Per *Curiam*):—That, however, the object of the provisions contained in s. 342 of the Cr. P. C. having been attained the trial was not vitiated. **C** EMPEROR *v.* ALIMADDIN NASKAR, 29 C. W. N. 231; 41 C. L. J. 101; (1925) A. I. R. (C.) 361; 26 Cr. L. J. 631; 52 C. 522 **919**

——— **s. 342**—*Sessions trial—Examination of accused, method of.*

The proper method of applying s. 342 of the Cr. P. C. is to bring to the attention of the accused specific matters which appear in the evidence against him. Merely questioning him generally as to whether he has anything to say or anything to add to what he said before the Committing Magistrate is not a satisfactory method of applying the section. **C** SHAMLAL SINGH *v.* EMPEROR, 26 Cr. L. J. 572 **716**

——— **s. 342**—*Summons case—Examination of accused, whether necessary—Failure to examine accused—Prejudice.*

Where an accused person in a summons case is prejudiced by the failure of the Magistrate to examine him at the conclusion of the prosecution case, the trial is liable to be set aside and a fresh trial ordered.

Quære:—Whether an examination of the accused under s. 342 of the Cr. P. C. is necessary in summons cases. **O** EMPEROR *v.* SHEOPAL, 10 O. & A. L. R. 1381; 1 O. W. N. 833; 26 Cr. L. J. 655 **943**

——— **s. 347**—*Warrant case, trial of—Charge framed—Commitment to Sessions for portion of charge—Procedure.*

Section 347 of the Cr. P. C. authorises a Magistrate at any stage of the trial of a warrant case to commit the accused for trial to the Court of Session instead of completing the trial himself. The new charge which is then drawn up by the Magistrate has the effect of cancelling any previous charge framed by him but this is so only with respect to the subject-matter of the new charge. So far as this subject-matter is concerned the previous proceedings before the Magistrate must be regarded as proceedings in an enquiry preliminary to commitment but this alteration of the character of the enquiry does not extend to any matter which is not the subject of the new charge.

Where a Magistrate after having taken cognizance of a warrant case finds that the accused ought to be committed to the Court of Session in respect of a portion of the subject-matter of the charge, but that he has not committed a part of the offence with which he has been charged, his duty is to commit the accused for trial in respect of the subject-matter of the former portion of the charge and to acquit him so far as the latter portion of the charge is concerned.

Section 347 of the Cr. P. C. does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the Court of Session that the proceedings are taken out of Ch. XXI of the Code and the other proceedings of the Magistrate continue to be governed by the provisions of that Chapter. **O** BISHAMBHAR NATH *v.* EMPEROR, 10 O. & A. L. R. 1210; 1 O. W. N. 705; 26 Cr. L. J. 520 **360**

——— **s. 350**—*Transfer of Magistrate—Trial de novo—Transfer of case to transferred Magistrate, effect of—Procedure.*

When on the transfer of a Magistrate to another station, a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out, and such Magistrate has no jurisdiction, on the case being transferred to him again by the District Magistrate, to proceed with the trial from the point where he had left it. **M** SARDAR KHAN *v.* ATTAULLA, 20 L. W. 847; 47 M. L. J. 926; (1925) A. I. R. (M.) 174; 26 Cr. L. J. 510 **254**

——— **s. 350 (a)**—De novo *trial—Accused, right of, to re-examine some witnesses only—Procedure.*

Under proviso (*a*) to s. 350, Cr. P. C., the right given to an accused person is the right of demanding that the prosecution witnesses or any of them be re-

summoned and re-heard, and it rests on the accused to say who shall be re-summoned and re-heard. The complainant, however, has no such right, and when the accused is exercising his right under the proviso in regard to some witnesses only, the complainant cannot claim a *de novo* trial from the beginning. It is open to the accused at any time to say that he does not wish certain witnesses to be re-summoned and re-heard, even though previously he had asked for them to be re-summoned and re-heard. **M** VADIGALAPYDIGADU, *In re*, 20 L. W. 916; (1925) A. I. R. (M.) 317; 26 Cr. L. J. 526 **366**

——— **s. 362**—*Trial before Presidency Magistrate—Record of evidence, when necessary.*

Under s. 362 of the Cr. P. C., it is the duty of the Presidency Magistrate to keep a record of the evidence in a case in which the sentence inflicted upon the accused exceeds six months.

Even in cases falling under sub-s. (4) of s. 362, Cr. P. C., the discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably. **B** MOHAMED ROSHAN *v.* EMPEROR, 26 Bom. L. R. 1232; (1925) A. I. R. (B.) 147; 26 Cr. L. J. 454 **134**

——— **ss. 369, 439**—*Review—High Court, power of, to review order—Order enhancing sentence, in absence of accused, validity of.*

The High Court has no jurisdiction to review or revise its own orders in criminal matters.

An order of enhancement of sentence passed without opportunity being given to the accused of being heard either personally or by Pleader, is null and void *ab initio*, as being without jurisdiction, and does not bar the Court from dealing with the matter a second time. **O** PARAS RAM *v.* EMPEROR, 10 O. & A. L. R. 1328; 1 O. W. N. 891; 26 Cr. L. J. 543 **383**

——— **ss. 415A, 562**—*Order of release on probation of good conduct—Appeal, whether lies—Non-appealable sentence—Convicts, when can appeal.*

An appeal lies on behalf of a convicted person against whom an order, under s. 562 (1) of the Cr. P. C., has been passed.

By operation of s. 415A of the Cr. P. C., a right of appeal is also conferred on those who are jointly tried with a person against whom an order under s. 562 (1), Cr. P. C., has been passed, and having been convicted, are given non-appealable sentences. **C** BAHADUR MOLLA *v.* EMPEROR, 29 C. W. N. 151; 41 C. L. J. 45; (1925) A. I. R. (C.) 329; 26 Cr. L. J. 455; 52 C. 463 **135**

——— **ss. 435, 439**—*Revision, application for, disposal of—Fresh application, whether barred.*

Ordinarily a Judge disposing of a revision petition filed by a convicted person or his Pleader against the propriety of his conviction cannot be said to be adjudicating on the question of enhancing the sentence.

A Court exercising its revisional powers upon a revision petition ordinarily deals with the points, raised in the petition and has no occasion to travel outside them and consider the whole case upon its merits as the Court that tries the accused and the Court that hears the appeal, if any, does. It might be otherwise, in a revision case taken up by the Court *suo motu*.

The only limitation to the exercise of the right to apply for revision is that an application for revision cannot be made both to the Sessions Judge and to the District Magistrate, also that a petitioner is in practice required to state all his grounds for revision in a single petition. With these exceptions there is nothing in the Cr. P. C. to make the disposal of one criminal revision case a bar to the disposal of another revision case arising out of the same original trial. It is only when there has been an actual adjudication upon a particular point, such as the jurisdiction of the lower Court to try the accused or the adequacy of the sentence, that the High Court will not review its own decision.

Where, therefore, the High Court has once dismissed a revision petition filed by a convict against the propriety of his conviction, it still has jurisdiction to consider another application made by the complainant or the Crown to enhance the sentence passed upon the convict.

Per *Wallace, J.*—No Court can reasonably accept the principle that once it has passed any sort of order in a criminal revision it is precluded from entertaining any further revision petition or reference in the same case, or even from proceeding *suo motu*. When a Court has refused to allow as adequate certain reasons put forward by a party for interference in revision it cannot be said to have endorsed the correctness, legality and propriety of the finding, sentence or order in revision beyond all further possibility of question. **M** ANIF SAHIB, *In re*, 26 Cr. L. J. 583 **727**

——— **s. 436**—*Further enquiry, when to be ordered.*

Where the whole evidence has been heard by a Magistrate hearing the case and has been disbelieved, a revising authority would not lightly interfere with the order of the Magistrate.

The provisions of s. 436 of the Cr. P. C. are meant to apply to cases where there has been some misinterpretation of the law or principle of law, or there has otherwise been miscarriage of justice. The mere fact that on the evidence a revising authority comes to a different conclusion from that arrived at by the Court that heard the evidence does not justify an order for further enquiry. **A** ZABAR SINGH *v.* RAM SARUP, L. R. 6 A. 47 Cr.; 26 Cr. L. J. 582 **726**

——— **s. 438**—*Reference, when to be made*—Adhiar, *whether labourer or tenant.*

A reference to the High Court in a criminal matter can only be made in respect of an error on a point of law.

An *adhiar* may be a mere labourer or he may be a tenant, and the question whether he is a mere labourer or a tenant must depend on the facts of each case. **C** EMPEROR *v.* ASIMULLAH, 26 Cr. L. J. 651 **939**

——— **s. 439**—*Conviction, setting aside of—Accused previous convict—Sentence, adequacy of.*

The High Court will not set side a conviction and direct a re-trial merely because after the conclusion of the case the Crown has discovered that the accused is a previous convict and the sentence passed upon him is not adequate. **A** EMPEROR *v.* RAM DIN, L. R. 6 A. 16 Cr.; 26 Cr. L. J. 654; (1925) A. I. R. (A.) 292 **942**

——— **s. 439**—*Magistrate consulting Appellate Magistrate—Irregularity—Proceedings, whether can be quashed—High Court, power of.*

It is extremely irregular for a Magistrate to consult and take the advice of an Appellate Magistrate in regard to proceedings pending before himself.

The High Court will not, however, quash the proceedings on revision on that ground alone during the pendency of the trial before the Magistrate although it has power to do so at any stage on a pro-

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per case being made out. **M** SAMI GOUNDAN, *In re*, 20 L. W. 937; (1925) A. I. R. (M) 315; 26 Cr. L. J. 421 **37**

——— **s. 439**—*Order of acquittal—Revision—High Court, powers of.*

The High Court can no doubt revise orders of acquittal, but the power of reversing acquittals is one that will only be used sparingly and when the interests of public justice demand.

It is in very exceptional cases that acquittals are set aside in revision on the application of private persons. **R** KHEM CHAND *v.* LALU, 3 Bur. L. J. 323; (1925) A. I. R. (R.) 193; 26 Cr. L. J. 511 **255**

——— **s. 439**—*Question of fact—Revision.*

A Magistrate trying a case is entitled to his opinion on facts and his order is not liable to be set aside in revision merely because he has not acted according to a superior Court with "fair mindedness and breadth of vision". **O** HAFIZ KHAN *v.* EMPEROR, 10 O. & A. L. R. 1189; 1 O. W. N. 878; 26 Cr. L. J. 527 **367**

——— **s. 439**—*Revision—High Court, power of, to quash proceedings.*

Where it appears to the High Court that the continuance of certain proceedings before a Subordinate Court would mean an abuse of the processes of the Court it is the duty of the High Court to interfere and to quash the proceedings. **C** HARANDRA NATH DAS *v.* JOTISH CHANDRA DUTT, 40 C. L. J. 283; (1925) A. I. R. (C.) 100; 26 Cr. L. J. 545; 52 C. 188 **641**

——— **ss. 439, 562 (1-A)**—*Penal Code (Act XLV of 1860), s. 279, conviction under, by Magistrate of Second Class—Magistrate, jurisdiction of, to release accused after admonition—Revision—High Court, interference by.*

The proviso to sub-s. (1) of s. 562 of the Cr. P. C. must be read as a part of the sub-section. It is superseded as regards the effect of sub-s. (1-A) by the words "the Court before whom he is so convicted," in the aforesaid sub-section, and cannot be used so as to control those words. A Magistrate of the Second Class, therefore, has jurisdiction to pass an order of release of an accused person convicted by him under s. 279 of the Penal Code after due admonition, under s. 562 (1-A) of the Cr. P. C.

The High Court will not in revision interfere with an order passed by a Magistrate under s. 562 (1-A) of the Cr. P. C., unless the order is clearly mistaken or injudicious or amounts to a failure of justice. **A** MURLIDHAR *v.* MAHBOOB KHAN, 26 Cr. L. J. 624; 47 A. 353 **848**

——— **s. 440**—*Parties, whether entitled to be heard.*

Under s. 440 of the Cr. P. C. no party has any right to be heard either personally or by Pleader before any Court while exercising its powers of revision. **O** HAFIZ KHAN *v.* EMPEROR, 10 O. & A. L. R. 1189; 1 O. W. N. 878; 26 Cr. L. J. 527 **367**

——— **s. 476**. *See* CR. P. C., 1898, s. 195 (c) **244**

——— **s. 476**—*Perjury committed in judicial proceeding—Order for prosecution, when can be made—Reasonable probability of conviction.*

Where perjury is alleged to have been committed in the course of a judicial proceeding and is duly brought to the notice of the Court, the Court is justified in taking action under s. 476 of the Cr. P. C., and order prosecution of the offender.

It is not necessary that the Court should form its opinion as to the desirability of prosecuting the offender during the progress of the actual case.

It is not fair to allow proceedings for perjury to take their course where the evidence is evenly balanced and there is no reasonable probability of securing a conviction. **R** VALAB DAS *v.* MAUNG BA THAN, 2 Bur. L. J. 154; 1 R. 372; (1924) A. I. R. (R.) 54; 25 Cr. L. J. 523 **362**

——— **(as amended by Act XVIII of 1923), s. 476**—*Sanction to prosecute—Sanction under old Procedure, legality of.*

A sanction to prosecute for perjury granted according to the procedure prescribed by the Cr. P. C., 1898, after its amendment in 1923, prescribing a different procedure, is illegal, and no Court can take cognizance of it. **B** *In re* GAFUR DAUD SAHEB, 26 Bom. L. R. 1235; (1925) A. I. R. (B.) 151; 26 Cr. L. J. 448 **54**

——— **s. 476A**—*Penal Code (Act XLV of 1860), s. 193—Complaint dismissed by Bench of Magistrates—Order by District Magistrate directing prosecution of complainant for perjury, legality of—Perjury—Oath not administered, effect of.*

A complaint was dismissed by a Bench of Honorary Magistrates. The District Magistrate, to whom an appeal would ordinarily lie from the order of the Bench took up the matter under s. 476A of the Cr. P. C. and ordered the prosecution of the complainant under s. 193 of the Penal Code:

Held, that the District Magistrate had jurisdiction to make the order which he had passed although the original complaint was not heard by him.

Even where no oath is administered to a witness in a judicial proceeding in a Court of Justice the witness is bound to state the truth and if he fails to do so he is guilty of an offence under s. 193 of the Penal Code. **A** MOTI RAM *v.* EMPEROR, L. R. 6 A. 44 Cr.; 26 Cr. L. J. 566 **710**

——— **s. 488**—*Unable to maintain itself, meaning of—Maintenance for child—Child's ability to earn something, relevancy of—Reference to High Court—Referring Court, duty of.*

The words "unable to maintain itself" in s. 488 of the Cr. P. C. mean "unable to earn a livelihood for itself,"—that is to say, a complete livelihood, such as an adult person might earn, without depending on any other person.

In fixing the sum payable for maintaining a child, it is not permissible in law to take into consideration the fact that the child is able to earn something towards its own support.

In all cases where a reference is made to the High Court in proceedings for maintenance it is desirable that the Referring Court should itself hear both parties before making any recommendation. **R** BARAN SHANTA *v.* MA CHAN THA MAY, 2 R. 682; (1925) A. I. R. (R.) 197; 26 Cr. L. J. 535 **375**

——— **s. 491** -Habeas corpus—*Guardian de jure, application by—Girl over 17 years of age—Considerations applicable—Welfare of minor—Minor's preference.*

On an application for *habeas corpus* in respect of detention of a minor child against the guardian's wishes, the jurisdiction of the Court is essentially a parental one and must be exercised for the benefit and welfare of the child, the word "welfare" being taken in its widest sense. The moral and religious welfare of the child as well as its physical well-being must be considered, with due regard to its ties of affection.

The order of the Court must be made with reference to the position of the parent, that of the child and its happiness and all the circumstances of the case.

Criminal Procedure Code—contd.

If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. There is, however, no hard and fast rule that in the case of a girl over 16 and a boy over 14, the Court has no option in the matter and that the wishes of the infant must be given effect to. Such a rule is too artificial, and even if such a rule obtains in England, there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail.

The mother of a minor girl between 17 and 18 years of age applied for a writ of *habeas corpus* for the production of the girl who was living with her step-sister and had consented to give herself in marriage to a relation to whom the mother objected. The girl's choice of her future husband was a free one and she expressed a decided preference to remain with the step-sister:

Held, that the proper order to make in the case was to free the girl from all restraint and to set her at liberty to go where she chose. **M** SARASWATHI AMMAL *v.* DHANAKOTI AMMAL, 47 M. L. J. 614; (1924) M. W. N. 870; 20 L. W. 902; (1924) A. I. R. (M.) 873; 26 Cr. L. J. 616 **840**

——— **(as amended by Act XVIII of 1923), s. 497,** *scope of—Bail in non-bailable cases—Magistrate, powers of—High Court, discretion of.*

Section 497 of the Cr. P. C., 1898, as amended in 1923, tends to limit rather than enlarge the powers of Magistrates in granting bail in non-bailable cases.

The High Court, however, is not limited within the bounds of s. 497, Cr. P. C., and has absolute discretion in the matter, but it is bound to follow the general law as a rule, and not to depart from it, except under very special circumstances, especially so in the initial stages of a case. **R** BOUDVILLE *v.* EMPEROR, 2 R. 546; (1925) A. I. R. (R.) 129; 26 Cr. L. J. 427 **43**

——— **ss. 517, 520**—*Order for disposal of exhibits—Court, power of—Question, whether can be separately considered.*

Section 517 of the Cr. P. C. does not limit the power of the Magistrate or Judge, who has omitted to pass an order for disposal of exhibits as part of his judgment convicting the accused, so as to deprive him of all power to subsequently pass orders for the disposal of the property.

Similarly a Court of Appeal or Revision is not so limited. Section 520 of the Code expressly authorises the separate consideration, where necessary, of matters referred to in the section. **R** MA WET *v.* MG PO TAIK, 3 Bur. L. J. 302; (1925) A. I. R. (R.) 183; 26 Cr. L. J. 518 **358**

——— **s. 526**—*Transfer of case—Pleader appearing in Court of his father.*

There is no rule against a Pleader appearing in the Court of his father, and the mere fact that the son of a Magistrate appears as a Pleader in a case before him, cannot be a ground for transfer of the case from his Court. **O** PEARAY LAL *v.* PUTTAN, 10 O. & A. L. R. 784; 26 Cr. L. J. 440; (1925) A. I. R. (O.) 348 **56**

Criminal Procedure Code—concld.

——— **s. 528**—*Transfer of case by District Magistrate—Sub-Divisional Magistrate, power of, to retransfer case—Use of strong language by Court.*

Under s. 528 of the Cr. P. C. a Sub-Divisional Magistrate has the power to withdraw a case pending before a Subordinate Magistrate. But the section cannot be so read as to imply that after a District Magistrate has transferred a case from the file of one Magistrate to that of another, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the case to his own file.

The use of strong language by a Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions but as soon as he expresses himself strongly he gives himself away, and if he raises by his language an apprehension in the mind of a party that he is prejudiced he has only himself to thank. A calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal. **A** MUHAMMAD AKBAR *v.* EMPEROR, 23 A. L. J. 133; L. R. 6 A. 57 Cr.; 26 Cr. L. J. 538; (1925) A. I. R. (A.) 283; 47 A. 288 **378**

——— **s. 537.** *See* CR. P. C., 1898, s. 263 **146**

——— **s. 562.** *See* CR. P. C., 1898, s. 415-A **135**

——— **s. 562**—*Receiving stolen property, offence of—Section, whether applies.*

Section 562 of the Cr. P. C. cannot be applied in a case under s. 411, Penal Code. **Pat** KABIR SHAH *v.* EMPEROR, (1923) A. I. R. (Pat.) 297; 1 Pat. L. R. 174 Cr.; (1923) Pat. 237; 26 Cr. L. J. 419 **35**

Criminal trial—*Appeal to Privy Council—Special leave—Letters Patent (Cal.), cl. 41.*

Points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave to the Privy Council.

Appeals in criminal matters under cl. 41 of the Letters Patent (Calcutta) should not be encouraged where no point of law has been raised by the Trial Judge nor will an application for special leave to appeal as an alternative be granted as a matter of course.

Obiter.—Clause 41 of the Letters Patent (Calcutta) is not applicable to a case where any point or points of law have been reserved for the opinion of the High Court, by an authority outside the High Court; *viz.*, by the Advocate-General of Bengal. **P C** BARENDRA KUMAR GHOSE *v.* EMPEROR, (1925) A. I. R. (P. C.) 1; 29 C. W. N. 181; (1925) M. W. N. 26; L. R. 6 A. (P. C.) 1; 26 P. L. R. 50; 27 Bom. L. R 148; 6 P. L. T. 169; 23 A. L. J. 314; 41 C. L. J. 240; 48 M. L. J. 543; 1 O. W. N. 935; 3 Pat. L. R. 1 Cr.; 52 C. 197 (P. C.) **47**

——— *Irregular Police investigation—Trial, whether void—Charge against one person—Offence also disclosed against another—Stay of proceedings—De novo trial—Charge of substantive offence—Abetment, conviction for—First Information Report, nature of.*

A trial is not necessarily void simply because it is preceded by a Police investigation which has failed to comply with Ch. V of the Cr. P. C.

A Magistrate who finds that there is a chance of getting a conviction against a person not charged, is not bound to stop the proceedings at any stage of the trial, arrest such person and start the original trial *de novo.*

Criminal trial—concld.

A man who is charged with a substantive offence and nothing else, can always without framing a further charge be convicted of abetment of it.

A First Information Report need not be made with the same precision and particularity as a charge or a plaint in a civil suit. **R** JOSEPH *v.* EMPEROR, 3 Bur. L. J. 265; (1925) A. I. R. (R.) 122; 26 Cr. L. J. 492 **236**

——— *Prosecution case found to be untrue—Acquittal—Procedure—Penal Code (Act XLV of 1860), ss. 147, 149.*

Where in a riot case it is found that the case presented to the Court by the prosecution is definitely untrue it is not necessary for the accused to plead the right of private defence or to show that they have not exceeded the right of private defence. On the finding that the case for the prosecution is untrue the accused are entitled to an acquittal. **Pat** RADHE SAHI *v.* EMPEROR, 2 P. L. R. 217 Cr.; (1925) A. I. R. (Pat.) 175; 26 Cr. L. J. 647 **935**

Custom—*Landlord and tenant—Well sunk by tenant on land appurtenant to house—Landlord, whether can sue for demolition of well.*

A tenant is entitled to improve his house in the *abadi.*

The sinking of a *pucca* well in a part of the land which is appurtenant to a tenant's house does not entitle the *zemindar* to sue for the demolition of the well. **A** MAHADEO RAI *v.* JAN MUHAMMAD, 23 A. L. J. 231; (1925) A. I. R. (A.) 341 **1**

——— *or personal law—High caste Hindus—Presumption—Joshi Brahmans of Saila Kalan, Tahsil Garhshankar, District Hoshiarpur—Succession—Daughters versus collaterals.*

The initial presumption in the case of high caste Hindus is that they are governed by their personal law.

Joshi Brahmans of *Mauza* Saila Kalan, Tahsil Garhshankar, District Hoshiarpur, are not governed by custom and among them daughters are not excluded by collaterals in the matter of succession to ancestral property. **L** ANANT RAM *v.* RAM RATTAN, 5 L. 547; (1925) A. I. R. (L.) 247 **431**

——— **Adoption**—*Hindu Jats of Chunni Khurd, Tahsil Kharar, District Ambala—Daughter's son, whether can be adopted—Burden of proof.*

When a sonless man in any land-holding group which recognises a power to adopt asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power.

The burden of proving that the adoption of a daughter's son by a sonless Hindu Jat proprietor of Chunni Khurd, Tahsil Kharar, District Ambala is valid is on the party who sets up the custom. **L** HARI SINGH *v.* RATTAN SINGH, 5 L. 519; (1925) A. I. R. (L.) 243 **412**

——— **Alienation**—*Ancestral land—Just antecedent debt.*

An alienation of ancestral land for the purpose of paying just antecedent debts is permissible by custom. **L** ARJUN *v.* JUG LAL, (1923) A. I. R. (L.) 422 **95**

——— *Gujars of Hoshiarpur Tahsil—Gift by sonless proprietor to daughter, validity of.*

Among Gujars of Hoshiarpur Tahsil a gift by a sonless proprietor of a portion of his ancestral holding to a daughter or daughter's son in lieu of services is

Custom—concld.

valid by custom. **L** UMRA *v.* RAJI, 5 L. 473; 6 L. L. J. 601; (1925) A. I. R. (L.) 222 **135**

——— **Succession**—*Daughter v. Collaterals—Self-acquired property—Sandhu Jats of Amritsar District.*

By the custom prevailing among Sandhu Jats of the Amritsar District, daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property. **L** NADHAN SINGH *v.* RAJO, 1 L. C. 15 **783**

——— *Kalasra Jats of Dogar Kalasra, Muzaffargarh District—Daughter, whether loses her right by marriage outside family—Burden of proof.*

The burden of proving that the daughter of a sonless proprietor loses her right of succession to her father's estate by marrying outside the family is on the collaterals.

Among Kalasra Jats of Dogra Kalasra, Muzaffargarh District, the daughter of a sonless proprietor loses her right of succession by marrying outside the family. **L** ALLAH WASAYA *v.* ZOHRAN, 5 L. 535; (1925) A. I. R. (L.) 258 **436**

Defamation. *See* PENAL CODE, 1860, s. 500 **144**

Divorce Act (IV of 1869), s. 7—*Divorce petition—Domicil—Adultery, evidence of—Submission by respondent, whether sufficient—Adultery with unnamed person—Relief, grant of.*

Unless it is shown that the parties to a divorce petition are domiciled in British India, the Divorce Act gives no jurisdiction to the Courts to hear the petition.

An allegation to the effect that the parties are domiciled in British India ought to be contained in every petition under the Divorce Act.

A mere submission, not an admission, on the part of the wife that she had committed adultery with [illegible] person is insufficient evidence to establish adultery.

Per *Marten, J.*—In a petition for divorce founded on adultery with a named person and also with some person or persons unknown, relief cannot be granted in respect of the latter allegation, unless leave to dispense with the named co-respondent is first obtained from the Court. **B** HEWSON *v.* HEWSON, 26 Bom. L. R. 467; (1924) A. I. R. (B.) 397 **774**

Easement, *extinguishment of—Merger, requisites of—Suit for declaration of easement—Necessary parties.*

In order that an easement may be extinguished there must be complete unity of seisin, *i. e.*, the absolute ownership of the dominant and servient tenements must vest in the same person. In other cases of unity the easement is suspended, not extinguished.

In a suit for the declaration of a right of easement a dominant owner has no cause of action against servient owners who have neither caused obstruction nor raised any objection to the exercise of his right of easement. He is not bound to make parties any servient owners other than those who have so obstructed or challenged his right. **C** DURGA RAM DAS *v.* BHARAT RAM DAS **739**

——— *Right of way—Long and uninterrupted user—Presumption—Nature of obligation—Servient owner, whether can object on ground of inconvenience—Right of way, limit of—Failure to draw inference that user is as of right—Second appeal.*

Long, uninterrupted and peaceful enjoyment of a right of way is presumed to be as of right. There is no presumption that the enjoyment is by license.

Easement—concld.

Under law, the nature of the obligation resting on the owner of the servient tenement is purely negative, that is to say, he must not so deal with the servient tenement as to render the easement incapable, or more difficult of enjoyment by the owner of the dominant tenement.

Easements of way must not be vague or indefinite, that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose.

When once a right of way has been acquired, the servient owner cannot object to it on the ground of inconvenience, nor can he put an end to the right by showing that there is another pathway which the dominant owner might use.

The question of the precise limit of the right in any particular case must depend upon the proof of the particular line between the *terminus a quo* and the *terminus ad quem* over which the owner of the dominant tenement claims the right.

Where there has been long and continuous user of a right of way by a party, it is open to the Court to draw the inference that the user was of right, and a failure to draw it from the facts proved is a ground for interference in second appeal. **N** WASUDEO *v.* SHANKAR, 7 N. L. J. 232; (1925) A. I. R. (N.) 168 **84**

Ejectment, *suit for—Burden of proof—Recognition of tenancy—Duty of Court.*

In a suit for ejectment the initial onus is on the plaintiff to prove his title. As to the right of the defendant to hold the land, when there is no contract between him and the plaintiff or any privity of contract as between the parties, the defendant must also prove his right to remain on the land.

Where a recognition of tenancy is set up the Court should determine in each case whether on a consideration of all the facts, not merely by giving undue weight to words used, a legal inference is or is not to be drawn that there has been a recognition establishing the relationship of landlord and tenant between one who has paid and another who has received rent for a number of years. **C** SALISH CHANDRA GHOSE *v.* DEBENDRA NATH DEY **636**

Electricity Act (IX of 1910), s. 22, Sch., cl. (vi), paras. 4, 5—*Transfer of supply to new premises—Written requisition, whether necessary.*

Before a person can claim a supply of electricity for his new premises in substitution of the supply which he used to get for his old premises, he must put in a requisition in writing as required by cl. (*vi*), of the Schedule to the Electricity Act. **B** BHAGWANJI *v.* AHMEDABAD ELECTRICITY CO., 26 Bom. L. R. 1206; (1925) A. I. R. (B.) 120; 49 B. 182 **186**

Estoppel. *See* EXECUTION OF DECREE **193**

——— against Statute. *See* C. P. C. 1908, s. 11 **123**

——— *Attestation of document by witness—Knowledge of transaction—Mortgage by Hindu widow—Attestation by reversioners, effect of.*

Attestation of a document may take place in circumstances that would indicate that a witness attesting the document did in fact know of the nature of the transaction and assented to it.

A mortgage-deed executed by a Hindu widow to pay off a debt due from the reversioners of her deceased husband was attested by the reversioners:

Held, that the reversioners had assented to the mortgage and that they and their successors were

Estoppel—concld.

estopped from questioning it after the estate had fallen into possession. **A** RAM ADHAR *v.* BHAGWAN SINGH, L. R. 5 A. 644 Civ.; (1925) A. I. R. (A.) 209 **580**

Evidence Act (I of 1872), ss. 13, 40, 41, 42, 43. *See* C. P. C., 1908, s. 11 **979**

——— **ss. 24, 25.** *See* CR. P. C., 1898, ss. 298, 299 **830**

——— **s. 26**—*"In custody of Police Officer," meaning of—Confession made to* Mashirs, *admissibility of.*

The meaning of the words "in the custody of a Police Officer" in s. 26 of the Evidence Act, cannot be extended by implication to cases beyond what is absolutely necessary, that is, where the person is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the person to whom the confession is made. But where the accused is not arrested or under supervision, and is merely being invited to explain certain circumstances, it would be going further than the section warrants to exclude the statement that he makes, on the ground that he is to be deemed in Police custody. It, however, by no means follows, that because the statement is admissible, therefore, it should not be considered with considerable care to see how far reliance should be placed on such extra-judicial confession. The weight to be given to it depends very much on the circumstances of the case, whether suspicion attached to the accused at the time, whether accused was intelligent or ignorant of the possible result of the confession, what the position of the *Mashirs* was and the like. **S** EMPEROR *v.* MAHOMED BUX, 16 S. L. R. 143; 26 Cr. L. J. 609 **833**

——— **s. 30**—*Confessional statement of exculpatory nature—Admissibility against co-accused.*

A statement to the effect that the person making it and his co-accused struck the deceased in exercise of their right of private defence is in no sense a confession and cannot be taken into consideration against the co-accused. **L** MAULU *v.* EMPEROR, 6 L. L. J. 434; 26 Cr. L. J. 531 **371**

——— **s. 32**—*Dying statement of dacoit—Admissibility against other dacoits.*

The statement of a dying dacoit as to the circumstances of the dacoity resulting in his death giving the names of his associates, is not admissible in evidence against the other dacoits under s. 32 of the Evidence Act. **A** DANNU SINGH *v.* EMPEROR, L. R. 5 A. 201 Cr.; (1925) A. I. R. (A.) 227; 26 Cr. L. J 547 **643**

——— **ss. 32 (2), 35**—*Criminal Procedure Code (Act V of 1898), s. 154—First Information Report, admissibility of—Statement in First Information Report, value of—*Post mortem *report, admissibility of, after death of Doctor—Statements made in previous criminal trial, whether admissible in subsequent trial of different accused.*

A First Information Report is an official record made by a public servant in the discharge of his official duties and is admissible in evidence under s. 35 of the Evidence Act. By itself, however, the report would only prove that a certain person had made that statement and the contents of the report may be used as a corroborative piece of evidence to show that the implication of the persons mentioned in the report in the offence reported is not an afterthought. The probative value of the document does

Evidence Act—contd.

not go further and it cannot be used as a substantive piece of evidence in the case.

A *post mortem* report made by a Doctor who has since died is admissible in evidence under s. 32 (2) of the Evidence Act.

Statements of witnesses made in a criminal trial are not admissible in evidence after the death of the witnesses in a subsequent trial against an accused person who had no opportunity of examining the witnesses, nor is the judgment delivered in a previous trial admissible in a subsequent trial of a different accused person in respect of the same offence. **A** MOHAN SINGH *v.* EMPEROR, L. R. 6 A. 49 Cr.; 26 Cr. L. J. 551 **647**

——— **s. 32 (5)**—*Declaration by person as to his parentage, whether admissible.*

A declaration by a person as to his parentage made *ante litem motam* is admissible in evidence under s. 32 (5) of the Evidence Act in proof of such parentage. **O** SANTU *v.* TARA, 10 O. & A. L. R. 1226 **407**

——— **s. 35**. *See* CR. P. C., 1898, ss. 154, 157, 158 **650**

——— **s. 35** — *Judgment containing recital of pleadings—Admissibility in evidence to prove acknowledgment.*

Obiter:—A judgment *inter partes* which contains a recital of the pleadings is admissible in a subsequent suit to prove an acknowledgment contained in the pleadings in the previous suit. **M** UDAMANATHALA NALUPURATATIL IBRAINE *v.* PARAMESHWARA BAVANNAVAR **996**

——— **s. 42**—*Incidental remarks in judgment concerning property not in dispute, whether admissible.*

The fact that a judgment is relevant under s. 42 of the Evidence Act would not render remarks made in that judgment incidentally about property which was not then in suit, admissible in evidence in a subsequent suit. **L** BANWARI LAL *v.* SHEO CHAND, (1923) A. I. R. (L.) 384 **795**

——— **s. 65**—*Loss of document—Hearsay evidence.*

Where direct evidence is available, hearsay evidence is inadmissible for the purpose of proving the loss of a document. **M** VENKATACHARIYULLU *v.* RAMANIACHARYULY, 47 M. L. J. 906; 21 L. W. 67; (1925) A. I. R. (M.) 345 **524**

——— **s. 90**—*Document executed by* am-mukhtar—*Presumption—Plaintiff what must prove.*

When a document 30 years old is signed by the *am-mukhtar* on behalf of his principal, the only presumption that arises under s. 90 of the Evidence Act is that the document was signed by the *am-mukhtar* as such, and it must be proved that the *am-mukhtar* had authority to execute the documents on behalf of the principal. **C** RAMANI KANTA RAY *v.* BHIMNANDAN SINGH, 50 C. 526; (1924) A. I. R. (C.) 82 **221**

——— **s. 90**—*Will thirty years old—Execution—Attestation—Presumption.*

Where all the attesting witnesses to a Will, which is more than thirty years old and is produced from proper custody, are shown to have been dead, a presumption may be drawn as to its genuineness and proper attestation, under s. 90 of the Evidence Act. **O** SHIAM SUNDER SINGH *v.* JAGANNATH SINGH, 10 O. & A. L. R. 1261; 1 O. W. N. 881; 28 O. C. 91 **558**

——— **s. 92**—*Sale-deed—Recital of no encumbrance—Parol evidence of vendor's knowledge of existence of encumbrance, admissibility of.*

A declaration or recital in a sale-deed that there is no encumbrance on the property or that the vendor

Evidence Act—concld.

has a good title to convey is not one of the terms of the contract of sale, and evidence to prove that the vendee was aware of such defect cannot be said to vary or contradict the terms of the contract and is not inadmissible in evidence under s. 92 of the Evidence Act. **M** GONDU RAMASUBBU IYER *v.* MUTHIAH KONE, **999**

——— **s. 98**—Technical words. *See* LIMITATION ACT, 1908, SCH. I, ART. 53 **299**

——— **s. 114, Ill. (a)**. *See* PENAL CODE, 1860, s. 411 **722**

——— **s. 114, Ill. (e)**. *See* LIMITATION ACT, 1908, s. 19 **633**

——— **s. 115**—*Estoppel—Admission of validity of Will and title of devisee, effect of.*

Where a devisee under a Will transfers a portion of the property received under the Will in favour of a rival claimant to the estate on receipt of a representation by him that he admits the validity and operative nature of the Will and accepts the devisee as the absolute owner of the estate; the person making the representation cannot afterwards be allowed to deny the truth of his representation in a suit between himself and the representative of the devisee. **O** MOHAMMAD HASAN *v.* ALI HYDER, 10 O. & A. L. R. 1229; 12 O. L. J. 1; 1 O. W. N. 803: 28 O. C. 8; (1925) A. I. R. (O.) 337 **509**

——— **s. 115**—*Estoppel—Donee, whether can question right of ostensible donor to make gift.*

A person who takes property under a gift from several ostensible donors, is estopped from asserting that some of the donors had no right to make the gift. **M** KEEZHANTHI JANAKI *v.* PATHIAPURAYIKEEZHANTHI GOVINDAN **546**

——— **s. 118**. *See* CR. P. C., 1898, s. 342 **236**

——— **s. 165**—*Evidence in Court, whether can be tested by extraneous matter—Judge, duty of.*

A Judge has no right to test evidence given in Court by material which has not legally been made evidence. He has the right and the duty to test a witness's evidence by putting questions to him for the purpose of clearing up any matters which may be ambiguous or doubtful. But before he is justified in commenting adversely upon a witness's evidence, he must establish the particular fact warranting such criticism by proper evidence in Court and not by reference to documents which are not properly on the record. **L** AMAR NATH *v.* EMPEROR, 5 L. 476; (1925) A. I. R. (L.) 187; 26 Cr. L. J. 463 **143**

Execution of decree—*Decree allowing interest only on costs—Stay of execution—Security bond reciting payment of interest on principal amount—Decree whether varied—Decree-holder, whether entitled to interest on principal amount.*

A decree was passed in favour of the appellant for damages and costs and in the decree interest was allowed only in respect of costs. An appeal was preferred against the decree by the respondents, and in order to obtain a stay of execution during the pendency of the appeal, the respondents executed a security bond which recited the fact that interest was payable upon the sum allowed for damages also, but there was no specific agreement to pay interest upon this sum nor was there any recital of the rate of interest. The appeal was eventually dismissed. In execution of the decree:

Held, that the Appellate Court by dismissing the appeal affirmed the decree of the Trial Court and

Execution of decree—contd.

that the only decree which could be executed was that decree which had not in any way been modified by the terms of the security bond, and that the appellant was, therefore, not entitled to recover any interest upon the principal amount mentioned in the decree. **Pat** MANGAL PATHAK v. MESAR SINGH, (1924) Pat. 273; (1925) A. I. R. (Pat.) 128 **110**

——— *Decree directing payment within certain time —Failure to make payment within time, effect of.*

Where a decree directs that on payment by the plaintiff of a certain sum of money within a certain period, the defendant shall convey certain property to the plaintiff, the failure of the latter to make the payment within the time limited in the decree disentitles him from executing the decree. **R** MA PU MAI v. KO SIT TIN, 3 Bur. L. J. 163; (1924) A. I. R. (R.) 375 **352**

——— *Executing Court, whether can go behind decree—Objections taken to maintainability of suit considered in judgment, whether can be taken again in execution.*

Where objections to the maintainability of a suit are considered by the Court and a decree is passed in the suit, the Executing Court cannot go behind the decree and the judgment-debtor is not entitled to re-agitate, in execution proceedings, the objections which have been disposed of by the Court in its judgment before passing the decree. The decree must be executed as it stands. **Pat** OFFICIAL ASSIGNEE OF BENGAL v. JAGA BIBI **488**

——— *Judgment-debtor, death of—Legal representative, doubt as to—Wrong representation—Sale, validity of—Mortgagor and mortgagee—Estoppel.*

B and *M*, two Hindu cousins, sold certain land belonging to them to one *D*, who afterwards conveyed one moiety of the land to the wives of *B* and *M* each. The wives of *B* and *M* subsequently mortgaged their respective moieties. After this certain creditors of *B* brought a suit to which both *B* and *M*, their wives and the mortgagee were parties. In this suit it was held that the conveyance to *D* was a sham transaction, and that *B* and not his wife was the true owner. Subsequently the mortgagee obtained a money-decree in a Small Cause suit against both *M* and his wife, which was, after the death of *M* and his wife, executed against their son, who was brought on the record as their legal representative, and the right, title and interest of both the judgment-debtors in the property was sold and purchased by the decree-holder. On this a suit was filed by the daughter of *M* and his wife for redemption of the mortgage created by her mother, alleging that she was the preferential heir to her mother's *stridhan*, that it was not open to the defendant to question the title of her mother from whom he had taken the mortgage and that the sale of the property in execution of the money-decree was invalid, as her brother was not the proper legal representative of her mother :

Held, (1) that the defendant as mortgagee was estopped from questioning the title of his mortgagor, the plaintiff's mother ;

(2) that, however, the sale in execution of the money-decree was not invalid under the circumstances of the case, as the question as to whether *M* or his wife was the true owner of the land was to say the least, not free from doubt, in view of the result in the suit brought by creditors of *B*, and, therefore, it was difficult to say that the decree-holder had no justification whatever to treat the son as the proper legal representative for the purposes of execution proceedings. **B** MADHAVRAO HARBAJI v. AMBABAI LAXMAN, 26 Bom. L. R. 1210; (1925) A. I. R. (B.) 125 **193**

Execution of decree—concld.

——— *Mortgage-decree — Decree-holder notifying Executing Court that sale would not affect rights of certain defendants, effect of—Amendment of decree —Decree-holder, right of, to proceed against any portion of mortgaged property—Duty of Court.*

No amendment of an execution petition should be allowed after it has been registered. Where, however, a mortgagee decree-holder simply notifies to the Court that the sale of the mortgaged properties should not affect the *mirasi* rights or interests of certain defendants and makes no further prayer with respect to them in the execution application, his action does not amount to an amendment of the petition.

It is the right of a mortgagee-decree-holder, in order to realise his dues, to proceed against any of the mortgaged properties or any portion of them inasmuch as his mortgage-debt extends to every bit of the property mortgaged.

A question with regard to the apportionment of the mortgage-debt between different mortgagors defendants must be raised in the mortgage-suit itself, and cannot be raised in execution proceedings.

A decree-holder is entitled to execute the decree as it stands and the Executing Court is in law bound to execute the decree as it finds it and is not entitled to go behind it. **C** ABUL HASMAT AHAMAD v. HRISHIKESH DAS **742**

——— *Sale—Amendment of decree, effect of.*

If at the time when an auction sale is held there is a valid decree standing the sale is perfectly valid and a subsequent event that the decree is amended or even set aside would not necessarily nullify the sale. **A** FATEH LAL v. SHAR SINGH, L. R. 6 A. 63 Civ.; (1925) A. I. R. (A.) 264 **660**

Execution sale—*Saleable title, whether guaranteed.*

In an execution sale, all that a Court does is to sell the right, title and interest of the judgment-debtor. It does not guarantee that the judgment-debtor has a good saleable title. **M** AMMATHAYI AMMAL v. SIVARAMA PILLAL, 20 L. W. 987; 48 M. L. J. 74; (1925) A. I. R. (M.) 334 **272**

Extradition Act (XV of 1903), s. 23. *See* CR. P. C., 1898, ss. 54 (7), 491 **913**

Factories Act (XII of 1911), ss. 18 (2), 41 (g)—*"Serve on the manager an order in writing," meaning of—Order of Inspector, failure to comply with—Prosecution of manager—Condition precedent.*

The words "serve on the manager an order in writing" in s. 18 (2) of the Factories Act mean that such an order as is referred to in Form O should be served definitely on the manager of the factory and that it should specify exactly what measures the manager is to take in order to remove the danger.

Section 18 (2), Factories Act, contemplates that the Inspector is to make up his mind definitely what is the order which he requires to be carried out under the Act, and for breach of which he will prosecute the factory owner or manager under the Act, and that equally definite notice is to be given to the latter.

The mere fact that the manager was aware of what the Inspector wanted him to do is not a sufficient compliance with the specific requirements of the Act.

A manager of a factory cannot, therefore, be prosecuted under s. 41 (*g*) of the Factories Act unless the

Factories Act—concld.

condition precedent mentioned therein is complied with, that is to say, that the requisite notice has been served on the manager of the factory. **B** NARAYAN ANANT DESAI *v.* EMPEROR, 26 Bom. L. R. 1245; (1925) A. I. R. (B.) 143; 26 Cr. L. J. 482 **226**

Family arrangement. *See* MUHAMMADAN LAW **945**

——— *Share allotted to persons not legally entitled and not parties, effect of.*

In the case of a family arrangement arrived at in the course of arbitration proceedings persons who may not be legally entitled to a share in the estate but who are given some benefit under the arrangement are entitled to have the benefit of it even though they were not parties to the submission. **M** DADA SAHIB *v.* KOLLAPURAM GAJARAJ SINGH, 20 L. W. 854; 47 M. L. J. 928; (1925) A. I. R. (M.) 204 **258**

First Information, *value of.*

A First Information Report is not like the deposition of a witness given in Court and cannot be considered to be exhaustive. **L** JHANDU *v.* EMPEROR, 6 L. L. J. 268; (1924) A. I. R. (L.) 555; 1 L. C. 414; 26 Cr. L. J. 653 **941**

Foreigners Act (III of 1864), s. 3-A—*Foreigner, apprehension of, by Commissioner of Police—Report to Government, when to be made—Burden of proof—Order of Government not obtained—Detention, whether legal—Criminal Procedure Code (Act V of 1898), s. 491.*

It is incumbent on the Commissioner of Police to report the case to the Local Government at the same time as he issues a warrant for the apprehension of an alleged foreigner.

The onus is on the apprehended person to prove that he is not a foreigner.

Where after the apprehension of an alleged foreigner no orders have been obtained from the Government under s. 3 of the Foreigners Act, the continued detention of the person apprehended is an illegal or improper detention within the meaning of s. 491 (1) (*b*) of the Cr. P. C., or, in the alternative, the person apprehended is not being dealt with according to law within the meaning of s. 491 (1) (*a*).

The executive powers of deportation of the Government must be exercised without delay on the receipt of the report from the Commissioner of Police.

Per *Fawcett, J.*—The provision of sub-s. (5) of s. 3-A, Foreigners Act, about the orders being given without delay is mandatory, and sub s. (4) of that section must be read as if the words "pending the orders of the Local Government" were qualified by the words "such orders being obtained within a reasonable time," for "without delay" means this. **B** *In re* JAGERDEO, 26 Bom. L. R. 1252; (1925) A. I. R. (B.) 139; 26 Cr. L. J. 458; 49 B. 222 **138**

Guardians and Wards Act (VIII of 1890), s. 17—*Muhammadan Law—Guardianship—Minor, female—Married sister, whether can be guardian—Court, duty of.*

Under s. 17 of the Guardians and Wards Act, in appointing or declaring a guardian of a minor, the Court must be guided by what appears under the circumstances to be for the welfare of the minor but this should be done consistently with the law to which the minor is subject.

The precept of the Muhammadan Law is that the custody of a female minor may not be given to a

Guardians and Wards Act—contd.

married sister where there is a possibility of the married sister's husband taking the minor into marriage for himself. Where, however, it is impossible to discover any suitable guardian the powers of the Court are not circumscribed by the tenants of the Muhammadan Law.

A person who is appointed guardian by a Court must be a person to whom the Court can render every available assistance under the law. It is a contradiction in terms to choose a guardian and then tell him that the Court is not prepared to help him for the protection of property and person of the minor. **O** GUNNA *v.* DARGAHI, 10 O. & A. L. R. 1281; 28 O. C. 132 **624**

——— **ss. 29, 31, 47, 48**—*Minor—Sale of minor's property—Sanction of Court—Duty of Court—Sanction, whether can be withdrawn—Interests of minor—Prior agreement for sale—Specific performance, suit for—District Judge, order of, whether can be questioned.*

A guardian appointed by the Court under the Guardians and Wards Act is prohibited from transferring any property of the minor without obtaining the previous permission of the Court and the Court must not grant any such permission to the guardian except in case of necessity or for an evident advantage of the ward. In granting such permission to the guardian, it is the duty of the Court to see that the transaction confers the highest benefit on the minor.

If on account of competition between intending purchasers the minor gets a higher value for the property which is intended to be sold, it is not the business of the District Judge to enquire into the motive which leads the rival purchasers to offer higher bids. It is to the advantage of the minor that there should be such a competition between purchasers.

Where a sale of a minor's property is proposed to the District Judge and he is of opinion that a higher value than that proposed by the guardian is obtainable for the property intended to be sold, it is open to him to direct the *Nazir* to hold an auction of the property in order to obtain the best value for the property. There is nothing wrong in such procedure being followed.

A District Judge who makes an order on the representation of a statutory guardian for sale of the property of his ward for the value suggested by the guardian may withdraw that order if it is brought to his notice that a higher value can be obtained for the minor's property than the value for which the guardian proposes to sell it; it may not be due to the guardian's improvidence, it may be due to his inability to find proper purchasers with his best endeavours to do so that he suggests a lower value.

Where a person purchases the property of a minor under a sanction granted by the District Judge, the Court will not grant a decree for specific performance of a prior contract for the sale of such property entered into by the guardian of the minor in favour of a third person as against such purchaser.

An order made by a District Judge concerning the sale of the property of a minor cannot be quashed in a suit for specific performance of a contract to sell such property entered into by the guardian of the minor.

Courts in India will not allow a bargain made by an improvident guardian to be enforced against the interests of the minor if it be shown to be a bargain made to the detriment of the minor.

Guardians and Wards Act—contd.

Quære.—Whether a contract of sale of the property of a minor which has been sanctioned by a District Judge can be specifically enforced after the District Judge has cancelled or withdrawn his sanction. **C** TARINI KUMAR DUTTA *v.* SRISH CHANDRA DAS **667**

——— **s. 32**—*Trusts Act (II of 1882), ss. 77, 78—District Judge, jurisdiction of, to dispossess third persons in possession of minor's property—Trust created by minor's father for payment of debts, whether can be cancelled by District Judge.*

Under the Guardians and Wards Act a District Judge has no jurisdiction to dispossess third persons from property over which they may be, rightly or wrongly, in possession. He can at best give directions to the guardian to take necessary steps to recover the property.

In order to arrange for the payment of their debts three separated Hindu brothers executed a deed of trust under which trustees were appointed to take charge of the management of their entire estate and to pay out of its income the debts that were outstanding against it. Subsequently, one of the brothers died and his minor son succeeded to his interest in the estate. The widow of the deceased was appointed the guardian of the person and property of her minor son, but the District Judge being of opinion that it was desirable that the management of the estate should continue in the hands of the trustees, passed an order to that effect and added the minor's mother as one of the trustees. The District Judge also permitted the guardian to enter into a deed of partition with the other proprietors under which the minor's share in the estate was separated and the exact amount of his liability was allocated. Sometime afterwards the minor's guardian became dissatisfied with the management of the other trustees, and on her application the District Judge, after expressing the view that it was no longer in the interest of the minor that the trustee should continue to manage the property when his mother was altogether excluded from the management, said that he thereby "cancelled the trust." He also directed that the guardian should herself manage the property through paid managers:

Held, (1) that the trustees not having been directly appointed by the District Judge were not under his direct control, and he had no jurisdiction in a summary proceeding either to issue orders to the trustees to hand over the possession of the minor's property to the guardian or to terminate the trust;

(2) that the trust created by the minor's father and uncles had continued to be in existence throughout and all that had happened on the death of the minor's father was that a new trustee had been added and that, therefore, the District Judge had no jurisdiction to set aside the trust;

(3) that even if it was assumed that a new trust was created on behalf of the minor by his guardian it could not be cancelled or revoked unless the case fell within the provisions of s. 77 or s. 78 of the Trusts Act. **A** HARBANS SINGH *v.* RAJINDER KUAR, 23 A. L. J. 28; L. R. 6 A. 162 Civ.; (1925) A. I. R. (A) 277; 47 A. 313 **1047**

——— **s. 72**—*Lunatic, guardian of, appointment of—Heir, whether can be appointed guardian.*

The provisions of s. 72 of the Guardians and Wards Act imposing a restriction to the appointment of the legal heir of a lunatic to be the guardian of his person cannot be attended to in a case where near relations alone can be appointed guardians of the person of the lunatic. **O** BALBIR *v.* CHEDI LAL, 10 O. & A. L. R. 968 **276**

High Courts Act, 1861 (24 & 25 Vic. C. 104), s. 15. *See* INSOLVENCY ACT, 1848, (11 & 12 Vic. c. 21), s. 3 **1025**

Hindu Law—*Female owner, alienation by—Payment of secured debts.*

Under the Hindu Law a female owner who represents the whole estate for the time being is bound to manage it to the best of her ability. She must be allowed reasonable latitude in the exercise of her powers provided she does not act unfairly towards the reversioners. So long as there are outstanding debts which are a charge on the estate and which bind the estate and which cannot be got rid of by the reversioners without payment, it is her discretion to decide whether she should pay them off or not. It is not incumbent on a transferee from her to establish that some dire consequences would have ensued if these debts had not been discharged. **A** AMBIKA PRASAD *v.* MADHO PRASAD **868**

——— **Adoption**—*Ante-adoption agreement between natural and adoptive father—Contemporaneous Will—Bequest of properties to third persons, binding nature of—Matters for consideration—Benefit to adopted boy.*

Per *Spencer, Offg. C. J.*—If an adoption and a disposition of his property by the adoptive father form part of one transaction, the adopted son never acquires any interest in the property disposed of and no question can arise as to his guardian's competency to deal with it.

Per *Kumaraswami Sastri, J.*—Where an adoption is made by a Hindu who at the time of adoption has absolute power of disposal over his property, a simultaneous agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *intervivos* or by a Will binds the adopted son in all cases where it is for his benefit.

Case-law on ante-adoption agreements reviewed.

In regard to ante-adoption agreements, the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted. But the rights of the boy to be adopted should not be tested with reference to what his position in the family would be *after adoption* and by seeing whether the adoptive father could *after the adoption* have made the alienations which are disputed, since the right of a Hindu father to give his son in adoption is not governed by any questions of benefit to the adopted boy.

If the adopting father would not make the adoption but for the conditions agreed to by the natural father and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. **M** KRISHNAMURTHY AIYAR *v.* KRISHNAMURTHI AIYAR **882**

——— *Self-acquired property, whether becomes joint.*

Under the Hindu Law, self-acquired property does not become joint immediately on the adoption of a son. **L** KARAM SINGH *v.* RUPWANTI, 6 L. L. J. 412; (1925) A. I. R (L.) 122 **296**

Hindu Law—contd.

——— **Adoption** *subsequent to wife's death—Succession to relatives of wife—Adopted son, rights of.*

An adopted son can inherit to the relations of the wife of his adoptive father only where she has taken part in the adoption.

Where a Hindu subsequent to the death of his wife, adopts a boy, the adopted son cannot inherit as a collateral to the relatives of the deceased wife of his adoptive father.

A wife who does not or cannot take part in the adoption of a boy by her husband, cannot become the mother of the boy in the same sense as the wife who receives the boy in adoption and who is termed the "receiving mother."

The adoption of a boy being only to a man the relationship of the adopter to the adopted boy is irrespective of there being an adoptive mother. **M** VENKATASUBBIER *v.* SUNDARAMMA, 20 L. W. 925; 48 M. L. J. 126; (1925) A. I. R. (M.) 340 **318**

——— **Alienation** *by husband—Confirmation by widow, whether fresh alienation.*

A confirmation by a Hindu widow of a past alienation by her husband cannot be regarded as a fresh act of alienation by her. **M** ELGAN *v.* NANJAPPAN **964**

——— *by widow—Necessity—Enquiry by alienee—Burden of proof.*

It is not sufficient for a person who proposes to take an alienation of property from a Hindu widow to assure himself that necessity for the alienation exists. He must further assure himself that such necessity cannot be satisfied without borrowing; although he is in no way responsible to prove that the money advanced by him was really utilized in satisfying the necessity. **O** RAMAN *v.* BARATI, 10 O. & A. L. R. 965; 27 O. C. 329; 1 O. W. N 654 **489**

——— **Debt**—*Decree against father—Ancestral property in son's hands, whether liable—Civil Procedure Code (Act V of 1908), s. 53.*

A Hindu father can by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt, if the other member of the family happens to be his son.

The whole of the ancestral property in the hands of a Hindu son is liable to be sold in execution of a money decree passed against his father. **B** NARAYAN GANESH *v.* SANGUNABAI GANGADHAR, 26 Bom. L. R. 1200; (1925) A. I. R. (B.) 193; 49 B. 113 **181**

——— **Endowment**—*Will, construction of—* Shebaitship, *devolution of—Gift to unborn persons, validity of—Devolution of* shebaitship, *variation in —Directions as to management, whether cease to be operative.*

A Hindu testator by his Will, made a gift of certain properties to an idol and appointed his wife and his three brothers *shebaits* and as to future *shebaits* made the following provision: "When you all have ceased to be, he who shall be of the Hindu pursuation and senior in age, amongst your legal heirs shall have the management of the property:"

Held, (1) that the *shebaitship* was a hereditary office;

(2) that the provision as to the appointment of future *shebaits* being in the nature of a gift to unborn persons failed and the *shebaitship* reverted to the heirs of the founder, on the death of the heirs of the *shebaits* mentioned in the Will who were in existence at the time of the death of the testator.

The directions as to management of an endowment do not cease to be operative simply because the original provision as to devolution of *shebaitship* ceases to be operative, owing to its being varied. **C** PRAMATHA NATH *v.* ANUKUL CHANDRA, 29 C. W. N. 17; 40 C. L. J. 564; (1925) A. I. R. (C.) 225 **875**

——— **Joint family**—*Alienation by certain members —Subsequent adjudication of Manager—Receiver, whether can claim property.*

The elder members of a Hindu family owning joint ancestral houses and shops and carrying on business mortgaged certain houses and shops belonging to the family. Subsequently the Manager of the family who was a junior member was adjudicated insolvent and the Receiver seized all the transferred properties. The transferee applied for recovery of these properties. It appeared that the object of the transfer was to save the property from the creditors of the insolvent:

Held, that the transfer was liable to be set aside and the Receiver was justified to claim the properties so alienated. **A** NARAIN DAS *v.* BANKIM CHANDRA, 46 A. 912; (1925) A. I. R. (A.) 194 **396**

——— ——— *Debt incurred by managing member —Sons, liability of—Alienation of co-parcenary property—Enquiry as to necessity—Family business, whether enough.*

If the managing member of a joint undivided estate incurs debt, his sons are liable for the payment of the debt to the extent of the estate of the joint family, provided that the debt is not tainted with immorality or illegality.

The rule of the Hindu Law that no inquiry would sustain an alienation of the co-parcenary property unless the facts represented to the alienee were such as, if true, would have justified the loan is firmly established.

The mere existence of a family business is not sufficient, and the lender must also show that the money was required for the family business. **L** GIRDHARI LAL *v.* KISHEN CHAND, 5 L. 511; (1925) A. I. R. (L.) 240 **463**

——— ——— *Decree against father on basis of contract of indemnity—Sons' property, whether can be attached.*

One *B.* made a payment to *S.* in satisfaction of a claim in which the brothers of *S.* were jointly interested along with *S.* and *S.* undertook to indemnify *B.* against any claim made by his brothers. The brothers of *S.* subsequently sued to enforce their claim against *B.* and obtained a decree. *B.* having died his heirs sued *S.* for the return of the money paid to him and obtained a decree in execution of which family property in the hands of the sons of *S.* was attached. The latter brought a suit for a declaration that the property in their hands was not liable to be sold in satisfaction of the decree obtained by the heirs of *B.*:

Held, that the decree being based upon the liability of *S.* to indemnify *B.* in the event of a claim being made by the brothers of *S.* the sons were under a pious duty to satisfy the decree and, therefore, property in their hands was liable to be attached in the execution of the decree. **O** MATA DIN *v.* MAHARAJ DIN, 12 O. L. J. 33; 1 O. W. N. 960; (1925) A. I. R. (O.) 325 **959**

——— ——— *Guardian, whether can be appointed in respect of family property.*

A member of a joint Hindu family cannot be appointed guardian by a Court of another member of the family in respect of property belonging to the whole family. Under the Hindu Law the active

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eldest member of the family is manager of the joint family property without any order of Court. **O** BALBIR *v.* CHEDI LAL, 10 O. & A. L. R. 968 **276**

——— **Joint family**—*Marriage debts—Minor co-parcener, whether bound—Alienation by* de facto *guardian for benefit of estate.*

Under the general principles of Hindu Law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage of his sister.

A debt contracted for the marriage of a co-parcener in a joint Hindu family is binding on the other co-parceners.

A Hindu is not entitled to impeach an alienation made during his minority for the benefit of the estate and with due regard to his interests by his *de facto* guardian. **L** DEDAR SINGH *v.* BANSI **741**

——— *Mortgage of portion of family property by one brother—Partition—Allotment of mortgaged property to other brother, effect of—Sale in execution of mortgage-decree—Suit to recover property, whether maintainable.*

One of two undivided brothers executed a mortgage of a portion of the family property. Subsequently a partition took place between the two brothers and the property to which the mortgage related was assigned wholly to the other brother. After the partition the mortgagee brought a suit for sale on his mortgage against the mortgagor, obtained a decree and bought the property in execution proceedings. The brother to whose share the property had fallen brought a suit to recover the property from the mortgagee auction-purchaser:

Held, that the plaintiff was entitled to recover the property and was not estopped from bringing the suit merely because he did not intervene in the mortgage suit brought by the defendant against his mortgagor. **A** NARAIN *v.* RAM SARAN DAS, 22 A. L. J. 853; (1924) A. I. R. (A.) 871; L. R. 5 A. 751 Civ. **490**

——— *Partition, partial, suit for, whether maintainable—Property in possession of tenants, whether can be excluded.*

A partial partition of Hindu joint family properties should be allowed where there are circumstances which militate against the division of all the family properties, for instance, where property which has not been included in the suit is in possession of strangers claiming adversely. The mere fact, however, that certain items of the property are in the possession of tenants does not entitle the plaintiff to exclude such items from the suit. **M** AGRAHARA SUBRAMANIAN *v.* AGRAHARAM RAMCHANDRA RAO, 47 M. L. J. 908; (1925) A. I. R. (M.) 333 **503**

——— *Partition — Separate acquisitions after partition — Presumption — Partition suit—Persons interested in some properties not joined, effect of—Procedure.*

Where on a partition among the members of a joint Hindu family one member separates from the others, and thereafter conveyances of property are taken in the name of one or the other of the other members, the mere fact that the conveyances are so taken, is not conclusive of the fact that the property acquired by means of such conveyances constitutes separate acquisitions of the members in whose names the conveyances respectively stand, nor is the fact of separate acquisitions inconsistent with the fact that such members continued joint after the partition.

Hindu Law—contd.

In a suit for partition the fact that persons interested in some of the joint properties are not made parties to the suit does not debar the plaintiff from getting a decree with respect to properties which belong exclusively to the parties to the suit. **C** NALINARSYA GHOSAL *v.* RAGHUNATH GHOSAL **662**

——— **Joint family**—*Partnership, entered into by Manager—Members, whether partners.*

A contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners. **N** SHEONARAIN *v.* BABULAL, (1925) A. I. R. (N.) 268 **775**

——— *Separation from brothers, effect of—Brother, whether separated from his descendants.*

Where a Hindu separates from his brothers, there is no presumption that he and his descendants cease to constitute among themselves a joint family. **P C** JAI NARAIN *v.* PRAG NARAIN, (1925) A. I. R. (P. C.) 11; (1925) M. W. N. 13; 21 L. W. 162; 48 M. L. J. 236; 2 O. W. N. 157; L. R. 6 A. (P. C.) 73; 27 Bom. L. R. 713; 29 C. W. N. 775 (P. C.) **2**

——— *Share of member, whether attachable in execution—Sale of joint family property—Purchaser of share of one member, right of, to demand partition—Suit by another member to set aside sale, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXI, r. 90.*

A member of a joint Hindu Mitakshara family has an interest in the joint family property which is capable of being attached in execution of a decree against him.

The purchaser of a share of a member of a joint Mitakshara Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family.

Joint family property was sold in execution of a decree obtained against some of the members of the family. An application for setting aside the sale having been dismissed, plaintiffs filed a suit for recovery of possession; one of the plaintiffs was not a party to the application under O. XXI, r. 90, C. P. C.:

Held, that it was not necessary for all the plaintiffs to apply under the provisions of O. XXI, r. 90 of the C. P. C., and the suit was maintainable. **Pat** MEDNI PRASAD SINGH *v.* NAND KESHWAR PRASAD SINGH, 2 Pat. 386; (1923) A. I. R. (Pat.) 451 **1014**

——— *Will—Testamentary guardian, appointment of, validity of.*

A Hindu father cannot validly appoint by Will a guardian of the property for his minor son to take effect after his death, where such property is joint family property. **M** KODURI SUBBARAYADU *v.* KOYYALAMADI SUBBANNA, 47 M. L. J. 765; (1925) A. I. R. (M.) 371 **457**

——— **Mortgage** *by widow—Necessity—Creditor whether entitled to personal decree—Execution against other property of last male owner, whether permissible—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.*

Where a creditor lends money to a Hindu widow for legal necessity and obtains security for his debt in the form of a mortgage-bond, he is entitled, where the property secured proves insufficient to discharge the debt, to obtain a decree for the balance of the debt under O. XXXIV, r. 6 of the C. P. C., and in execution of such decree to attach property belonging to the

Hindu Law—contd.

deceased husband of the mortgagor. **A** JAGANNATH PRASAD *v.* JADO ROY, L. R. 6 A. 87 Civ.; (1925) A. I. R. (A.) 352 **963**

——— **Mortgage** *by widow—Onerous conditions—Declaration, suit for, by reversioner—Necessity for loan—Conditions not justified—Relief.*

Where in a suit by the reversioner of a deceased Hindu for a declaration that a deed of mortgage executed by the widow of the deceased is invalid and void as against the plaintiff, the Court finds that there was necessity for the loan but that there was no necessity for the onerous conditions laid down in the deed, the plaintiff is entitled to a declaration that the conditions shall not be binding upon him. **O** MOHAN LAL *v.* DHAN KUAR, 10 O. & A. L. R. 1036; 27 O. C. 362; 1 O. W. N. 741 **426**

——— *decree against father—Sale in execution—Sons, whether can set aside sale.*

When property has been sold in auction in execution of a decree against the father, it is not open to his sons or grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree has been obtained was without any legal necessity or not in lieu of any antecedent debt. **A** GAJADHAR PANDE *v.* JADUBIR PANDE, 22 A. L. J. 980; L. R 5 A. 780 Civ.; (1925) A. I. R. (A.) 180; 47 A. 122 **31**

——— **Property** *acquired by father before birth of sons—Interest taken by sons, nature of.*

Obiter dictum.—Property acquired by a Hindu father before the birth of any of his sons descends to his sons as separate property and each of the sons is entitled to sell his undivided share in the property and his power of alienation in respect of such share is not subject to any restraint by his brothers. **O** MATHURA DAS *v.* RAMJI MAL **1006**

——— **Public religious trust**—*Misappropriation by managing member—Other members, liability of.*

A Hindu by his Will created a trust for public purposes of a charitable or religious nature. The managing member of the joint family misappropriated the monies belonging to the trust and applied them in family business :

Held, that the other members of the family were liable, jointly with the managing member as well as severally, to re-pay the amount with interest to the trust. **P C** JAI NARAIN *v.* PRAG NARAIN, (1925) A. I. R (P. C.) 11; (1925) M. W. N. 13; 21 L. W. 162; 48 M. L. J. 236; 2 O. W. N. 157; L. R. 6 A. (P. C.) 73; 27 Bom. L. R. 713; 29 C. W. N. 775 (P. C.) **2**

——— **Widow**—*Alienation—Necessity—Consent of reversioners, value of.*

The consent of the whole body of reversioners at the date of an alienation by a Hindu widow would afford presumptive evidence of necessity, but it would not estop the actual reversioners from disputing the alienation, unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. **B** MANJAYA SANNAYA SHANBHOG *v.* SHESHGIRI SHAMBHULING, 26 Bom L. R. 1267; (1925) A. I. R. (B.) 129; 49 B. 187 **207**

——— *Renunciation in favour of reversioners—Surrender, when valid.*

A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one at the moment, and the surrender must be of the whole estate.

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The surrender to one of the reversioners is not equivalent to a surrender to all the reversioners, even if it is for the benefit of all the reversioners. **B** MANJAYA SANNAYA SHANBHOG *v.* SHESHGIRI SHAMBHULING, 26 Bom. L. R. 1267; (1925) A. I. R. (B.) 129; 49 B. 147 **207**

——— **Widow**—*Surrender of estate in favour of next reversioner in lieu of maintenance, effect of.*

A Hindu widow relinquished the whole of the immoveable property of her husband, which she was holding, in favour of the next reversioners of her husband and retained only the moveables and one house for purposes of residence. The reversioners agreed to pay a certain amount of cash and grain to her annually by way of maintenance. It did not appear that the moveables retained by the widow had any value and whether she had inherited them from her husband :

Held, that there was complete relinquishment of the widow's estate in favour of the reversioners which amounted to a surrender and vested the estate in the reversioners. **C** GOPAL CHANDRA DUTT *v.* SURENDRA NATH DUTT **804**

——— **Will**—*Bequest of entire property—Gift of undisposed residue, effect of.*

A gift of an undisposed residue of property already absolutely bequeathed does not cut down the previous absolute gift to a life-interest.

Where, therefore, a Hindu by his Will left the whole of his property to his wife absolutely and directed that after the death of his wife his adopted son should be the owner of all property:

Held, that the wife acquired an absolute estate and the adopted son got nothing under the Will. **L** KARAM SINGH *v.* RUPWANTI, 6 L. L. J. 412; (1925) A. I. R. (L.) 122 **296**

——— *Devise in favour of widow and predeceased son's widow—Interest taken by legatees—Inheritance—*Stridhan *property, succession to—Marriage in approved form—Presumption.*

A Hindu testator devised his property by Will to his widow and to his predeceased son's widow :

Held, that each of the legatees took an absolute interest in one-half of the property under the Will.

The heir of a Hindu woman to her *stridhan* is the nearest kinsman of her husband and not of her father, where her marriage had taken place in one of the approved forms.

The presumption, in the absence of any evidence to the contrary, is that a marriage was in one of the approved forms. **C** UMRAO KUAR *v.* SARABJIT SINGH, 10 O. & A. L. R. 1030; 1 O. W. N. 579 **618**

Identification evidence, *value of—Accused not previously known to witnesses.*

No reliance can be placed on the evidence of witnesses, professing after many months to identify persons, previously unknown to them, as having taken part in the crime, unless it is shown that there was a regular identification parade in which they picked out those persons from among others. **L** MAKHAN SINGH *v.* EMPEROR, (1924) A. I. R. (L.) 722; 6 L. L. J. 320; 26 Cr. L. J. 445 **61**

Income Tax Act (XI of 1922), s. 4—*Reciept of income in British India, what amounts to—British subject employed in Native State—Salary, whether taxable—Salary paid into Bank in Native State and subsequently transferred to British India, whether assessable.*

Income Tax Act—1922—contd.

Salary earned by a British subject outside British India is not ordinarily chargeable with income tax under the Income Tax Act.

The receipt of income referred to in s. 4 (1) of the Income Tax Act refers to the first occasion on which the recipient gets the money under his own control, and where such first receipt is not within British India the money cannot be said to have been received within British India.

The Income Tax Act contemplates that income accruing outside British India shall not be taxable unless (1) it is received in British India or is deemed to accrue or arise or to be received in British India, or (2) unless it constitutes the profits and gains of a business received or brought into British India within the meaning of s. 4 (2) of the Act.

The assessee was employed by H. E. H. the Nizam of Hyderabad at a fixed salary for a period of five years. Before the expiry of the period, however, the assessee resigned his post and returned to British India. Under the orders of H. E. H. the Nizam the balance of his salary for the remaining period of five years was directed to be paid to him through the Imperial Bank of India. The Manager of the Bank at Hyderabad instructed the Manager of another branch of the Bank in British India to pay a certain sum to the assessee in British India and to obtain formal receipts from him. The latter Bank obtained the necessary receipts from the assessee, who instructed the Bank to the effect that the money may be paid into his account with the branch of the Bank at Hyderabad subject to further instructions. The money was paid by the Government of H. E. H the Nizam into the assessee's account with the Imperial Bank of India at Hyderabad and was some time afterwards transferred to the assessee's account with another branch of the Bank in British India under his instructions:

Held, that the money had been received by the assessee within the meaning of s. 4 (1) of the Income Tax Act at Hyderabad and not in British India and was not, therefore, liable to assessment under the Act. **Pat** ALI IMAM *v.* EMPEROR, (1924) Pat. 349; 6 P. L. T. 47; (1925) A. I. R. (Pat.) 281; 3 Pat. L. R. 85 Cr.; 4 Pat. 210 **164**

——— **ss. 10 (2), (7), (9), 66**—*Expenditure on renewal of parts of car, nature of—"Obsolete," meaning of—Total destruction of machinery, whether renders it obsolete—Reference to High Court.*

The question whether a particular expenditure on certain parts of a motor-car is capital expenditure or merely a repair of wasting parts of the car, is a question of fact. The test is, whether, having regard to the part of the car which is repaired, it is such as requires a renewal from time to time, or such that with ordinary repair it lasts for the lifetime of the car. For instance, the body or the radiator or the wheels generally last for the lifetime of the car, while the tyres or the hood or such other parts are to be renewed periodically.

The question whether the total destruction of machinery which renders it unfit for the purpose for which it was originally intended and compels the owner to sell it as scrap iron, entitles him to claim an allowance in respect of the machinery under sub-cl. (7) of cl. (2) of s. 10 of the Income Tax Act, is one of considerable importance on which the Commissioner of Income Tax may be directed to state a case for the opinion of the High Court.

Income Tax Act—1922—concld.

Semble.—The word "obsolete" in sub-cl. (7) of cl. (2) of s. 10 of the Income Tax Act, should be taken to include cases of unfitness arising from whatever cause. Where a car falls into a ditch or otherwise becomes so damaged that it cannot be used as a car and has to be sold as scrap iron, it ought to be regarded as having become "obsolete" within the meaning of that expression. **M** RATNA SINGH, *In re*, 20 L. W. 859; (1925) A. I. R. (M.) 157 **478**

——— **ss. 23 (2), 66 (2), (3)**—*Return, doubt as to correctness of—Failure to give assessee notice—Reference to High Court.*

An Income Tax Officer not being satisfied as to the correctness of the return submitted by the assessee, assessed the tax payable without serving upon him a notice under s. 23 (2) of the Income Tax Act and without giving him an opportunity to produce evidence in support of the return. The assessee's appeal to the Assistant Commissioner having been rejected, he applied to the Commissioner, praying that the question be referred to the High Court. The Commissioner refused to do so and the petitioner obtained a Rule:

Held, that the question challenged the very foundation of the assessment and arose upon the proceedings adopted in the case and should, therefore, have been referred to the High Court. **C** NIRMAL KUMAR SINGH *v.* COMMISSIONER OF INCOME TAX, BENGAL, 29 C. W. N. 28; (1925) A. I. R. (C.) 173 **520**

Injunction—*Discretion of Court—High Court, interference by.*

The remedy by way of injunction is a discretionary matter but the discretion must be exercised on recognised principles and should not be arbitrary. Where the discretion has not been so exercised the High Court will interfere with the order of the lower Court if it is inconsistent with sound principles. **C** ASHUTOSH ROY *v.* CHAIRMAN OF THE COMRS., RAMPORE BOALIA MUNICIPALITY, 29 C. W. N. 643 **796**

Insolvency Act, 1848 (11 & 12 Vic. C. 21), s. 3—*Presidency Towns Insolvency Act (III of 1909), s. 122—Legal Practitioners Act (XVIII of 1879), s. 4—High Courts Act, 1861, (24 & 25 Vic. c. 104), s. 15—Vakils, whether entitled to audience in Presidency Insolvency Court—Insolvency Court, whether subordinate to High Court.*

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras.

The effect of section 121 of the Presidency Towns Insolvency Act is, that if Vakils had the right of audience in the Insolvency Court before 1909 it was not taken away from them; but if they had not such a right previously it was not conferred on them.

The mere fact that appeals lie from the decision of the Presiding Judge of the Insolvency Court to the High Court and the fact that s. 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its appellate jurisdiction, does not make the Insolvency Court subordinate to the High Court. Rule 13 of Ch. III of the Appellate Side Rules of the Madras High Court, which states that Advocates, Vakils and Attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has, therefore, no application to the Insolvency Court.

Section 4 of the Legal Practitioners Act was not intended to override the special provisions relating to

Insolvency Act, 1848—concld.

insolvency in the Presidency towns. M. G. KRISHNASWAMI AYYAR, *In the matter of an application of*, 48 M. L. J. 36; (1925) A. I. R. (M.) 385 **1025**

Interest. *See* C. P. C., 1908, s. 34 **218**

——— *Suit on bond—Liability for interest proved—Stipulation as to compound interest—Burden of proof.*

When the execution of a bond sued on is admitted and it is found that the defendant agreed to pay interest as entered in the bond, the burden rests on him to prove that he did not agree to the stipulation contained in the bond for the payment of compound interest. L. HARI RAM SHAH *v.* INAYAT, 6 L. L. J. 400; 1 L. C. 63 **340**

Interpretation of Statutes.

A Judge has no dispensing power which allows him to go behind the plain import of a Statute. M PRESIDENT, TALUK BOARD, HOSPET *v.* TATUR CHANDRAPPA, 47 M. L. J. 774; 20 L. W. 868; (1925) A. I. R. (M.) 173; (1925) M. W. N. 266 **612**

Jurisdiction, *how determined.*

The jurisdiction of a Court to hear a case depends on the allegations on which its help is sought. It may be that after a trial it is found that the case has been materially exaggerated, but unless it is found at the very outset that the allegations made by the complainant are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant must be accepted for purposes of jurisdiction. A RAGHUNANDAN PRASAD *v.* EMPEROR, L. R. 6 A. 39 Cr.; 26 Cr. L. J. 586; (1925) A. I. R. (A.) 290; 47 A. 64 **730**

——— *Suit of Small Cause nature filed on Regular Side—Appeal—Plaintiff, whether can plead want of jurisdiction—Estoppel.*

Plaintiff filed a suit triable by a Court of Small Causes in the Court of the Munsif. The suit was partly decreed and the plaintiff appealed to the District Judge. His appeal was dismissed. In revision it was contended on his behalf that as the suit was triable by the Court of Small Causes the judgments of the lower Courts were void on the ground of want of jurisdiction:

Held, that the plaintiff himself having sought the jurisdiction of the Court which decided the suit, and having obtained the further advantage of an appeal which he would not have obtained if the case had been tried on the Small Cause Court side, was now estopped from pleading want of jurisdiction in the lower Courts. O MAHARAJ DIN *v.* BALBHADDAR PARSHAD, 10 O. & A. L. R. 1326; 2 O. W. N. 8; 12 O. L. J. 265; (1925) A, I. R. (O.) 403 **481**

Jurisdiction of Civil Court. *See* BOMBAY LAND REVENUE CODE, 1879, s. 118 **204**

——— *See* TRUST **807**

Jurisdiction of High Court—*Proceedings of Legislative Council, whether can be questioned—Suit against President, maintainability of—Appropriation of provincial revenues—Supplementary estimate—Rules and Standing Orders, rr. 15, 94—Decision of President, finality of—High Court jurisdiction, whether excluded—*Quia Timet *action, nature of—Discretion of Court—Application for injunction—Specific Relief Act (I of 1877), s. 45.*

The proceedings of a subordinate Legislature like the Provincial Legislative Council can be questioned in the High Court.

Jurisdiction of High Court—contd.

The High Court is a Superior Court of Record and *prima facie* no matter is deemed to be beyond its jurisdiction unless it is expressly shown to be so.

By the word 'jurisdiction' is meant the authority which the Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision.

The President of the Bengal Legislative Council is not immune from the jurisdiction of the High Court and a suit can lie against him for an injunction restraining him from putting a certain motion before the Council.

If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament or State authority, the legal justification can be enquired into in the High Court.

A proposal for appropriation of provincial revenues cannot be made at any time before the Legislative Council.

A figure in an estimate once passed by the Legislative Council cannot be altered, except as provided by the statutory rules. If, therefore, Government subsequently find that any item has been inadvertently omitted from the demands for grants, or that demands which could not be foreseen at the time of presenting the Budget have since arisen or that the provision made for any item is likely to prove insufficient, the same formality has to be gone through as in the case of the original demands and Government has to make a fresh demand known as a supplementary or additional demand and submit a fresh estimate to the Legislative Council.

Supplementary estimates are always looked upon with particular jealousy by a popular Legislature because they tend to diminish the control of the Legislature, and if for large sums, really amount to a breach of contract between the Government and the Legislature.

Save and except what is provided for in s. 72D of the Government of India Act and r. 94 of the Rules and Standing Orders, there cannot be made any demand for grant even if His Excellency the Governor makes a recommendation for appropriation of provincial revenues on occasions not provided for in the said section and the said rule.

Rule 15 of the Rules and Standing Orders simply means that when the President has given his decision on a point of order, his decision is final. so far as the Members of the Council are concerned, and that it cannot be questioned by anybody within the Council.

The presence of the word 'final' in r. 15 does not exclude the jurisdiction of the High Court, nor does it conclude the matter.

There are two necessary ingredients for a *Quia Timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable, *i. e.*, it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *Quia Timet* action.

The power is entirely discretionary; it is a large power and the greater the power, the more cautious must be the exercise of it.

The right to vote supplies is perhaps the greatest privilege accorded to a Legislative Body and any

Jurisdiction of High Court—concld.

infraction of the Rules and Regulations guarding the provision as to the voting of supplies is an 'injury' which the members in a representative suit, are entitled to be protected from.

In disposing of an application for injunction the powers of the Court are not wholly circumscribed by the Rules laid down in s. 45 of the Specific Relief Act. C KUMAR SHANKAR *v.* H. E. A. COTTON, 40 C. L. J. 515; (1925) A. I. R. (C.) 373 **14**

Land acquisition—Khoti *lands—Compensation, how assessed—Apportionment between occupant and* khot *—*Warkas *or* bhati *land.*

In awarding compensation for the acquisition of *khoti* lands, the value of the interest of the superior holder must be included in the award and not deducted from the value of the occupant's interest.

The method of apportioning compensation between the occupant and the *khot* in the proportion of two to one can only be made applicable in the case of *warkas* or *bhati* lands which are not surveyed and which cannot be considered to be in the exact occupation of any particular tenant. B GAJANAN VINAYAK *v.* ASSISTANT COLLECTOR, SALSETTE, 25 Bom. L. R. 480; (1924) A. I. R. (B.) 54 **11**

——— Khoti *village—*Bhati *lands—Occupiers, whether can acquire title by prescription—Compensation—Apportionment between* khot *and occupiers.*

Certain *bhati* land in a *khoti* village was acquired under the Land Acquisition Act. It appeared that the villagers had been accustomed to cut grass on the waste lands if it was required for feeding their animals or for sale, and had enclosed such lands and sold them by registered deeds to the knowledge of the *khot* who never interfered with the exercise of these rights:

Held, (1) that the villagers acquired proprietary rights in the lands so enclosed and dealt with and were, therefore, entitled to compensation;

(2) that the compensation money should be divided in the proportion of one to the *khot* and two to the occupier.

The acquisition of rights by prescription is open in law to villagers in *khoti* villages against the *khot*, whatever his rights under the lease from Government may be. B VALLABHDAS NARAYANJI *v.* SPECIAL LAND ACQUISITION OFFICER, 23 Bom. L. R. 1288; 46 B. 272; (1922) A. I. R. (B.) 365 **427**

Land Acquisition Act (I of 1894), s. 23—*Market value, determination of—Sale, recent, effect of—Market, fluctuations of.*

Where the property under acquisition has been recently purchased, the price paid is *prima facie* the market-value thereof.

The claimant may claim more than the price paid, and it is open to him to contend that he bought the property at less than its market-value, or that there has been a general rise in the value of property between the date of purchase and the date of declaration. On the other hand, it is open to Government to show that the price paid by the claimant was so high that no prudent purchaser would have paid it, and also that there has been a general fall in the value of property in the neighbourhood between the date of agreement and the date of declaration. B GOVERNMENT OF BOMBAY *v.* ISMAIL AHMED HAFIZ MOOSA, 26 Bom. L. R. 217; (1924) A. I. R. (B.) 362 **531**

Landlord and tenant—Abwabs—*Additional sums payable in excess of rent—Payment for several years without objection, effect of.*

Where a *pattah* stated the total rent to be at a certain sum and certain additional items for vet cocoanut and for Beggar were shown in a tabulated form and in that form was also shown a sum as the total amount payable for the land and the body of the *pattah* provided that the cocoanuts were to be supplied and the labour was to be performed specifically on a single occasion only:

Held, that the additional items in respect of cocoanut and Beggar were irrecoverable *abwabs.*

The payment of a disputed amount as rent for a large number of years without objection does not prevent the question as to the legality of the payment being raised in a subsequent suit between the parties. C ABDUL KARIM *v.* PROSANNA KUMAR **770**

——— *Adverse possession by tenant, whether possible—Construction of decree—Decree in ejectment suit directing defendants not to be ejected on compliance with certain conditions, effect of—Defendants, whether constituted tenants.*

In a suit for ejectment and mesne profits which was decreed, the decree provided that the defendants should not be ejected if they continued to pay rent at the prevailing rate. The defendants did not take advantage of the condition and were formally ejected from the lands in dispute in execution of the decree. After execution of the decree they retained or regained possession of the lands. In a second suit for ejectment:

Held, that the condition in the decree had not the effect of making the defendants tenants of the plaintiffs and that their possession after the execution of the decree was that of trespassers and that the plaintiffs must prove attornment by the defendants subsequent to the execution of the decree in order to establish that the status of the defendants was that of tenants.

Per *B. B. Ghose, J.*—A tenant cannot, during the term of his tenancy, by any act or declaration of his disseise the landlord. He may, by repudiating the landlord's title, during the term, forfeit the term but the landlord is not bound to take advantage of the forfeiture and his estate cannot be affected thereby. A tenant cannot cause the Statute of Limitation to run against his landlord by giving notice to him of an adverse title during the term. The Statute runs against the landlord only when the relationship of landlord and tenant is determined and the landlord is entitled to take possession. This principle is also applicable to cases where the tenants claim not an absolute title in themselves but only an interest higher than that to which they are entitled.

A lease is not determined on a forfeiture until the landlord does some act showing his intention to determine the lease. It is the privilege of the landlord to take advantage of a forfeiture or not and adverse possession of the tenant does not commence against the landlord from the date on which the tenant renounces the tenancy. C GOPIKA RAMAN ROY *v.* ATAL SINGH **678**

——— *Adverse possession—Claim based on grant, failure of—Entry in village record, effect of—Tenant claiming under-proprietary rights—Burden of proof.*

Where a person comes forward with a claim on the basis of a grant and fails to prove it, he cannot turn round and say that he has been holding adversely from the date on which he founded his titl under the grant. The theory of adversity of title ca

only come in if no claim is laid to any title whatsoever for the commencement of possession.

An entry in the village record, or even the opinion of a Revenue Court, that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietary nature in the cultivator and will not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he does not do so within six years of the final order.

A mere assertion on the part of a lessee, during the currency of his lease, that he is an under-proprietor does not create an under-proprietary right in his favour by adverse possession.

Where a *zemindar* comes into Court asking for a declaration that the defendants who are cultivating land under him are tenants and not under-proprietors, the burden of proving that they are under-proprietors and not tenants lies on the defendants. **O** SULTAN KHAN *v.* HARDWARI, 10 O. & A. L. R. 1485; L. R. 6 A. (O.) 33; 1 O. W. N. 768 **850**

——— *Agricultural lease—Notice to quit—Reasonable period—Custom.*

Neither the provisions of the Transfer of Property Act nor the principles of English Law in regard to a notice to quit are strictly applicable to agricultural leases in India.

All that is required in the case of such leases is a reasonable notice which is a question of fact to be decided in each case according to the particular circumstances and the local custom as to reaping crops and letting land The exact synchronising of the date fixed in the notice with the termination of the period of the lease is not necessary in every case. **M** JARA POOJARI *v.* SOMAKKA, 20 L. W. 941; (1925) A. I. R. (M.) 346 **339**

——— *Construction of deed—Lease—Tenancy-at-will or permanent lease—Void lease, acceptance of, by lessee—Implied surrender.*

The terms of a lease ran as follows:—"You shall yourselves cultivate this land from this time forward until you yourselves give up the same. You shall plough the same and raise the crops which you intend to raise and yourselves shall enjoy both the *varams* in the produce got therefrom. You should deliver *gutha ragi* grain to me (by way of rent) in this manner until you deliver possession of the said laud to me. If you do not act in the above said manner, if you make any delay and if you fail to measure *gutha* grain to me on *Sivaratri* day in any year, I shall take possession of my land immediately without obtaining your consent and lease out the land for cultivation to persons to whom I am pleased to lease out the same:"

Held, that the intention of the parties was to create a permanent lease in favour of the lessees which could be put an end to only in one circumstance, *viz.*, the non-payment of rent by them and that the lease could not, therefore, be terminated by simply giving a notice to quit.

There is no implied surrender by the acceptance by the lessee of any lease which is void or which is voidable and is in fact avoided. The implied surrender is subject to an implied condition that the surrender is to be void if the new lease is made void. **M** ELAGAN *v.* NANJAPPAN **964**

——— *Excess lands in occupation of tenant—Back rent, claim for.*

In respect of excess lands in the occupation of a tenant, the landlord is entitled to recover what is called back rent; in other words, the landlord is entitled in any litigation to have an enquiry as to the exact area in the occupation of the tenant and the rent recoverable in respect thereof for the years in suit. **C** MANMATHA PAL *v.* SURENDRA NATH BOSE, 40 C. L. J. 538; (1925) A. I. R. (C.) 463 **162**

——— *Grove—Abandonment of portion—Landlord, whether can recover possession.*

According to the usual custom prevailing in the Province of Oudh, when a grove is held by a tenant who is not the owner thereof, it reverts to the landlord when it is abandoned by the tenant.

A tenant of a grove is not entitled to sell the grove or any portion thereof.

Where a tenant of a grove sells a portion of the grove, the landlord is entitled to recover possession of that portion from the transferee on the ground that the tenant has abandoned that portion of the grove and that it has reverted to him. **O** MAHABIR PARSHAD *v.* UMAN SHANKAR, 10 O. & A. L. R. 1310; 2 O. W. N. 22; L. R. 6 A. (O.) 39; 12 O. L. J. 258; (1925) A. I. R. (O.) 319; 28 O. C. 133 **527**

——— Manhunda *rent, what is.*

Manhunda rent is a fixed amount not depending upon the total out-turn of the crop grown. **Pat** RAGHUNANDAN SAHAY *v.* RAM SUNDER PRASAD, (1924) Pat. 355; 6 P. L. T. 4; 3 Pat. L. R. 22; (1925) A. I. R. (Pat.) 299 **172**

——— *Occupancy holding, transfer of portion of—Surrender of holding after transfer, whether affects transferee.*

A surrender of an occupancy holding by the tenant after the transfer of a share of the holding is invalid in so far as it professes to affect the interest of the transferee. **C** JOGESH CHANDRA ROY *v.* TAZAR ALI **757**

——— *Tenancy, nature of—Appeal, second—Question of law—Permanent tenancy—Presumption—Principles applicable.*

The question whether a presumption of permanency of tenancy is justified upon the facts found, is a question of law and is open to correction in second appeal.

The circumstances of each case must determine whether the presumption should or should not be made, as it is impossible to give any exhaustive enumeration of the facts which shall or shall not justify the presumption to be drawn.

In the case of non-agricultural holdings, created before the Transfer of Property Act, where the origin of the tenancy is unknown and its inception is lost in antiquity, the principle of a lost grant may be invoked by the tenant, and from the conduct of the parties and the surrounding circumstances, the Court may be asked to presume that the tenancy is a permanent one. The conduct of the landlord in recognising succession and transfer and in standing by when *pucca* buildings have been raised upon the land, may be relied on in finding out the terms of the lease at its inception, or, the tenant may rely upon the principle of enquitable estoppel as against the landlord, whereby the landlord may be estopped from showing that the lease is a terminable one.

Mere forbearance, however, to enhance the rent or to eject the tenant, where the right exists, means nothing. If transfers are made describing the tenancy as permanent and the landlord recognises the transfer, he allows the creation of evidence by conduct. Otherwise, a transfer of tenancy of home-

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stead land would ordinarily be no evidence of the permanency of the tenancy. The building of *pucca* houses and that to the knowledge of the landlord is evidence of the assertion of the tenant of his belief that the tenancy at its inception, which is unknown, was permanent. In this connection no question of estoppel or acquiescence arises, and the case depends upon the principle of inference of the terms of a lost grant.

In order to enable the Court to make a presumption of permanency the following elements, must ordinarily be shown to exist, *viz.*, (1) the origin of the tenancy for residential purposes must be unknown; (2) the existence of permanent *pucca* buildings on the land built long before any controversy arises and that to the knowledge of the landlord; (3) uniform payment of rent, and (4) recognition of succession and transfer by the landlord. The absence of the 3rd and 4th elements would raise difficulties in the way of raising the presumption, but would not be decisive if there are other circumstances in aid of the presumption. **C** ABDUL HAKIM KHAN *v.* ELAHI BAKSHA SAHA, 29 C. W. N. 138; (1925) A. I. R. (C.) 309; 52 C. 43 **103**

——— *Tenant not put in possession of whole holding —Suspension of rent—Abatement of rent.*

Where a portion of a holding is let out to a lessee and the lessor subsequently lets the holding to another lessee and is unable in consequence to put the latter in possession of the whole holding, there will be a full suspension of the rent in respect of the whole holding until such time as the landlord puts the lessee in possession of the whole holding. Where, however, the lessee is aware at the time when the lease is granted to him that a portion of the holding is in the possession of another there will not be a suspension of the whole rent but only a proportionate abatement of it. **C** JOYRAM CHANDRA *v.* BISNU CHARAN **781**

Land revenue—Asli *lands assessed at Permanent Settlement—Submergence and re-emergence—Person in possession, title of, dispute about—Additional assessment, whether justified.*

Lands settled as *asli* lands at the time of the Permanent Settlement and assessed with revenue are not liable to additional assessment of revenue, when they re-emerge after submergence.

The mere fact that the title of the person in possession is in dispute does not give the Government the right to make assessment of the lands. **C** SECRETARY OF STATE FOR INDIA *v.* KALI NARAYAN ROY, 29 C. W. N. 119; (1925) A. I. R. (C.) 273 **211**

Lease, *construction of—Document reserving yearly rent—Intention of parties—Tenancy terminable by death, whether heritable—Tenant-at-will, ejectment of—Notice, whether necessary.*

Every document which reserves a yearly rent or which states that the rent is payable in proportion to certain *aliquot* parts of the year does not necessarily create a tenancy from year to year.

Where the intention of the parties is that the tenancy is to be determined by the death of either party there can be no estate which the heir can take.

It is settled both in England and in India that in the case of a tenancy-at-will no formal notice is required but a demand for possession is sufficient. **Pat** RAMDHANI GOPE *v.* MISS C. V. SCOTT, (1924) Pat. 333; (1925) A. I. R. (Pat.) 256 **77**

Legal Practitioners Act (XVIII of 1879), s. 4. *See* INSOLVENCY ACT, 1848, s. 3 **1025**

Letters Patent (Cal.), cl. 41. *See* CRIMINAL TRIAL **47**

Letters Patent (Mad.), cl. 15—*Permission to sue as pauper, grant of—Order of Judge, Original Side, whether judgment—Appeal.*

The final order of a Judge sitting on the Original Side of the High Court, allowing or refusing to allow a plaintiff to sue as a pauper is a "judgment" within the meaning of cl. 15 of the Letters Patent, and is, therefore, appealable. **M** BABU SAH *v.* PURUSHOTHAMA SAH, 20 L. W. 845; 35 M. L. T. 136; 47 M. L. J. 932; (1925) A. I. R. (M.) 167 **201**

——— **cl. 36**—*Civil Procedure Code (Act V of 1908), s. 98—Provincial Small Cause Courts Act (IX of 1887), s. 25—Difference of opinion—Procedure.*

Where in a revision petition to the High Court under s. 25, Provincial Small Cause Courts Act, there is a difference of opinion between the Judges, cl. 36 of the Letters Patent applies and not s. 98, C. P. C., and the opinion of the Senior Judge, therefore, prevails. **M** NAGAPPA PILLAI *v.* ARUNCHALAM CHETTY, 47 M. L. J. 876; (1925) A. I. R. (M.) 281 **1016**

Libel—*Fair comment, what amounts to—Damages, assessment of—Nominal and exemplary damages, when can be awarded.*

Bodies of trained, disciplined and organized servants of the Government acting under the instructions and directions of superior officers, such as the Police and the Military, are expected not to give way to feelings of vengeance and to observe a higher standard of conduct than untrained, undisciplined and unorganized rabble in the street among whom they are expected to keep order.

Just, however, as a higher standard of behaviour is expected from the Police and the Military as compared with the crowds in the streets, similarly from a body of cultured, highly educated gentlemen preparing to make an enquiry, is expected a calmer and more judicial attitude than is to be expected from mere casual narrators.

Where the facts stated are correct, reasonable and even plausible, criticism may be justified as fair comment, but if there are no facts to warrant the defamatory imputation the defence of fair comment cannot be maintained in an action for libel.

A person who makes a defamatory statement cannot escape liability in respect of it merely because he made it honestly but without due care.

In a suit to recover damages for libel nominal damages will be awarded only when the plaintiff is content to clear up his character, and does not care to put money in his pocket.

In assessing damages in a case of libel the conduct of the defendant during the proceedings may be considered but such conduct is only his conduct in the First Court. The repetition in the Appellate Court of the defence in the Court below cannot be considered as aggravating conduct.

Where no private malice or personal grudge has been proved and it is shown that the defendant acted throughout in the public interest, the case is not one for exemplary damages.

Per *Reilly, J.*—The right of fair comment on matters of public interest is a right which it is the duty of the Courts carefully to guard and liberally to interpret.

In criticising the conduct of the Police on the occasion of a riot, the defendants stated in a report

that the Police and the superior officers were, before the commencement of the riot, engaged in a criminal conspiracy for the purpose of provoking a breach of the peace and violence on the part of non-co-operators and then using reprisals and finally fixing the responsibility on the movement of non-co-operation, and they went on to say that they considered the evidence was conclusive and unimpeachable about the complicity of plaintiff, who was the District Superintendent of Police in the transaction. In a suit for damages by the plaintiff for libel, it was found that the Policemen had misbehaved on the day in question, but that there was no proof of any conspiracy much less of plaintiff's complicity in it:

Held, that the report had gone far beyond the limits of justifiable criticism and any plea of fair comment must, therefore, fail. **M** SUBRAMANIA IYER *v.* HITCHCOCK; 22 L. W. 26 **900**

Limitation, *operation of—Cause of action, accrual of*—Putni taluk, *sale of—Sale set aside—Restoration of possession—Rent, suit for—Limitation.*

The period of limitation is extended where there has been a suspension of the cause of action or where the cause of action has accrued not on the date indicated in column 3 of the Schedule to the Limitation Act but on a subsequent date for no fault of the plaintiff.

Time runs from the date on which the rights of the party suing are finally settled, giving birth to his cause of action, and once it starts running it cannot be stopped by any act which does not bring about any change in those rights.

The operation of an original decree is not suspended by the presentation of an appeal nor is it interrupted where the decree of appeal is one of dismissal.

Where the sale of a *putni taluk* is subsequently set aside and the *patnidars* are put in possession of the *taluk* the suspension of the *zemindar's* right to recover rent is put an end to on the date of such restoration, and limitation for the recovery of rent commences from the date of such restoration of possession to the *putnidars*. The mere fact that an appeal is preferred from the order setting aside the sale, which is subsequently dismissed, does not affect the question of limitation. **C** BIJOY CHAND MAHATAB *v.* NILMONI LAHIRI **1007**

Limitation Act (IX of 1908), s. 5—*Appeal filed after limitation*—Bona fide *mistake—Extension of time—Sufficient cause.*

In answer to a suit for ejectment of certain tenants from their holdings on the allegation that they were non-occupancy tenants the latter pleaded that they cultivated the land under certain other persons who were under-proprietors in the village. These latter persons were thereupon impleaded as defendants and set up under-proprietary rights. The Court held that no such rights were proved and decreed the suit, but the names of the intervenor were not shown in the decree which was passed in the case. The intervenor defendants filed an appeal in the Court of the District Judge beyond the period of limitation and explained that the delay was due to the fact that they had first intended to file an appeal in the Commissioner's Court and it was only after taking legal advice that they had discovered that the appeal lay to the Court of the District Judge. The District Judge refused to admit their appeal on the ground that their names did not appear in the decree. Thereupon they made an application to the Court for the amendment of the decree and the decree was amended by inserting their names in the decree:

Held, (1) that the right of the appellants to appeal from the decree of the First Court arose on the date when the decree was amended by the addition of their names and that in this view of the case their appeal could not be regarded as having been filed beyond time;

(2) that in any case the appellants were entitled to the benefit of s. 5 of the Limitation Act.

An honest mistake made by a litigant upon incorrect advice amounts to sufficient cause for extending the period of limitation within the meaning of s. 5 of the Limitation Act.

The judicial discretion given by s. 5 of the Limitation Act to admit an appeal after the prescribed period of limitation should be exercised if the appeal has been prosecuted with due diligence, and when in the exercise of judicial discretion a Judge fails to apply the rule, the Appellate Court should either remit the case or itself exercise the discretion. **A** ISHWAR PARSAD *v.* BISHUNATH PRASAD, L. R. 6 A. 26 Rev. 627

——— **s. 5**—*Appeal filed beyond time—Extension of time, application for—Review application, time spent in, whether can be deducted—Due diligence.*

An application to extend the time limited for filing an appeal by deducting therefrom the time spent by the appellant in presenting and prosecuting a review application in respect of the judgment appealed against, may be granted on a consideration of the case under s. 5 of the Limitation Act, provided the appellant shows due diligence in making the application for extension. **C** KRISHNADAS ACHARJEE CHOUDHURY *v.* RAHIMANNESSA BIBI 996

——— **s. 5**—*Appeal presented beyond time—Negligence of Counsel—Extension of time—Sufficient reason.*

The fact that an appeal is presented beyond time owing to the negligence and forgetfulness of Counsel is not a sufficient reason for indulgence under s. 5 of the Limitation Act. **O** DILAN *v.* RAM BHAROSEY, 10 O. & A. L. R. 1276; 1 O. W. N. 880; (1925) A. I. R. (O.) 374 693

——— **s. 5**, *applicability of—Application to set aside ex parte decree.*

Section 5 of the Limitation Act applies only to appeals or applications for a review of judgment or for leave to appeal and not to an application for setting aside an *ex parte* decree or an order of dismissal for default. **R** MA NAW NAW *v.* SOMASUNDRAM CHETTY, 2 R. 655; (1925) A. I. R. (R.) 187 324

——— **s. 5**—*Civil Procedure Code (Act V of 1908), s. 110—Application for leave to appeal to Privy Council—Time spent in obtaining review of High Court judgment, whether can be deducted—Suit for partnership accounts—Value of subject-matter.*

The time occupied in prosecuting an application for review of the judgment of the High Court should be deducted in calculating the period of limitation for presenting the application for leave to appeal to His Majesty in Council.

In order to determine the value of the subject-matter of a suit for dissolution and accounts of a partnership for the purposes of s. 110 of the C. P. C., it is the value of the appellant's share and not the whole of the property that should be looked to. **B** NARIMAN RUSTOMJI *v.* HASHAM ISMAYAL, 26 Bom. L. R. 1261; (1925) A. I. R. (B.) 137; 49 B. 149 191

——— s. 10—*Money entrusted by one brother to another in trust for former's son—Trust—Suit to recover money—Limitation.*

A deed executed between two Muhammadan brothers recited the fact that a deceased brother of theirs had entrusted a certain sum of money to one of them for his son, and that the one to whom the money had been entrusted would be responsible for its payment. In a suit by the son of the deceased brother to recover the money from his uncle to whom it had been entrusted by his father:

Held, that an express trust had been created by plaintiff's father in his lifetime in respect of the money and that the recital in the deed was merely evidence of such a trust having been created and that the defendant being an express trustee the suit was governed by the provisions of s. 10 of the Limitation Act and no question of limitation could arise. **M** MUHAMMAD MATTHIAR *v.* KASA ROWTHAN, 20 L. W. 546; (1924) M. W. N. 876; (1924) A. I. R. (M.) 920 **508**

——— s. 14 (2)—*Execution petition in right Court—Proceedings continued in wrong Court*—Bona fide *proceedings—Exclusion of time.*

Where two separate Courts at different places have a common Judge who sits for a certain number of days in the month in each Court, and an execution application presented in one of the Courts which has jurisdiction, is taken up and disposed of in the other Court which has no jurisdiction, because the Judge happens to be sitting at that place, and the proceedings are eventually set aside in appeal, the decree-holder is entitled, in a subsequent application for execution, to exclude the time occupied in the proceedings in the wrong Court till the decision of the appeal under s. 14 (2) of the Limitation Act. **B** PANDU DAGADU *v.* JAMNADAS CHOTUMAL, 26 Bom. L. R. 470; (1925) A. I. R. (B.) 113 **778**

——— s. 18—*Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside—Fraud and irregularity, distinction between—Fraud, proof of—Limitation.*

Fraud in bringing about an execution sale is essentially different from irregularity in the conduct of the sale.

In order to obtain the benefit of the provisions of s. 18 of the Limitation Act in respect of an application to set aside an execution sale, the judgment-debtor must establish that there was some contrivance on the part of the decree-holder by which he was kept from the knowledge of his right to apply under O. XXI, r. 90 of the C. P. C. It is not sufficient to say that as there was fraud in the conduct of the sale, therefore, it must follow that there was a contrivance on the part of the decree-holder to keep the judgment-debtor from the knowledge of the fraudulent sale.

Fraud is, however, a continuing influence, and until that influence ends it retains its power of mischief, and, therefore, fraud antecedent to the accrual of the right of action may also be considered under s. 18 of the Limitation Act. **Pat** BAJRANG PRASAD SINGH *v.* SONEJHARI KUER **622**

——— s. 19. *See* MORTGAGE **330**

——— s. 19—*Acknowledgment — Promise to pay amount due, whether necessary.*

To constitute an acknowledgment within the meaning of s. 19 of the Limitation Act it is not necessary that there should be a promise to pay the amount due. All that is necessary under the section is that there should be an acknowledgment of present liability before the claim is barred by limitation. **M** PERI RAMASAMI *v.* CHANDRA KOTTAYA, 47 M. L. J. 840; (1925) A. I. R. (M.) 261 **297**

——— s. 19—*Acknowledgment, what amounts to—Statement by vendee that he purchased property from mortgagee, whether acknowledgment of subsisting mortgage.*

For a statement to amount to an acknowledgment within the meaning of s. 19 of the Limitation Act, there should be an acknowledgment of liability and it should be a conscious acknowledgment.

When a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into the possession of his vendor as a mortgagee. All that he admits is that his vendor came into the possession of the property on foot of a mortgage. No question arises in his mind as to whether the mortgage subsists or has become time-barred. The statement by itself does not signify to the mind of the person making it or to anybody else that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making the statement. Such a statement does not amount to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act. **A** SHAM DEVI *v.* BHAGWAT DAYAL, L. R. 6 A. 139 Civ.; (1925) A. I. R. (A.) 353 **584**

——— s. 19—*Evidence Act (I of 1872), s. 114, ill. (e)—Acknowledgment—Agent, authority of, proof of—Presumption—Mortgage*—Wajib-ul-arz, *entry in—Verification by agent of mortgagee, effect of.*

The sufficiency of an alleged acknowledgment which is relied on as operating to save limitation must be judged with reference to the law in force at the time when the question arises and not with reference to the law in force at the date of the acknowledgment.

No valid acknowledgment can be made by a general agent unless he is expressly or impliedly authorised in that behalf, but the authority may be presumed from the attendant circumstances.

Where a mortgage was recited in a *wajib-ul-arz* prepared during a Settlement effected under Regulation VII of 1822 as amended by Regulation IX of 1833, and the *wajib-ul-arz* was attested and verified by the agent of the mortgagees:

Held, that having regard to the directions issued to the Settlement Officers with regard to the preparation and verification of a *wajib-ul-arz*, it was open to the Court to presume under s. 114 of the Evidence Act, that the Settlement Officer had satisfied himself as to the authority of the agent to verify the *wajib-ul-arz* on behalf of the mortgagees, and that, therefore, the recital and verification constituted an acknowledgment within the meaning of s. 19 of the Limitation Act. **A** GANGA RAM *v.* LACHAMAN SINGH, L. R. 5 A. 736 Civ.; (1925) A. I. R. (A.) 176 **633**

——— s. 22—*Addition of party—Limitation, expiry of—Application to amend plaint, whether can be allowed.*

If a new plaintiff is added as a party to a pending suit after the lapse of the period of limitation fixed for the suit, the bar of limitation would not be saved.

A Court acts rightly in rejecting an application to substitute the name of a person in place of that of the plaintiff on record after the lapse of the period of limitation for filing the suit, when the new plaintiff claims under a different cause of action. **M** VENKATASUBBAMMA *v.* PULIPULLA REDDY **961**

Limitation Act—contd.

——— **s. 23, Sch. I, Art. 120**—*Criminal Procedure Code (Act V of 1898), ss. 145, 146—Attachment of property—Declaration, suit for—Limitation, commencement of.*

In a proceeding under s. 145 of the Cr. P. C. the land in dispute was attached by the Magistrate under s. 146 and a Receiver was appointed in respect of it, the parties being referred to the Civil Court for the determination of their rights. The plaintiff subsequently brought a suit for a declaration that he was the owner of the land:

Held, (1) that it was the attachment by the Magistrate and not any wrongful act of the defendant which had given rise to the right to sue and that the right accrued when the attachment was made and limitation began to run from that date under Art. 120 of Sch. I to the Limitation Act;

(2) that after the date of the attachment by the Magistrate no fresh period of limitation began to run under s. 23 of the Limitation Act. **N** YEKNATH *v.* BABIA, 20 N. L. R. 195; (1925) A. I. R. (N.) 236 **631**

——— **s. 26**—*Easement—Right of way—Uninterrupted user for twenty years—Presumption—Failure to draw presumption—Second appeal, whether competent.*

An open user continued without interruption for a period of over twenty years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of s. 26 of the Limitation Act.

Failure on the part of an Appellate Court to draw from such user a presumption that it was as of right is an error of law which makes a second appeal competent. **N** NARAIN *v.* IKRAM, (1925) A. I. R. (M.) 270 **81**

——— **Sch. I, Arts. 29, 36**, *applicability of—Suit to recover compensation for loss sustained by irregular execution sale*—Terminus a quo.

A suit to recover compensation for loss sustained on account of the irregular sale of certain property in execution of a decree is governed by Art. 36 of Sch. I to the Limitation Act, and must be brought within two years from the date of the sale.

Article 29 of Sch. I to the Limitation Act must be interpreted to apply only to the seizure of property and not to govern any suits arising out of what happens later at the time of sale. **L** CHANDA SINGH *v.* JAI KISHEN DAS, 5 L. L. J. 289; (1924) A. I. R. (L.) 135 **24**

——— **Art. 49**—*Permissive possession of moveables—Possessor's claim to ownership—Possession when becomes unlawful—Suit for recovery of possession*—Terminus a quo.

Where the original possession of moveables is permissive the character of that possession is not changed by the fact that the person in possession sets up a claim to the property as his own. The possession does not become unlawful until a formal demand for its return is made and refused.

A suit for recovery of possession under such circumstances is governed by Art. 49 of the Limitation Act and is within time if brought within 3 years from the date of refusal. **R** MA MARY *v.* MA HLA WIN, 2 R. 555; (1925) A. I. R. (R.) 146 **10**

——— **Art. 53**—*Sale on credit—Suit to recover price—Limitation, commencement of—Evidence Act (I of 1872), s. 98—Technical words*

Limitation Act—contd.

—"Thavani," *meaning of—Oral evidence, whether admissible.*

Under s. 98 of the Evidence Act, evidence of the meaning which words bear in mercantile transactions can be given, and where a particular word has obtained a technical meaning in a particular trade or when used in a particular context, the Courts when construing that word are bound to take into account that meaning.

The word "*thavani*" has acquired in transactions in piece-goods amongst dealers in Godown Street and Coral Merchant Street in the City of Madras a particular significance and is equivalent to a credit *period.*

In a contract for sale of piece-goods in the City of Madras, the vendor sent the vendee a bill and at the top the following words appeared, "Debit interest at ¾ per cent. per mensem after sixty days *thavani*":

Held, that the sale was a *credit* sale and not a *cash* transaction; and that under Art. 53 of Sch. I to the Limitation Act, limitation for the suit commenced to run only on the expiry of the period mentioned, when the price became payable. **M** K. M. P. R. N. M. FIRM *v.* SOMASUNDARAM CHETTY & Co., 47 M. L. J. 844; 20 L. W. 981; (1925) A. I. R. (M.) 161 **299**

——— **Sch. I, Arts. 66, 80**—*Bond providing for repayment of principal after fixed period—Interest payable monthly—Default in payment of interest—Principal becoming due—Suit to recover principal and interest—Limitation, commencement of.*

The amount of a bond was expressed as payable within six months and interest thereon was to be paid month by month, and it was provided that in the event of default in payment of interest for any month compound interest was to accrue on the unpaid amount and the lender was to have a right to file a suit at once for the recovery of principal and interest without waiting for the stipulated period of six months. No interest was paid under the bond. In a suit to recover principal and interest:

Held, (1) that the suit was governed by Art. 80 of Sch. I to the Limitation Act;

(2) that the money due under the bond became payable on failure to pay the first month's interest and that limitation began to run from the date of the first default and the fact that it was also stated in the bond that the money was payable five months later did not entitle the creditor to ignore the former date as the starting point of limitation and select the later one because it suited his convenience better.

It is not open to the parties to an agreement to contract themselves out of the Law of Limitation by inserting in their agreement alternative starting points for limitation. **O** PHERAI *v.* PUDAI RAM, 10 O. & A. L. R. 1037; 27 O. C. 318; 1 O. W. N. 647 **280**

——— **Art. 89.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, Sch. II, Art. 31 **704**

——— **Art. 95**—*Suit to set aside decree on ground of fraud—Limitation, commencement of—Suit for declaration and consequential relief—Nature of suit, whether changed by failure to adduce evidence with regard to consequential relief.*

By giving up or not adducing evidence in support of the prayer for consequential relief and treating it as surplusage a plaintiff cannot convert a suit for declaration and consequential relief into one for a mere declaration.

A suit to set aside a decree on the ground that it has been obtained by fraud is governed by Art. 95 of

Limitation Act—contd.

Sch. I of the Limitation Act and limitation for the suit begins to run from the date on which the plaintiff had notice of the decree. **C** SARADA PROSAD ROY *v.* RAI MOHAN SAHA **629**

——— **Sch. I, Arts. 137, 138**—*Civil Procedure Code (Act V of 1908), s. 64—Attachment—Mortgage pending attachment, whether void or voidable—Auction-purchaser, suit by, to recover possession—Limitation—Prior mortgage, paid off, whether kept alive—Intention of parties.*

A private alienation of property pending attachment is wholly void against all claims enforceable under the attachment.

Where pending an attachment the judgment-debtor executes a usufructuary mortgage of the attached property, the mortgage is void and the auction-purchaser in execution of the decree becomes entitled to possession of the property on the date of the sale. A suit brought by him to recover possession of the property more than 12 years after the sale is barred by limitation either under Art. 137 or Art. 138 of Sch. I to the Limitation Act.

The question whether a prior mortgage was or was not kept alive by a later mortgage executed in discharge of the earlier one, is one of the intention of the parties. **M** SRINIVASA IYENGAR *v.* VELLAYAN AMBALAM, 47 M. L. J. 913; (1925) A. I. R. (M.) 338 **349**

——— **Arts. 139, 144**—*Landlord and tenant—Tenant holding over after expiry of lease—Adverse possession—Ejectment suit—Limitation—Co-sharer holding over after lease—Failure to pay rent for long period, effect of.*

A tenant who holds on to the land after the expiry of the term of his lease cannot be said to be holding "adversely" to the landlord. As long as he is in possession he cannot deny that it was from the lessor that he got the land.

Where, however, a tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease under Art. 139 of Sch. I of the Limitation Act and after the expiry of 12 years the title of the landlord must cease by the application of s. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Article 144 of Sch. I of the Limitation Act has nothing to do with such a case.

Where a co-sharer who obtains a lease of the joint property from the other co-sharers continues in possession of the property after the expiry of the lease, without payment of rent or a share in the profits to the other co sharers for a very long period of time, the only inference possible is that he holds adversely to the other co-sharers and not as a co-sharer. **A** DALMIR SINGH *v.* JOTI PRASAD, L. R. 6 A. 254 Civ. **550**

——— **Art. 144**—*Adverse possession—Title, proof of—Nature of property—Limitation.*

Where in a suit for recovery of possession the plaintiff proves antecedent title and there is no allegation of dispossession nor is there any finding that the plaintiff was actually dispossessed on a certain date, Art. 144 of Sch. I of the Limitation Act applies to the case and the Court should consider whether the defendant has completed a title in himself by being in adverse possession for the statutory period.

In considering the question of possession in such a case the Court should consider the nature of the property and as to how far it is capable of being possessed directly. **A** ALI HAMMAD *v.* GHURPATTAR SINGH, 23 A. L. J. 244; L. R. 6 A. 184 Civ. **578**

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——— **Sch. I, Art. 181.** *See* C. P. C., 1908, s. 105 **808**

——— ——— **Art. 181**—*Mortgage-suit—Application for final decree—Limitation—Pendency of proceedings as to mortgagor's title—Suspension of time.*

The Limitation Act is complete in itself and any ground for extension of time or for the suspension of time must be sought for within the four corners of the Act itself.

Article 181 of Sch. I to the Limitation Act applies to an application by the plaintiff for the passing of a final decree in a mortgage-suit.

In a mortgage suit where a preliminary decree is passed and time is fixed for payment of the decree amount, the plaintiff must apply for the passing of a final decree within the time allowed by law, that is three years from the date fixed for payment, whether the mortgagor has title to the mortgaged property or not and whether the personal remedy is or is not outstanding.

The period prescribed by Art. 181 of Sch. I to the Limitation Act cannot be extended in favour of the plaintiff merely by reason of the pendency of proceedings in Court with regard to the title of the mortgagor.

When time has once begun to run, it cannot be suspended by reason of any proceedings in Court unless an injunction or a stay order has been obtained staying the proceedings, or the facts can be brought within one of the sections of the Limitation Act which lay down the conditions under which the running of time is suspended. **M** AMMATHAYI AMMAL *v.* SIVARAMA PILLAI, 20 L. W. 987; 48 M. L. J. 74; (1925) A. I. R. (M.) 334 **272**

——— **Arts. 181, 182**—*Civil Procedure Code (Act V of 1908), O. IX, rr. 2, 3, 4—Execution of decree—Application for execution—Continuation of proceedings—Application to continue proceedings, nature of—Dismissal of application for default of decree-holder—Limitation.*

An application contemplated by Art. 181 of Sch. I to the Limitation Act must be an application required by law to be made.

There is no provision of law which requires a decree-holder to make an application where the sole object is the continuation of proceedings in a pending case. Where the Court intends to and does, as a matter of fact, maintain an application for execution on its pending file, and stays proceedings for the time being and does not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file so that it may proceed with it, is not governed by any Article of the Limitation Act.

An application for execution of a decree for sale on foot of a mortgage was returned to the decree-holder for certain amendments to be made and for the filing of certain papers. The application was again filed by the decree-holder without the amendments having been made and without the papers which had been directed to be filed. The Court directed notice to issue to the judgment-debtors and fixed a date for hearing. On the date fixed the decree-holder did not appear and the notice issued to the judgment-debtor was found not to have been served as the decree-holder had failed to pay costs

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for further proceedings. Thereupon the Court passed the following order:—"The case be consigned to record on account of the decree-holder's default in prosecution. The decree-holder will bear his costs." More than three years after this order the decree-holder made an application for continuing proceedings under his previous application:

Held, that the order passed by the Court on the previous application could not be interpreted as meaning that the Court merely postponed the hearing of the application, the application was finally intended to be dismissed and was, as a matter of fact, dismissed by that order and that, therefore, the subsequent application was barred by time.

When an application for execution has been dismissed for default, in circumstances mentioned in rr. 2 and 3 of O. IX of the C. P. C. relating to suits, proceedings under r. 4 of the Order cannot be taken in respect of such an application. O IQBAL NARAIN *v.* JAGRANI, 10 O. & A. L. R. 1285; 1 O. W. N. 847; 28 O. C. 158 **450**

——— **Sch. I, Art. 182**—*Execution of decree—Instalment decree—Entire amount becoming due on default in payment of one instalment—Waiver—Limitation, commencement of.*

Where an instalment decree provides that the decree-holder will be entitled to sue for or take out execution for the entire amount on default in payment of any one instalment, the entire amount becomes due on such default and time begins to run against the decree-holder from the date of such default.

The fact of the decree-holder not enforcing the right given to him under the decree by attempting to realise the entire amount which falls due on default in payment of one instalment does not in itself amount to a waiver for all time to come, nor has such waiver the effect of modifying the terms of the decree. C KALI CHARAN ROY *v.* MOHESH CHANDRA **784**

——— **Art. 182**—*Execution of decree—Stay of execution, surety for—Application against surety, whether saves limitation against judgment-debtor—Application for leave to continue execution proceedings—Step-in-aid of execution.*

A person who undertakes, during the pendency of an appeal by a judgment-debtor, to pay a certain sum of money in the event of the appeal being dismissed, as a condition for the stay of execution during pendency of the appeal, does not become a joint judgment-debtor with the principal judgment-debtor within the meaning of the 2nd paragraph of Explanation (1) of Art. 82 of Sch. I to the Limitation Act, and an application for execution against such a person does not operate to save limitation against the judgment-debtor.

An application for permission to execute a decree by the representatives of a deceased decree-holder is a step-in-aid of execution which gives a fresh start to the period of limitation; but where such an application is made against a person who is not a joint judgment-debtor, the application operates to save limitation only as against such person and not as against other judgment-debtors in the case. C BIRENDRA CHANDRA SINGHA *v.* TULSI CHARAN GHOSE **657**

——— **Art. 185 (5)**. *See* C. P. C., 1908, s. 41, O. XXI, r. 2 **455**

Madras Administration of Estates Regulation (III of 1802), s. 16 (7), *scope of—Claim by more than one person—Jurisdiction of Judge.*

Madras Administration of Estates Regulation—concld.

Clause (7) of s. 16 of the Madras Administration of Estates Regulation, 1802, contemplates the case only of a single claimant appearing to claim the personal properties left intestate by a deceased person.

The duty of a Judge, if more than one claimant appears before him, is to refer the parties to a regular suit and not to give any decision acting under the Regulation. M MARUTHAVANASWAMI *v.* SUBRAMANIA THAMBIRAN, 47 M. L. J. 770; 21 L. W. 130; (1925) M. W. N. 166; (1925) A. I. R. (M.) 210 **414**

Madras District Municipalities Act (V of 1920)—*Election Rules—Poll not held—Election petition, whether maintainable.*

Under the Rules framed by the Madras Government for the decision of disputes as to the validity of elections held under the Madras District Municipalities Act, the District or Subordinate Judge has no jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies, a candidate has been deemed to be duly elected under r. 7 (1) of the Rules for the conduct of elections.

The scope of r. 1 of the Rules for the decision of disputes as to validity of elections must be limited to cases where a poll has been held. M SRINIVASACHARIAR *v.* BHAGAVATHAPURAM, 47 M. L. J. 762; (1925) A. I. R. (M.) 376 **218**

——— *Rules for preparation of electoral rolls, rr. 7, 8 (c)—"Preparation", whether includes action of revising authority—"Proceedings," meaning of.*

In the rules for the preparation of electoral rolls under the Madras District Municipalities Act, the word "preparation" is used both in a general and in a restricted sense in different places. In r. 8 of the rules, which provides that no failure to observe the directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings, the word "preparation" is used in the general sense and includes the action of the revising authority.

Therefore, a Judge inquiring into an election dispute cannot go behind the electoral roll which is final and inquire into alleged defects in the procedure followed by the authority revising an electoral roll. Under r. 7 of the said rules, the revising authority must consist of the Chairman of the Municipality and two unofficial gentlemen nominated by the Collector, but an order admitting a claim to be entered in the electoral roll cannot be questioned on the ground that it was signed by the Chairman and only one unofficial, instead of two as required by the rules.

The word "proceedings" in r. 8 (*c*) of the above rules is of the widest import and includes an inquiry into an election dispute. M PALANISAMI PILLAI *v.* SRINIVASARANGACHARIAR, 47 M. L. J. 795; 20 L. W. 851; (1925) A. I. R. (M.) 160; (1925) M. W. N. 283 **322**

——— **ss. 3 (21), 180, 347, 362**—*Encroachment on land on side of street—Offence—Limitation for prosecution.*

An encroachment upon land by the side of a street, even though such land is uncovered by any pavement or other structure, amounts to an encroachment on the street within the meaning of s. 180 of the Madras District Municipalities Act.

Section 362 of the Madras District Municipalities Act deals with the removal of earth, sand or other materials or depositing such materials or making encroachment by depositing such materials on any

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land, river, estuary, canal, back-water or water-course. It has nothing to do with encroachment on streets.

The proviso to s. 347 of the Madras District Municipalities Act does not deal with a case under s. 362 of the Act, and a prosecution in respect of an act falling under the latter section must, therefore, be instituted within the period of three months prescribed by s. 347. **M** JAGANNADH NAIDU *v.* RAMA RAO, 20 L. W. 834; 47 M. L. J. 917; (1925) A. I. R. (M.) 186; 26 Cr. L. J. 550 **646**

Madras Land Encroachment Act (III of 1905), ss. 7, 14. *See* PUBLIC WAY **345**

Madras Local Boards Act (XIV of 1920), ss. 55 (2) (4), 57—*Honorary Magistrate, resignation by—Disqualification for election, whether removed before acceptance of resignation by Government.*

An Honorary Magistrate, disqualified as such for election as a member of a Local Board under s. 55 (2) (4) of the Madras Local Boards Act, cannot relieve himself of that disqualification merely by submitting his resignation to Government. The disqualification subsists until the resignation is accepted by the Government.

After an office is conferred and assumed, it cannot be laid down without the consent of the appointing power. **M** PRESIDENT, TALUK BOARD, HOSPET *v.* TUTUR CHANDRAPPA, 47 M. L. T. 774; 20 L. W. 868; (1925) A. I. R. (M.) 173; (1925) M. W. N. 266 **612**

Madras Proprietary Estates Village Service Act (II of 1894), s. 15 (2)—*Notice to proprietor by person other than Collector, validity of—Appointment by Divisional Officer, validity of—Suit to recover office—Burden of proof.*

Under s. 15 of the Madras Proprietary Estates Village Services Act, a statutory duty is cast upon the Collector to give notice to the proprietor of his action under s. 7 of the Act. Any notice by any subordinate of his, such as a Sub-Collector, does not fulfil the conditions laid down in cl. 2 of s. 15, and is ineffective.

When a person comes before the Court claiming a village office on the ground of his having been validly appointed, it is his duty to make out that he has been validly appointed.

A Revenue Divisional Officer gave notice to a proprietor under s. 15 of the Madras Proprietary Estates Village Service Act and the nomination by the latter of the defendant to a village office was vetoed by the said officer on the ground that it was not made within the prescribed time after receipt of notice and the plaintiff was nominated to the office, but the order was set aside by the Collector on appeal by the defendant. In a suit by the plaintiff for recovery of the office:

Held, that there being no proper notice to the proprietor by the Collector under s. 15, his nomination of the defendant was not out of time;

(2) that the appointment of the plaintiff was unwarranted and illegal;

(3) that whether or not an appeal lay to the Collector, the plaintiff who was not entitled to the office was not entitled to any relief against the defendant who was in possession of it. **M** VENKATASUBBAYYA *v.* GOVINDA KRISHNA, 20 L. W. 826; (1925) A. I. R. (M.) 290 **282**

Madras Revenue Recovery Act (II of 1864), s. 58—*Revenue Settlement—Assessment, validity of—Classification as dry or wet—Enhanced rate, legality of—Suit for declaration, maintainability of.*

Madras Revenue Recovery Act—concld.

Once a Land Revenue Settlement has been duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment, since the annual payment is incapable of increase during the period for which the Settlement is made.

When once certain lands have been assessed as dry at a Revenue Settlement, they cannot within the period of 30 years during which the Settlement remains in force be re-assessed as wet. Such assessment being illegal and *ultra vires*, the party aggrieved is not debarred by the provisions of s. 58 of the Madras Revenue Recovery Act, from bringing a suit for recovery of the amount so illegally levied and for a declaration that such assessment is illegal. **M** SECRETARY OF STATE FOR INDIA *v.* RAMANUJACHARIAR, 47 M. L. J. 780; 20 L. W. 973; (1925) M. W. N. 264; (1925) A. I. R. (M.) 355 **419**

——— **s. 63**—*Madras Sale of Minor's Estates Regulation (X of 1831), s. 2—"Regular course of inheritance," whether includes survivorship—Minor owner, unregistered, whether protected.*

The Madras Sale of Minor's Estates Regulation, 1831, applies to all minor owners of property whether registered or not.

The expression "by the regular course of inheritance" in the Madras Sale of Minor's Estates Regulation, 1831, includes property taken by way of survivorship.

The effect of s. 63 of the Madras Revenue Recovery Act is to leave the rights conferred on minors by the Madras Sale of Minor's Estates Regulation, 1831, whether they are technically land-holders or not, unaffected by the Act. **M** KATTAMANCHI KRISHNA REDDI *v.* THOLA RAMAKRISHNAYYA SETTY, 47 M. L. J. 667; 20 L. W. 791; (1925) A. I. R. (M.) 253; (1925) M. W. N. 49 **873**

Madras Sale of Minor's Estates Regulation (X of 1831), s. 2. *See* MADRAS REVENUE RECOVERY ACT, 1864, s. 63 **873**

Malabar Law—Tarwad—*Gift of property described as* jenm, *nature of—Suit to set aside gift—Limitation.*

A mere recital in a deed of gift executed by the members of a Malabar *tarwad*, that the property gifted is *jenm* property of the donors, does not lead to any presumption or inference in law that the property is in the hands of the donors as *tarwad* property.

Obiter dictum.—A gift of *tarwad* property by the *karnavan* is not void *ab initio* and the adult members of the *tarwad* are bound to sue to set aside the gift within limitation. **M** KEEZHANTHI JANAKI *v.* PACHIAPURAYIKEEZHANTHI GOVINDAN **546**

——— Tavazhi—Karnavan, *acquisitions by—Presumption—Maintenance arrangement with* karnavan *of* tarwad—*Junior members, rights of—Denial of* tarwad *right—Forfeiture.*

In the absence of evidence to the contrary, the presumption is in favour of the view that property acquired by the *karnavan* of a Malabar *tavazhi* is acquired for the *tavazhi* and with the *tavazhi* funds, and the presumption must prevail unless the person who avers that the property is a self-acquisition proves that fact by evidence.

It is not open to the junior members of a Malabar *tarwad* to set aside any arrangement that the *karnavan* has made for the purpose of the enjoyment of the *tarwad* properties by certain other junior members for their maintenance, and the latter are entitled to

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continue in possession of the properties of the *tarwad* until and unless the *karnavan* of the *tarwad* asks for the return of their possession from them.

Where the members of a *tavazhi* are in possession of certain properties of their *tarwad* under an arrangement with the *karnavan* for their maintenance, a recital in a *karar* amongst themselves that the properties belong to the *tavazhi* does not operate to work a forfeiture of their rights and the other junior members of the *tarwad* cannot on that ground get a decree for recovery of possession of the properties, where the members of the *tavazhi* unconditionally admit in their written statement in the suit that the properties belong to the *tarwad*. **M** APPATTA CHATHU NAMBIAR *v.* APPATTA SEKHARAN NAMBIAR, 47 M. L. J. 695; (1925) M. W. N. 61; (1925) A. I. R. (M.) 430 **1050**

Malicious prosecution—*Damages, suit for—Accusations substantially true—Reasonable and probable cause.*

The first thing that a plaintiff in a suit for damages for malicious prosecution has to prove is his innocence.

Where information given to a Magistrate which led to the institution of proceedings under s. 107 of the Cr. P. C. against the plaintiff included more than one specific accusation and the Court found that one of those accusations was not supported by evidence but that there was reasonable and probable cause for the information which was given to the Magistrate:

Held, that the plaintiff was not entitled to recover damages for malicious prosecution as the case, as a whole, had not been found to have been laid without reasonable and probable cause. **Pat** HARIHAR SINGH *v.* DASRATH AHIR, (1925) A. I. R. (Pat.) 469 **476**

Minor—*Contract of marriage entered into by guardian, whether enforceable—Breach of promise of marriage—Suit for damages by minor, whether maintainable—Damages, assessment of.*

A contract of marriage made on behalf of a minor by a person who is the natural guardian of the minor and who is the only person who could enter into such a contract is valid and binding.

Where a contract is made by a guardian of the minor so as to be binding on the minor and which is for the benefit of the minor there is an enforceable contract in law and the minor can enforce it.

Parents in India can make a binding contract of marriage on behalf of their daughters.

In assessing damages for breach of promise of marriage, the injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant's means should all be taken into consideration. **B** FERNANDEZ *v.* GONSALVES, 26 Bom. L. R. 1035; 48 B. 673; (1925) A. I. R. (B.) 97; 48 B. 673 **587**

——— *Guardian* ad litem—*"Gross negligence," what is—Omission to file document, whether negligence—Appeal, second—Finding as to negligence—Mixed question of law and fact.*

Where a guardian of a minor omits to put forward a plea which he should have put forward or fails to defend a suit which he ought to have defended, he would be guilty of negligence. But where a suit is prosecuted with due diligence, the mere fact that a certain document which might have helped the party was not filed in evidence is not by itself sufficient to show that there was "gross negligence" on the part of the guardian who conducted the litigation on behalf of the minor.

To afford a ground for relief in subsequent proceedings, the negligence attributed to a guardian must be gross negligence in law, that is, such negligence as would imply that the person guilty of it neglected to do what was plainly his duty to do or did something which he ought not to have done or omitted to do something which any man of ordinary prudence would have done.

The question whether there was negligence or such negligence as would vitiate the proceedings in a Court of Law is not a pure question of fact but a question of mixed law and fact and it is quite competent to the High Court in second appeal to go into the question to see whether there was gross negligence on the part of the minor's guardian in the conduct of a previous suit. **M** SITHAMRAJU ANANDA RAO *v.* VENKATADRI APPA RAO, 47 M. L. J. 700; (1925) M. W. N. 75; (1925) A. I. R. (M.) 258 **812**

——— *Guardian, negligence of—Default of appearance, whether amounts to negligence—Minor, whether bound by decree.*

Where the guardian of a minor defendant omits to do his plain duty and by reason of such negligence the suit is decided against the minor which would not have been otherwise decreed against him, the guardian's negligence must be held to have contributed to the Court proceeding in the manner it did, and the decree is not binding on the minor.

Where the guardian of a minor defendant had taken out *subpœnas* for his witnesses and had done everything to get the case ready, but was absent on the day of the trial and his Pleader applied for adjournment which was refused and the suit was decreed against the minor:

Held, that as the guardian's absence prevented his Vakil from placing before the Court all the facts necessary in order to enable the Court to grant time and this led to the suit being decreed against the minor, the guardian was guilty of negligence and the decree was not binding on the minor. **M** DADA SAHIB *v.* KOLLAPURAM GAJRAJ SINGH, 20 L. W. 854; 47 M. L. J. 928; (1925) A. I. R. (M.) 204 **258**

Mortgage—*Chattels—Sale and re-purchase of other chattels—Mortgagor's lien, whether attaches to purchased goods.*

The right of a hypothecatee of chattels does not attach to goods or chattels purchased with the sale-proceeds of the chattels or goods hypothecated, unless there is a contract that the hypothecatee should have a right against the goods substituted for the goods sold.

The lien of a hypothecatee of goods does not attach to the goods in the hands of a *bona fide* purchaser for value without notice of the hypothecation. **M** KANDASAMI CHETTY *v.* ADIMOOLA CHETTY, 47 M. L. J. 704; (1925) A. I. R. (M.) 275 **277**

——— *Co-mortgagees—Payment to one co-mortgagee, whether discharge of liability.*

A payment to one of two joint-mortgagees is a valid discharge of the mortgage liability. But a mere undertaking to pay the amount at some future date is not equivalent to payment. **M** PERI RAMASAMI *v.* CHANDRA KOTTAYA, 47 M. L. J. 840; (1925) A. I. R. (M.) 261 **297**

——— *Equity of redemption, purchaser of—Mortgage-decree, satisfaction of—Purchaser of equity of redemption, rights of.*

Mortgage—concld.

Where the debt due under a mortgage-decree is paid off by the person who had purchased the equity of redemption and the entire interest in the land, the rights under the mortgage-decree are kept alive and enure for the protection of the purchaser.

Where at the time of the purchase, one of the items of the mortgaged property has already been attached by the mortgagee in execution of a money-decree of his and the property having been put to sale, the mortgagee obtains a sale certificate without the knowledge of the purchaser of the equity of redemption, he cannot set up this sale as against the purchaser. **R** HLA BAN U *v.* RAMANATHAN CHETTYAR, 3 Bur. L. J. 287; (1925) A. I. R. (R.) 89 . **308**

——— *Mortgagor, power of, to grant lease—Suit on mortgage—Payment of rent, when valid—Mortgagee, whether bound.*

The powers of a mortgagor to grant leases after the execution of a mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses; but it is well-settled that a mortgagor cannot after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the mortgagee, create except as stated above a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant.

A payment of rent in advance after the institution of a suit on a mortgage and indeed by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding upon the mortgagee.

Payments made by tenants to a mortgagor after a mortgage, but before notice of it, must in order to be valid against the mortgagee, have been made in respect of rent which was due at the time of payment or became due before notice of the mortgage.

Where a lessee has prepaid to his lessor all the rent to become due under the lease and the lessor then mortgages the premises to a mortgagee who neglects to make proper enquiry of the lessee, who is in possession. the mortgagee cannot recover any part of the rent reserved by the lease. **C** KIRAN CHANDRA *v.* DUTT & Co., 29 C. W. N. 94; 40 C. L. J. 500; (1925) A. I. R. (C.) 251 **522**

——— *Redemption partial.*

A mortgage, though originally indivisible can cease to retain its indivisible character, if the equity of redemption is divided up. **L** KARIM BAKHSH *v.* KARIM BAKHSH, (1923) A. I. R. (L.) 22 **102**

——— *Redemption—Transferee from mortgagor—Interest, barred, liability to pay—Usufructuary mortgage.*

A transferee from the mortgagor is not bound to pay to the mortgagee at the time of redemption a claim for interest which has become barred by limitation.

Where a mortgagee has been in enjoyment of the mortgaged property, he must be considered to have realised the interest from out of the profits of the property, and a mortgagor in such a case seeking to redeem the property can be compelled only to pay the mortgage-money. **M** MANJUNATH SHAMBHUGA *v.* SANNAYAL, (1924) M W. N. 776; (1924) A. I. R. (M.) 852 **205**

Mortgage—concld.

——— *Redemption—Trees planted by mortgagee whether can be removed by him.*

A mortgagee is entitled to make any use he likes of the land in his possession. If he grows any crop on it he can cut it away before handing over the land to the mortgagor. Similarly, if he plants any trees on the land he is entitled to remove the trees before handing over the land to the mortgagor on redemption. **A** LALLU SINGH *v.* RAGHUNANDAN, L. R. 6 A. 114 Rev. **690**

——— *Sub-mortgage to member of Hindu joint family—Purchase by sub-mortgagee in execution of decree—Statement re existence of first mortgage—Suit for redemption—Acknowledgment—Other members whether, bound—Limitation Act (IX of 1908), s. 19.*

In the case of a mortgage executed in 1859, the mortgagees executed a sub-mortgage of their mortgagee rights in 1900 in favour of two members of a Hindu joint family, *S.* and *K.* The sub-mortgage was a simple one. *S.* and *K.* got a decree for sale against their mortgagors and purchased the property in execution. In the list of properties to be sold signed by *S.* he described the property as subject to the mortgage of 1859. In a suit for redemption of the mortgage of 1859 against *S.* and other members of the family:

Held, (1) that *prima facie* the suit was barred;

(2) that inasumch as in describing the property purchased by him *S.* mentioned that it was subject to the mortgage of 1859, this constituted a valid acknowledgment and the suit was within time against him;

(3) that as the purchase was made for the benefit of the entire family and in preparing the list *S* was acting on behalf of the family, the acknowledgment was binding on all the members of the family. **A** SANWAL DAS *v.* ALI MAHDI, 22 A. L. J. 1018; L. R. 5 A. 718 Civ.; (1925) A. I. R. (A.) 174 **330**

Muhammadan Law—*Co-heirs, position of—Tenants-in-common — Adverse possession — Custom in derogation of personal law, proof of.*

Where a custom has been set up in derogation of the personal law of the parties, which overrides the provisions of the personal law, it must be strictly proved by very clear and definite evidence and such evidence must establish all the elements of a valid custom.

The entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants-in-common and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others.

Co-heirs under the Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all the co-heirs. **C** ASIRUDDIN MONDAL *v.* LATIFUNESSA BIBI **763**

———, *interpretation of.*

When once a great Muhammadan Jurist has interpreted a particular precept of Muhammadan Law in a particular way that interpretation should be followed without referring back to original authorities. That is the only method of making the Muhammadan or Hindu Law certain when administered by Indian Courts.

The narrow sense in which the Muhammadan

Muhammadan Law—contd.

Jurists understood the term "property" is wholly unsuited to the modern and progressive state of society. O IMDAD ALI *v.* AHMED ALI, 10 O. & A. L. R. 1215; 1 O. W. N. 868; 28 O. C. 55 **400**

——— *Settlement—Gift—Restriction on alienation —Construction — Vested remainder, creation of, validity of—Will—Bequest to one heir—Consent of other heirs when effective—Family arrangement — Relinquishment, consideration for—Alienation by guardian—Direction of father—Discharge of debt—Sons, whether bound.*

Where a Muhammadan by a deed of settlement gave certain properties to his sons "to be enjoyed by them from this date with all rights absolute," but later on, the document contained recitals that the sons "shall not subject the properties to mortgages or other alienations, and that both of them shall live with the income derived therefrom and maintain themselves, and that after them their descendants shall enjoy the same with the right of making alienations as they pleased":

Held, that the sons took an absolute estate in the properties settled upon them and the direction against alienation was invalid as being only in the nature of a pious wish that the sons should hand down the properties to their children unimpaired.

Under the Sunni Law a testamentary disposition by a Musalman is invalid in so far as it purports to dispose of more than one-third of the testator's estate or to benefit any of his heirs, unless the heirs whose rights are affected by such disposition consent to it after his death expressly or impliedly or by passive acquiescence. Consent during life is not enough.

The policy of the Muhammadan Law is to prevent a testator from interfering by Will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. It is incumbent upon those who seek to set up the consent of the heirs after the death of the testator to a Will made by him to show very clearly that the forms of the Muhammadan Law, whereby its policy is defeated, have been complied with.

If there is a dispute and all the members of the family come to an arrangement, it is not open to any of the parties to go behind such an arrangement, but where a father and his sons amicably arrange that the father should settle all his property upon the sons reserving to himself little or nothing, it cannot be said that the essentials of a family arrangement are present, which would preclude any of the parties to the arrangement from claiming by inheritance to any other party.

In order to make out a valid family settlement by which a person can relinquish his right to property not only *in' præsenti* but also *in futuro*, there must be in the first place consideration for such relinquishment, and in the second place there must be words which convey such an expression of intention on the part of the parties to the document. So long as the arrangement is merely a one-sided arrangement or where there is no dispute to be settled, a mere settlement of property by one person upon another cannot be considered to be a family arrangement under which rights which will accrue in future have been given up.

Under the Muhammadan Law, the father is entitled to deal with the properties as he likes and the sons cannot question any alienation made by him. Therefore, an alienation which was arranged to be made by a Muhammadan father and is carried out by the guardian of his minor sons, after his death, cannot be contested by them especially where it is for the purpose of discharging a debt incurred in the lifetime of their father.

Obiter.—The Muhammadan Law does not permit the creation of a vested remainder by a deed of settlement or by Will, but it is not opposed to the Muhammadan Law to make a bequest in favour of a legatee subject to the legatee paying a certain amount to another person. In other words, a trust can be created subject to which a legatee can take a bequest; but the words must be explicit for the purpose of creating such a trust. M ABDUL RAHIMAN *v.* UTHUMANSA ROWTHER **945**

——— **Gift**—Hiba-bil-ewaz, *what is—Gift in lieu of services, whether revocable—Waiver of right of revocation, effect of.*

Under the Muhammadan Law a donor may revoke a gift even where he has purported to waive his right of revocation at the time of or after the declaration of gift; provided that where he has accepted something in return for the waiver he cannot revoke the gift. Where a donor waives his right of revocation in lieu of services rendered to him by the donee in consideration of which the gift is made, the gift cannot be revoked.

Per *Dalal, J. C.*—A gift made in consideration only of natural love and affection or of services or of favours rendered does not fall under the category of a *hiba-bil-ewaz.*

Per *Wazir Hasan, A. J. C.*—Under the Muhammadan Law services rendered by a donee to the donor may form the consideration of a gift and such a gift must be regarded as a *hiba-bil-ewaz.* O IMDAD ALI *v.* AHMED ALI, 10 O. & A. I. R. 1215; 1 O. W. N. 868; 28 O. C. 55 **400**

——— **Marriage**—*Conversion to Islam, effect of, on prior marriage—Prior marriage, whether dissolved.*

The mere fact of a Hindu woman changing her religion, even though *bona fide*, does not *ipso facto* dissolve her previous marriage. Even under pure Muhammadan Law a convert's first marriage is not dissolved automatically on conversion. It is only where the conversion takes place in a country where the Muhammadan Law is not administered that the marriage is so dissolved on the lapse of a woman's term of probation. But when she remains in a country where the Muhammadan Law regarding questions of marriage is in force, she has only the right to obtain a divorce *if* her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court.

No question of the doctrine of *factum valet* arises in a case of a second marriage by a woman where her first husband is still alive. The second marriage, in such a case, is not only irregular but illegal and such an illegality cannot be cured either by acquiesence or long continued cohabitation. A MAHATAB-UN-NISSA *v.* RIFAQATULLAH, L. R. 6 A. 145 Civ. **459**

——— **Minor** — *Guardian — Maternal grandfather —Discharge for mortgage-money.*

Under the Muhammadan Law the maternal grandfather of a minor is not his *de jure* guardian and has no power to dispose of the immoveable property of the minor or to give a valid discharge in respect of mortgage-money due to the minor. L ABDUL RAZAK *v.* ABDUL RAHMAN, 1 L. C. 485 **632**

Muhammadan Law—concld.

——— **Minor**—*Mother, whether can alienate property of minor—Suit to recover property alienated—Ancestral debt, liability to pay.*

The mother of a Muhammadan minor has no power, under the Muhammadan Law, as *de facto* guardian of the minor to alienate or charge the immoveable property of the minor, even if the transaction is for the benefit of the minor. Any such alienation is void *ab initio.*

A Muhammadan minor who sues to recover immoveable property alienated by his mother during his minority as his *de facto* guardian, is liable to satisfy a proportionate share of any ancestral debts due from the estate, before he can recover his share in the property. **L** JHANDA *v.* SAPURAN SINGH, 1 L. C. 18 **772**

Negligence—*Accident—Child crossing railway line at unauthorised place—Proximate cause, what is—Invitation, allurement and trap—Suit for damages—Contributory negligence.*

Plaintiff, a little girl of 7 years of age, was run over by a locomotive engine while she was crossing the railway line in broad daylight, and lost her right arm and right leg. There was no crossing at the point but it was found that people living in the neighbourhood were in the habit of crossing the railway line at the point where the accident happened. There was nothing to show that it was possible to bring the engine to a dead stop as soon as the child was noticed crossing the line. In a suit for damages against the Railway Company:

Held, that the proximate cause of the accident was that the plaintiff stepped on the Railway line in front of a moving engine and was guilty of negligence in not keeping a sharper lookout for passing trains when she was crossing the line at an unauthorised place of crossing and the accident being thus due to plaintiff's want of care, the suit must fail.

Per *Spencer, Offg. C. J.*—Persons who cross an open railway line at an unrecognised crossing do so at their own peril. The plaintiff, if not a trespasser, was at the most a licensee, and, where a licensee is concerned, the owner of the premises is not liable for damage caused by the negligence of the licensee, provided that he does not place any trap in the way of those who come up on the premises. In the present case there was no trap, no allurement and no invitation. The existence of a short cut cannot itself be treated as an allurement, nor does the failure of the Railway Company to prevent passengers from crossing the line at the point of accident amount to an invitation or allurement either to adults or children to cross the railway line without proper circumspection.

It is the party who is last negligent who is made responsible for an accident arising from the negligence of both parties.

Per *Srinivasa Iyengar, J.*—Negligence is the failure to exercise proper care. But what is proper care depends on the time, place and circumstance. Whether any particular act or omission constitutes negligence would have to be decided having regard to the person injured, the manner in which the injury was occasioned and the time, place and circumstance in each case.

The theory of contributory negligence is not a special or separate branch of the law, nor is the theory which relates to what may be called the further or secondary negligence of the defendant. They are

Negligence—concld.

all but different aspects of the one sole question in the case "what was the proximate or effective cause of the accident?" If the defendant was negligent, still if the plaintiff could have by the use of ordinary prudence avoided the accident, the plaintiff is held not entitled to recover, not because he was also negligent but only because the proximate cause of the accident should be held in such cases to have been not the primary negligence of the defendant but really the negligence on the part of the plaintiff which was what largely contributed to the result. Similarly if in spite of the negligence of the plaintiff the defendant could, even then, by the exercise of ordinary care have avoided the accident and injury, the plaintiff is held entitled to recover not because he was not negligent but only because the negligence that proximately caused the injury was the negligence not of the plaintiff but of the defendant. **M** MADRAS & SOUTHERN MAHARATTA RY. CO. *v.* JAYAMMAL, (1924) M. W. N. 899; 47 M. L. J. 887; 21 L. W. 91; (1925) A. I. R. (M.) 304 **969**

——— *Railway Company—Injury to passenger—Burden of proof—Duty of Company—Contributory negligence.*

The duty of a Railway Company is to exercise due care and skill in carrying passengers. It is not bound to carry passengers safely and securely, but to take all reasonable care that in the management of its trains the passengers are not exposed to undue danger.

In a suit to recover damages for an accident due to the defendant's negligence, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it, but when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale.

Plaintiff, a passenger by one of the defendant Company's trains, was lying on the centre berth. A ladder which should ordinarily have been placed under the berth was placed in the rack above, but it could not be ascertained whether this was done by a servant of the Company or by one of the passengers. During the course of the journey the ladder fell down from the rack and injured the plaintiff who sued the Company for damages:

Held, (1) that the plaintiff was not in any way guilty of contributory negligence;

(2) that, on the other hand, it had not been established that the Company was guilty of negligence and that, therefore, the plaintiff's suit must fail. **B** VISHNU DIGAMBAR PALUSKAR *v.* B. B. & C. I. RAILWAY, 25 Bom. L. R. 881; (1924) A. I. R. (B.) 278 **416**

Negotiable Instruments Act (XXVI of 1881), s. 29—*Promissory note executed by executor—Personal liability—Pro-note executed by guardian of minor.*

When a promissory-note is executed by any person, he is personally liable on it unless it is clear that such a liability is excluded.

Executors are personally liable on notes executed by them as such, even though they may be acting for the benefit of the testator's estate in doing so, unless their liability is excluded, in the manner provided in s. 29 of the Negotiable Instruments Act.

A person who executes a pro-note does not exclude his personal liability merely by saying that he executes the note as the guardian of a minor. **M** KODURI SUBBARAYADU *v.* KOYYALAMUDI SUBBANNA, 47 M. L. J. 765; (1925) A. I. R. (M.) 371 **457**

Negotiable Instruments Act—concld.

——— **s. 87**—*Pro-note, alteration in, after execution, effect of—Liability, whether discharged—Suit on pro-note—Admission of defendant, effect of.*

Under s. 87 of the Negotiable Instruments Act where an alteration is made in a pro-note after its execution without the knowledge or the consent of the maker the pro-note becomes void, but the alteration has not the effect of discharging the liability of the maker.

Where in a suit on a pro-note which has been altered subsequently to its execution without the knowledge or consent of the defendant, the defendant admits the claim but alleges that the debt is re-payable in a certain manner the suit may be decreed in accordance with the admission, without any reference to the pro-note. **O** ZULFIQAR AHMED *v.* ROBERT ELLIOT, 10 O. & A. L. R. 1008; 1 O. W. N. 605 **423**

Originating summons—*Joinder of parties—One individual interested in different capacities—Procedure.*

In an Originating Summons the same individual, even in different capacities, cannot appear both as an applicant and as a respondent, nor can the same individual appear as two persons, even on the same side, nor can he appear by two different sets of Counsel. **B** JAMSHEDJI NAOROJI *v.* SORABJI NAOROJI, 25 Bom. L. R. 1137 **504**

Oudh Civil Digest, s. 172 (a). *See* C. P. C., 1908, s. 41, O. XXI, r. 2 **455**

Oudh Estates Act (I of 1869), ss. 2, 11, 13, 19, 22 (7), (11)—*Succession to estate of* taluqdar—*Widow, position of—Collateral, rights of—Succession, when opens—Construction of document—*Taluqdari sanad—*"Male heir," meaning of—Females, exclusion of—Will by* taluqdar *—Formalities—Attestation—Acknowledgment of execution at time of registration, effect of—Succession Act (X of 1865), s. 50.*

The vesting of a remainder which is a doctrine borrowed from English Law does not find a place in the scheme of devolution of property settled under s. 22 of the Oudh Estates Act. Under that Act where a widow succeeds to the estate of her husband, succession to the collaterals opens on the death of the widow just as under the ordinary Hindu Law.

The Oudh Estates Act applies the principles of Hindu Law applicable to the case of a widow to a Muhammadan widow also. A Muhammadan reversioner, therefore, does not succeed to a vested right on the death of the last male-holder but has only an expectation and no interest. The right of the person entitled to succeed in such a case must, therefore, be determined at the date of the widow's death and not at the date of the death of the last male-holder.

Under the scheme of devolution of property laid down in s. 22 of the Oudh Estates Act no estate devolves under cl. (11) of the section until the previous clauses have exhausted themselves, *i. e.*, till after the death of the widow. The effect of cl. (11) is simply to refer the parties to the law which would govern the descent when the special provisions of the Act are exhausted. So long as the widow is alive those provisions would not be exhausted and no right of any heir under cl. (11) would vest during the lifetime of the widow.

A widow is not an heir under the Oudh Estates Act but she inherits the property. Not being an heir she is debarred from transferring the property during her life because the provisions of s. 11 of the Act will not apply to her, but during that term she is vested with the full estate.

A *taluqdari sanad* provided that the estate shall descend to the "nearest male heir according to the rule of primogeniture"

Held, that not only females but also the descendants of females were excluded from succession to the estate under the *sanad*.

Ordinarily in a Muhammadan family where a custom of exclusion of succession prevails the entire family line is excluded and not only the female on account of her sex, admitting her male issue to succesion.

The Statute Law of India is based on the principles of English Law, but in its application the Courts should follow the opinions of the Indian Courts acquainted with Indian ways of life and thought and not of English Courts which deal with people widely different from Indian in their social habits and intellectual developments.

Where a Will is acknowledged by the testator in the office of the Sub-Registrar in the presence of witnesses and such witnesses sign the Will in the presence of the testator at the same time or separately, the witnesses must be regarded as attesting witnesses within the meaning of s. 50 of the Succession Act.

In the case of a Will made by a *taluqdar* in favour of a person who is the next successor to the *taluqdar* under cl. (7), of s. 22 of the Oudh Estates Act, the directions contained in s. 13 of the Act need not be carried out, but in virtue of the provisions of s. 19 of the Act, which is applicable to all Wills made by a *taluqdar*, the Will must conform to the provisions of s. 50 of the Succession Act. **O** MOHAMMAD HASAN *v.* ALI HYDER, 10 O. & A. L. R. 1229; 12 O. L. J. 1; 1 O. W. N. 803; 28 O. C. 8; (1925) A. I. R. (O.) 337 **509**

Oudh Land Revenue Act (XVII of 1876), s. 40. *See* OUDH LAWS ACT, 1876, ss. 7, 9 **468**

Oudh Laws Act (XVIII of 1876), ss. 7, 9—*Oudh Land Revenue Act (XVII of 1876), s. 40—Pre-emption in respect of heritable, non-transferable lease—"Sub-division," meaning of.*

Under s. 7 of the Oudh Laws Act, read with s. 40 of the Oudh Land Revenue Act, a right of pre-emption should be presumed to exist not only in the case of under-proprietary communities but also in the case of communities constituted by the holders of heritable and non-transferable leases

Section 9 of the Oudh Laws Act allows a right of pre-emption to be exercised by a co-sharer of the sub-division of a tenure resulting from a heritable non-transferable lease. The sub-divisions contemplated by the section must be units bearing the relation one to another of having been called into existence by one and the same act or event of sub-division whatever the purpose of sub-division. **O** LACHHMIPAL SINGH *v.* BHAGWAT SINGH, 10 O. & A. L. R. 1294 **468**

——— **s. 20**—*Land acquired by adverse possession, whether ancestral.*

Land acquired after litigation on ground of adverse possession against a *taluqdar* to whom it originally belonged, is not ancestral property within the meaning of s. 20 of the Oudh Laws Act. **O** SIRAJ AHMAD *v.* IBNUL HASAN, 10 O. & A. L. R. 1404; 1 O. W. N. 697 **816**

Oudh Rent Act (XXII of 1886), ss. 108 (2), 127 —*Suit for ejectment for arrears of rent—Jurisdiction of Civil and Revenue Courts.*

Jurisdiction under the Oudh Rent Act is determined by the allegations contained in the plaint, and to make a suit for arrears of rent and for ejectment cognizable under s. 127 read with s. 108 (2) of the Act, it is sufficient for the plaintiff to allege that the defendant is a mere trespasser. **O** MANI RAM *v.* WASI ALI, 10 O. & A. L. R. 1197; L. R. 6 A. (O.) 25 **335**

——— **s. 127.** *See* SPECIFIC RELIEF ACT, 1877, s. 24 **9**

Parda nashin lady—*Gift, validity of—Onus probandi.*

When a person relies upon a deed of gift executed by a *parda nashin* lady, who is such in the true meaning of the term, that party must prove not only that the transaction is free from any pressure exercised to procure the making of the gift but also that the donor thoroughly understood the nature and the effect of her action.

A lady who is accustomed to transact business, is capable of carrying out monetary transactions and has no hesitation in appearing before comparative strangers cannot be called a *parda nashin* lady in the real sense of the term. **L** SRI RAM *v.* NAND KISHORE, 5 L. 465; (1925) A. I. R. (L.) 196 **169**

Partition, *suit for—Partition for convenience of possession—Decree, whether can be passed.*

A partition effected for convenience of possession cannot stand in the way of a decree for partition so long as it is not found that it is in conformity with the shares of the respective parties. **C** JOLFA BIBI *v.* AJALADDIN, 29 C. W. N. 229; (1925) A. I. R. (C.) 425 **1053**

——— **suit,** *nature of.*

A partition suit differs from other suits, in that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff, in so far as every party, whether plaintiff or defendant, is entitled to ask the Court to allot a share of joint property to him. **Pat** RAMJI PANDEY *v.* ALAF KHAN, 3 Pat. 859; (1925) A. I. R. (Pat.) 121 **90**

Partnership, *dissolution of—Acknowledgment of debt, whether binding on other partners—Agency—Presumption.*

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorised to do so, and such authority cannot be presumed.

The presumption of agency does not exist in the case of a partnership which has ceased to be a going concern. **N** SHEONARAIN *v.* BABULAL, (1925) A. I. R. (N.) 268 **775**

——— Suit for account. *See* LIMITATION ACT, 1908, s. 5 **191**

Part-performance, doctrine of, applicability of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 127 **799**

Penal Code (Act XLV of 1860), ss. 34, 114, *scope of—Act done in furtherance of common intention—All present, whether liable—Abetment—Presence of abettor at commission of crime.*

Section 34 of the Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it.

Section 114 of the Penal Code is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition. The section is evidentiary not punitory. **P C** BARENDRA KUMAR GHOSE *v.* EMPEROR, (1925) A. I. R. (P. C.) 1; 29 C. W. N. 181; (1925) M. W. N. 26; L. R. 6 A. (P. C.) 1; 26 P. L. R. 50; 27 Bom. L. R. 148; 6 P. L. T. 169; 23 A. L. J. 3[illegible]4; 4[illegible] C. L. J. 240; 48 M. L. J. 543; 1 O. W. N. 935; 3 Pat. L. R. 1 Cr.; 52 C. 197 (P. C.) **47**

——— **ss. 34, 395, 397**—*Dacoity with grievous hurt—Conviction, form of—Enhanced punishment, liability to.*

Section 397 of the Penal Code does not contain any substantive offence but merely prescribes the minimum punishment which can be awarded if robbery or dacoity is attended with certain circumstances mentioned in the section. A conviction merely under s. 397 has no meaning. A conviction in the case of a dacoity should be under s. 395 read with s. 397 of the Penal Code, in cases where the latter section applies.

Section 397 of the Penal Code applies only to the case of persons taking part in a dacoity, who themselves used deadly weapons, or themselves caused grievous hurt, or attempted to cause death or grievous hurt, and does not apply to the case of persons taking part in a dacoity who may be liable for substantive offences committed by some of the parties only by virtue of s. 34 of the Code. **A** DULLI *v.* EMPEROR, L. R. 6 A. 10 Cr.; 26 Cr. L. J. 570; (1925) A. I. R. (A.) 305; 47 A. 59 **714**

——— **ss. 97, 100**—*Quarrel picked by accused—Attack with* lathis—*Right of private defence, extent of—Death caused by* lathi *blow—Offence.*

Accused picked a quarrel with another and tried to hit him but was set upon by his opponent and the deceased and tried to run away. After running some distance he found that he could not make his escape; he then turned round and hit a blow on the deceased which resulted in his death:

Held, that the accused had acted in the exercise of the right of private defence and was not guilty of any offence.

An attack with *lathis* is likely to create a reasonable fear of grievous hurt being caused, and the person attacked is justified in striking with a *lathi* in self-defence to the extent of causing grievous hurt or even death, under s. 100 of the Penal Code. **A** RAM SEWAK *v.* EMPEROR, 23 A. L. J. [illegible]31; L. R. 6 A. 58 Cr.; 26 Cr. L. J. 542; (1925) A. I. R. (A.) 313 **382**

——— **ss. 97, 141, 147**—*Private defence, right of, extent of—Unlawful assembly, what constitutes.*

Where in a case of rioting the defence set up is the exercise of the right of private defence, the essence of the case is to ascertain who is the aggressor and whether the accused party acted in the exercise of his or their right of private defence or otherwise.

A man who is assaulted is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat, but may pursue his adversory till he finds himself out of danger.

Every attempt or threat to commit an offence would not, however, entitle a man to take up arms. He must pause and reflect whether the threat is intended to be put into execution immediately, because there are many threats which people use as a form of abuse, but which are never intended to be taken seriously, and, still others, which the persons saying them have not the capacity to put into immediate execution; for it is only against a danger present and imminent that the right of private defence avails.

The law will always make just allowance for the sentiments of a person placed in a situation of peril, who has no time to think. His blood is then hot and his sole object is to strike a decisive blow so as to ward off the danger. The right of private defence, however, is a very limited right. It cannot be converted into a right of reprisal and would not exonerate an accused person from punishment if he inflicts more harm than is necessary, even though such harm is caused under provocation.

The law does not declare a mere assemblage of men, however large, illegal. In order to be illegal it must be inspired by an illegal object as specified in s. 141 of the Penal Code. **N** SITARAM *v.* EMPEROR, 26 Cr. L. J. 587; (1925) A. I. R. (N.) 200 **731**

——— **ss. 99, 100**—*Right of private defence, extent of—Amount of force necessary, determination of.*

Where a person is attacked while doing a lawful act he is entitled to stand his ground and defend himself and is not required to run away and to seek the assistance or the protection of the authorities.

Where a man is put in a situation in which he is entitled to protect his own life against an intended attack it is impossible to weigh the force of the blows which he uses for that purpose in golden scales and to adjudicate with great nicety as to the exact amount of force which would be justified under the circumstances. **O** BAIJ NATH *v.* EMPEROR, 10 O. & A. L. R. 1022; 27 O. C. 292; 1 O. W. N. 588; 26 Cr. L. J. 513 **353**

——— **ss. 99, 332, 333**—*Right of private defence not pleaded—Court, duty of—Public servant acting in good faith—Private defence, right of, whether exists—Arresting Police Officers, as dacoits.*

Even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of the fact.

There is no right of private defence against an act of a public servant acting in good faith and under colour of his office, although that act may not be strictly justifiable in law.

The rightof private defence against property continues, where robbery is attempted, only so long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

Both ss. 332 and 333 of the Penal Code require as an ingredient of the offence the presence of an intention on the part of the accused person, namely, to prevent or deter a public servant from discharging his duty. Where, therefore, the accused persons are unaware of the fact that the persons whom they have confined are public servants, they are not guilty of any offence.

Where the accused believed certain Police Officers to be dacoits who had in the attempt to escape arrest used a revolver and thus committed a non-bailable and cognizable offence:

Held, that they were entitled to arrest the men and keep them in confinement so long as it was necessary for making them over to the custody of Police Officers. **A** KISHEN LAL *v.* EMPEROR, 22 A. L. J. 501; (1924) A. I. R. (A.) 615; L. R. 5 A. 177 Cr.; 26 Cr. L. J. 501 **245**

——— **ss. 107, 304, 323**—*Constant ill-treatment—Severe beating—Death due to shock—Offence—Omission to prevent beating, whether abetment.*

Where the accused who subjected her daughter-in-law to a continuous ill-treatment, gave her a severe beating on the day previous to her death, and the medical evidence showed that the death was due to "shock from several blows on an unnourished girl suffering from chronic lung disease":

Held, (1) that the accused did not intend or contemplate the death of the deceased as a result of the beating that was inflicted on her and was not, therefore, guilty of an offence under s. 304, Penal Code;

(2) that under the circumstances of the case the accused was guilty of an offence under s. 323, Penal Code.

To constitute abetment there must be under s. 107 of the Penal Code either (1) instigation, (2) conspiracy or (3) actual aid either by an act or an illegal omission.

The mere fact that the accused was sitting by when another person was beating a third, and did not interfere, is not sufficient to constitute abetment. **A** EMPEROR *v.* CHANDA, L. R. 5 A. 161 Cr.; (1925) A. I. R. (A.) 126; 26 Cr. L. J. 470 **150**

——— **ss. 109, 147, 149, 150, 188, 304**—*Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238—Riot—Person charged with actual culpable homicide, whether can be convicted of constructive culpable homicide—Minor offence—"Doubt" under s. 236, meaning of—Hiring person to commit riot and riot, whether same transaction—Person hired, acquittal of, effect of, on person charged with hiring—Disobedience of order and abetment of disobedience—Common object.*

Ordinarily a person cannot be convicted at a Sessions trial of an offence with which he has not been charged. The exceptions to this rule are to be found in ss. 237 and 238 of the Cr. P. C.

Section 238 of the Cr. P. C. has no application to a case where a man who is charged with actual culpable homicide is convicted of constructive culpable homicide, inasmuch as constructive culpable homicide cannot be said to be a minor offence compared with actual culpable homicide.

The doubt referred to in s. 236 of the Cr. P. C. must be a doubt as to the application of the law to proved facts. The section has no application where there may be a doubt as to facts which constitute one of the elements of the offence.

Where a person is charged with an offence under s. 304 read with s. 150 of the Penal Code and the charge against him is a definite one of having engaged or employed a particular person to commit culpable homicide not amounting to murder, and the Jury holds that the latter did not commit the culpable homicide, the person charged with having engaged or employed him cannot be convicted of constructive homicide under the provisions of s. 150 of the Penal Code.

Penal Code—contd.

The offence of hiring a person to take part in a riot is a separate and distinct offence from the riot itself and ordinarily the hiring and the riot would be separate transactions. There may, however, be circumstances in a case which might justify the Court in holding that the alleged hiring or employing and the riot were part of the same transaction.

Where certain persons jointly enter on certain land in defiance of an order that has been passed under s. 144 of the Cr. P. C., though some of them may be guilty of an offence under s. 188 of the Penal Code and others of abetment of that offence, nevertheless the common object of them all is one and the same. **C** NAYAN ULLAH *v.* EMPEROR, 26 Cr. L. J. 591 **818**

——— **s. 114**. *See* CR. P. C., 1898, s. 233 **231**

——— **s. 114**. *See* PENAL CODE, 1860, s. 34 **47**

——— **s. 114**—*Persons giving moral support to offence, liability of.*

Persons who are present at the time of a murder and have given their moral support to, and abetted, the deed, even if they did not take part in the actual murder, are under s. 114 of the Penal Code deemed to have committed the offence. **A** TULLI *v.* EMPEROR, 22 A. L. J. 1075; L. R. 6 A. 33 Cr.; (1925) A. I. R. (A.) 301 **130**

——— **ss. 141, 147**. *See* CR. P. C., 1898, ss. 221, 298 **711**

——— **ss. 141, 325**—*Unlawful assembly—"Enforce any right," meaning of—Use of force to maintain right, effect of.*

Where the common object of an assembly is to compel a person by means of force to omit to do a certain act, the assembly will become an unlawful assembly only if the act, the omission of which is compelled, is one which the person so compelled was legally entitled to do.

The true import of the expression "to enforce any right" in cl. (*iv*) of s. 141 of the Penal Code relates to an initial act when it is done in furtherance of any right, and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right.

A party of men who are not enforcing any right by means of criminal force but are, by means of force, maintaining a certain right, for instance the right to use water, which is being actually exercised by them, cannot be regarded as an unlawful assembly within the meaning of s. 141 of the Penal Code. **O** BAIJ NATH *v.* EMPEROR, 10 O. & A. L. R. 1022; 27 O. C. 292; 1 O. W. N. 583; 26 Cr. L. J. 513 **353**

——— **ss. 149, 302**—*Assault by less than five persons resulting in death—Accused, whether guilty of murder.*

Where it is not proved that five persons took part in an assault resulting in death, the accused cannot be held constructively guilty of murder under s. 149 read with s. 302 of the Penal Code, because s. 149 only applies where there is an unlawful assembly. **L** MAULU *v.* EMPEROR, 6 L. L. J. 434; 26 Cr. L. J. 531 **371**

——— **ss. 149, 304 (ii), 325, 342**—*Attempt to carry away woman by force—Rescue—Death and grievous hurt caused by rescuers—Wrongful confinement of assailants—Offence committed.*

Two years prior to the occurrence, the wife of the complainant had been abducted by one of the accused with whom she was living. On the day of the occurrence complainant organized a raid and arrived with his party at the house of the accused who had abducted his wife and attempted to carry her off by force in the absence of her paramour. She resisted and one of the party of the complainant struck her and proceeded to drag her away. On hearing her cries the accused came up to her rescue and proceeded to attack the party of the complainant with the result that they killed one of them and inflicted grievous hurts on another. They subsequently proceeded to put the members of the complainant's party in wrongful confinement:

Held, (1) that although the accused were justified in attempting to rescue the woman from the party of the complainant, when they proceeded to assault the party of the complainant in a body and caused grievous injuries to them, they constituted an unlawful assembly because their common object was to commit an offence, namely, to cause hurt or grievous hurt;

(2) that the accused were guilty of offences under ss. 304 (*ii*), 325, 342 read with s. 149 of the Penal Code. **L** RAHMAN *v.* EMPEROR, (1923) A. I. R. (L.) 322 **845**

——— **ss. 151, 188**—*Criminal Procedure Code (Act V of 1898), s. 149—Procession passing mosque with music—Order by Police Officer to stop, disobedience of—Offence—"Promulgate", in s. 188, Penal Code, meaning of—"Interpose," in s. 149, Cr. P. C., meaning of.*

A Sub-Inspector of Police, on receiving information that a certain procession of Hindus playing music was about to pass before a mosque, hurried to the scene and ordered the persons forming the procession, who were being led by the accused, to refrain from proceeding in the direction of the mosque with music playing, as there was apprehension of a serious riot if they did so. The accused refused to obey this order and advanced towards the direction of the mosque at the head of the procession playing music:

Held, that the accused were guilty of an offence under s. 151 of the Penal Code.

Per *Walsh, Actg. C. J.*—The word "promulgate" in s. 188 of the Penal Code seems to indicate, if not a formal document printed or written, at any rate, some form of publication. The promulgation need not be in printing or writing, and where a Sub-Inspector definitely conveys an order in a loud voice to a crowd in the street to stop, so that those who are addressed may understand it to be a definite order promulgated by a public officer in authority, and the order is disobeyed, the case would fall within the purview of s. 188 of the Penal Code.

Per *Sulaiman, J.*—A conviction cannot be sustained under s. 188 of the Penal Code unless it is found that the order of which disobedience is alleged was (*a*) promulgated by a public servant to the knowledge of the accused, (*b*) that that public servant was legally empowered to promulgate such an order and (*c*) its disobedience caused or tended to cause obstruction, annoyance or injury or risk of it to a person lawfully employed, or danger to human life, health or safety, or tended to cause a riot or affray.

To be justified in directing a certain act to be done or not to be done is one thing and to be legally empowered to order its commission or omission with the consequence of the disobedience being punishable under s. 188 of the Penal Code is quite another.

The word "interpose" in s. 149 of the Cr. P. C. conveys the idea of actively intervening and not merely a prohibition by word of mouth. **A** EMPEROR *v.* RAGHUNATH, 22 A. L. J. 1049; L. R. 6 A. 1 Cr.; (1925) A. I. R. (A.) 165; 26 Cr. L. J. 599; 47 A. 205 **823**

Penal Code—contd.

——— **s. 173.** *See* Cr. P. C., 1898, s. 195 **62**

——— **ss. 182, 211**—*Information to Police—Definite charge of offence—Offence.*

There is an essential difference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, s. 211 of the Penal Code applies.

Accused laid a clear and definite information before the Police to the effect that there was a dacoity in his house and that certain particular persons had taken part in it. It was found that no dacoity had taken place and that, at any rate, the persons mentioned by the accused never took part in the dacoity:

Held, that the accused was guilty of an offence under s. 211 of the Penal Code. **A** Samokhan *v.* Emperor, L. R. 6 A. 71 Cr.; 26 Cr. L. J. 594 **818**

——— **s. 186**—*Refusal of subordinate to allow superior to check books—Obstruction.*

The refusal of a *Patwari* to allow a *Kanungo* to go through his books and to check them is only an act of insubordination and is not a criminal act falling within the purview of s. 186 of the Penal Code. **A** Keshori Lal *v.* Emperor, L. R. 6 A. 43 Cr., 26 Cr. L. J. 597 **821**

——— **s. 193.** *See* Cr. P. C., 1898, s. 476A. **710**

——— **s. 196**, *offence under—Production of document in compliance with order of Court.*

It is an essential element of the offence under s. 196 of the Penal Code that the document should have been corruptly *used* or attempted to be *used* as true or genuine evidence.

The production of a document in compliance with an order of the Court does not amount to using the document as genuine within the meaning of the section. **R** Ma Ain Lon *v.* Ma On Nu, 3 Bur. L. J. 349; (1925) A. I. R. (R.) 191; 26 Cr. L. J. 509; 3 R. 36 **253**

——— **s. 215**—*Receiving gratification to restore stolen property—Accused suspected of actual theft—Conviction, whether legal.*

The accused promised to return a stolen bullock on payment of Rs. 30. He received the money and 3 days later produced the bullock:

Held, that the accused must have known who the actual thieves were and as he took no steps to bring them to justice, he was guilty of an offence under s. 215, Penal Code.

Per *Walsh, A. C. J.*—It cannot be a defence to the charge of accepting money for returning stolen property, that the person who takes the money is himself the thief. **A** Emperor *v.* Mukhtara, 22 A. L. J. 838; (1924) A. I. R. 783; 46 A. 915; L. R. 5 A. 145 Cr.; 26 Cr. L. J. 481 **225**

——— **ss. 224, 323**—*Assaulting—Police constable—Accused not in lawful custody—Private defence, right of.*

Where a person assaulted a constable who had wrongfully arrested him, in order to effect his escape, and it did not appear that the constable was acting in good faith under colour of his office:

Held, that the constable was guilty of wrongful confinement and as against him the accused was entitled to the right of private defence. **A** Ram Singh *v.* Emperor, (1923) A. I R. (A.) 34; 26 Cr. L. J. 428 **44**

——— **s. 300, Excep. 1**—*Husband finding wife in bed with paramour and killing both—Grave and sudden provocation—Offence.*

The accused on returning home late at night found his wife in the same bed with her paramour who escaped, but the accused ran after and killed him with a knife. He then came back to his own house and killed his wife:

Held, (1) that the paramour's presence in the house was a grave and sudden provocation sufficient to deprive the accused of his power of self-control, and the accused's act in killing the paramour was in such circumstances culpable homicide not amounting to murder;

(2) that the offence which he committed in killing his wife was one of the same character as he killed her immediately after, before he had time to regain his self-control. **L** Raham Shah *v.* Emperor, 6 L. L. J. 457; 1 L. C. 527; (1925) A. I. R. (L.) 114; 26 Cr. L. J. 534 **374**

——— **s. 302**—*Murder—Common intention—Death caused by one of several accused—Liability of other accused—Confession exculpating maker, whether can be used as against co-accused.*

Two accused persons who were charged with having committed murder and having subsequently robbed the deceased, made statements accusing each other of the murder but confessing that each of them had taken part in the robbery:

Held, (1) that the confession made by each accused could not, so far as it related to the murder, be used as against the other, inasmuch as the maker of the confession exculpated himself, and the confessions being mutually contradictory could not be relied upon;

(2) that so far as the confessions related to the robbery, they were valuable evidence both as against the person making the confession and as against the co-accused with regard to the robbery and also as leading to the inference that the robbery and the murder were parts of the same transaction and were committed by the same persons.

Where two men with the common intention of murdering a person set upon him and one of them fires a shot which kills him, both of them are guilty of murder under s. 302 of the Penal Code. **L** Mian Khan *v.* Emperor, (1923) A. I. R. (L.) 293 **836**

——— **s. 302**—*Murder—Poisoning—Cause of death, proof of.*

Before a person can be convicted of murder by poisoning, it is essential to prove that the death of the deceased was caused by poison and that the poison was administered to him by the accused. Where the cause of death cannot be ascertained with certainty, a conviction for murder by poisoning cannot be sustained. **L** Gurdevi *v.* Emperor, (1923) A. I. R. (L.) 325 **817**

——— **ss. 304, 323.** *See* Penal Code, 1860, s. 107 **150**

——— **ss. 304, 325**—*Attack with* chhavis *and sticks—Death caused by* chhavi *blow—Offence.*

The accused, three in number, two of whom were armed with *chhavis* and the remaining one with a stick, on a slight provocation, attacked the deceased and caused injuries to him. One of the accused who was armed with a *chhavi* used the blade of the *chhavi* in attacking the deceased, and the other accused who had a *chhavi* in his hand used the blunt end of the stick and refrained from using the blade. The deceased died as a result of the *chhavi* blow:

Held, (1) that the accused who used the blade of the *chhavi* was guilty of an offence under s. 304 (*ii*) of the Penal Code;

(2) that the remaining two accused must be presumed to have intended at least to cause grievous hurt and were, therefore, guilty of an offence unde

Penal Code—contd.

s. 325 of the Penal Code. L INDAR SINGH v. EMPEROR, (1923) A. I. R. (L.) 326 822

——— ss. 304, 325—*Attack with dangs—Death caused by single blow—Culpable homicide—Grievous hurts.*

Accused, three in number, attacked the deceased with *dangs* causing two grievous hurts and one simple hurt. One of the grievous hurts amounted to the fracture of the skull of the deceased and resulted in his death. There was no evidence as to which of the accused gave the blow upon the head of the deceased which caused his death:

Held, that none of the accused could be convicted of an offence under s. 304 II of the Penal Code, but that all of them were guilty of an offence under s. 325 of the Code. L JHANDU v. EMPEROR, 6 L. L. J. 258; (1924) A. I. R. (L.) 555; 1 L. C. 414; 26 Cr. L. J. 653 941

——— ss. 363, 366—*Kidnapping, charge of—Girl found to be over sixteen—Magistrate, duty of.*

Where in a case under s. 363, Penal Code, the Magistrate finds that there is *prima facie* sufficient evidence to show that the girl was enticed away as alleged, he should not discharge the accused merely because the girl is not under age, but should examine and decide the question whether the accused can be charged with an offence under s. 366 or some other cognate offence against a female of over sixteen. L GOKAL v. PHUMAN SINGH, (1924) A. I. R. (L.) 718; 6 L. L. J. 318; 26 Cr. L. J. 420 36

——— s. 379—*Theft—Guilty intention, absence of, effect of.*

Accused who was an "illiterate low caste cultivator" applied for Letters of Administration with the Will annexed to the estate of a deceased person who had made a registered Will in favour of the accused. Before Letters of Administration were granted but at a time when he had no suspicion that a *caveat* was likely to be entered, he removed a certain safe which was in the possession of the widow of the deceased, but which had been bequeathed to the accused under the Will. Subsequently, the widow entered a *caveat*, and charged the accused with the theft of the safe:

Held, that the conduct of the accused did not disclose the presence of a guilty intention on the part of the accused and that therefore he could not be convicted of theft. C DULAL BACHAR v. EMPEROR, 26 Cr. L. J. 652 940

——— s. 406—*Criminal breach of trust—Burden of proof—Prosecution, duty of.*

The mere fact that a person accused of an offence under s. 406 of the Penal Code admits the delivery of the property in dispute to him does not place on him the burden of proving that he received the property in a capacity other than that of a trustee. The prosecution must prove affirmatively that a trust had been created in respect of the property and that the accused had violated that trust. L PIRAN v. EMPEROR, (1923) A. I. R. (L.) 293 839

——— s. 408. *See* CR. P. C., 1898, ss. 222 (2), 303 (1) 372

——— s. 411—*Evidence Act (I of 1872), s. 114, Ill. (a)—Receiving stolen property—Burden of proof—Possession long after theft—Guilty knowledge—Presumption.*

In a case under s. 411 of the Penal Code the burden is on the prosecution to prove the guilty knowledge of the person prosecuted. There may, however, be circumstances in which this guilty knowledge may be inferred and may be accepted as conclusive if no explanation is forthcoming on the part of the accused person.

Where certain silver ornaments of the ordinary type which had been removed during a dacoity were recovered from the person of the accused's wife, the accused being a goldsmith, 2½ years after the dacoity and the explanation of the accused was that he had himself made the ornaments for the use of his wife:

Held, that no presumption could arise in the case that the accused had received the ornaments knowing them to have been stolen.

The illustrations to s. 114 of the Evidence Act only exemplify the law as enacted in the section and cannot be taken to restrict the sense of the section. The section itself simply says that the existence of any fact may be presumed which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct, etc. A CHOTTEY LAL v. EMPEROR, L. R. 5 A. 199 Cr.; (1925) A. I. R. (A.) 220 26 Cr. L. J. 578 722

——— ss. 415, 420—*Cheating—Harm to reputation or property, proof of—Intention of accused.*

In a case of cheating the Court has got to see the intention of the accused at the time of the offence and to judge all the consequences of the act or omission itself.

Under s. 415 of the Penal Code the damage or harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom. But the law does not take into account remote possibilities that may flow from the act. The proximate and natural result only of the act is to be judged and not any vague and contingent injury that may possibly arise.

The charge framed in a case ran as follows: "that you on or about the 19th September 1923 in Calcutta deceived Mr. E. J. Pithia of Birla Jute Manufacturing Co., Ltd. by inducing him to accept a Bought Note signed by your firm as brokers on behalf of Santoke Chand-Manik Chand, who, you represented, were a respectable firm of jute dealers carrying on business at 65, Noormull Lohia Lane, Calcutta, knowing that such representation was false, and further by inducing the said Mr. E. J. Pithia by means of such representations to give a receipt for the said Bought Note, and you thereby committed an offence punishable under s. 420, Indian Penal Code:"

Held, that the charge did not disclose an offence either under s. 420 or under s. 415 of the Penal Code. C HARENDRA NATH DAS v. JOTISH CHANDRA DUTT, 40 C. L. J. 283; (1925) A. I. R. (C.) 100; 26 Cr. L. J. 545; 52 C. 183 641

——— ss. 426, 427—*Mischief of graver kind, whether triable by Magistrate of Third Class.*

The law makes a distinction between mischief of a minor kind and mischief of the graver sort. Section 426 of the Penal Code makes an ordinary case of mischief punishable with imprisonment to the extent of three months and with fine; but where the amount of damage or loss caused is Rs. 50 or upwards the maximum punishment awardable under s. 427 of the Code is two years' imprisonment and fine. A case of the graver kind of mischief is not triable by a Magistrate of the Third Class. A RAGHUNANDAN PRASAD v. EMPEROR, L. R. 6 A. 39 Cr.; 26 Cr. L. J. 586; (1925) A. I. R. (A.) 290; 47 A. 64 730

Penal Code—concld.

——— **ss. 463, 467.** *See* CR. P. C., 1898, s. 195 (1) **377**

——— **s. 499**—*Criminal Procedure Code (Act V of 1898), s. 198—Defamation—Words uttered by another—Confirmation by conduct—Offence—Unchastity imputed to married woman—Husband, whether aggrieved—Complaint by husband.*

An accused person cannot escape liability for defamation merely because he did not himself utter the words complained of. Where by his conduct and by words which he did speak he intended to give and gave the impression that he adopted as his own the words uttered by another, he must in effect be deemed to have uttered the words imputed to him.

Where a married woman is defamed by an imputation of unchastity, her husband is a person aggrieved within the meaning of s. 198 of the Cr. P. C. and has the right to prefer a complaint of defamation. **M** BASINA APPANNA *v.* PETA AKKANNA, 47 M. L. J. 746; 20 L. W. 921; (1925) A. I. R. (M.) 320; 26 Cr. L. J. 521 **361**

——— **s. 500**—*Defamation—Religious controversy—Violent expressions—Personal character not assailed—Offence.*

A book was written by the accused, in reply to one written by the complainant, on highly controversial religious matters, in which the accused used most violent expressions against the complainant and his work, without, however, assailing his personal character and respectability:

Held, that the language used when taken with the context was not defamatory. **M** KUMARAGURUDASA SWAMIGAL *v.* KRISHNASWAMY MUDALIAR, (1924) M. W. N. 768; 47 M. L. J. 661; (1924) A. I. R. (M.) 898; 26 Cr. L. J. 464 **144**

——— **s. 500, Excep. 9**—*Defamation—Lawyer's reply notice—Allegations of immorality—Common interest—Privilege.*

The complainant served a lawyer's notice on the accused, her deceased husband's nephew, charging him with theft and criminal breach of trust with regard to properties left by her deceased husband and threatening him with civil and criminal proceedings. The accused in reply to the notice sent a letter also through his lawyer, alleging that the complainant was living an adulterous life, that her daughter was not born to her husband, that she had been discarded by him during his lifetime and that she had lost all right to his property. He also set up a Will by the deceased in his favour in which the testator had stated that there was none to protect him. On a charge of defamation:

Held, (1) that there was a matter of common interest between the complainant and the accused relating to the title to property left by the deceased giving rise to qualified privilege;

(2) that there was no malice or want of *bona fides* or presence of improper motive in the accused when he gave instructions to his Vakil to write the letter;

(3) that the matter fell within Exception 9 to s. 499, Penal Code, and was not defamatory. **M** SANKAMMA *v.* GOVINDA CHETTY, 20 L. W. 779; (1925) A. I. R. (M.) 246; 26 Cr. L. J. 428 **44**

Pleadings—*New case—Court, power of—Prejudice to defendant.*

A Court is not entitled to make a case inconsistent with or different from that which is presented to it on behalf of the parties, and it is not permissible for a Court to pass a decree in favour of a plaintiff upon the basis of a case which is inconsistent with the case which he himself has put forward. This rule is modified upon the question of prejudice to the defendant.

In a suit by a landlord for recovery of possession of a plot of land which the defendant alleged to have purchased from a former tenant of the plaintiff, the defence of the defendant was that the holding to which the plot in dispute appertained was not the holding of his transferor alone but belonged to him and several others, having devolved on them on the death of their father, and that inasmuch as the other heirs of the latter were still living, the sale of the holding by one of them did not operate to transfer the entire holding so as to give the landlord the right of re-entry. The finding was that although there were other heirs of the deceased tenant living they had no interest in the holding and that the transferor of the defendant was the only tenant of the holding:

Held, (1) that the consequence of the finding was that the transfer in favour of the defendant operated to extinguish the rights of his transferor in the holding and constituted abandonment such as entitled the landlord to re-enter;

(2) that it could not be said that the finding was contrary to the claim of the plaintiff. **C** JOAD ALI *v.* RAIKISHORE SAHA **753**

Possession—Permissive possession. *See* LIMITATION ACT, 1908, SCH. I, ART. 49 **10**

———, *suit for—Declaratory decree, whether may be given—Civil Procedure Code (Act V of 1908), O. VII, r. 7, O. XLI, r. 33*

The discretion allowed to the Court under O. VII, r. 7 and O. XLI, r. 33 of the C. P. C. is very wide and empowers it to pass a declaratory decree in a suit for possession when the plaintiff specifically asks for any alternative relief to which he may be found entitled. **L** ARJUN *v.* JUG LAL, (1923) A. I. R. (L.) 422 **95**

Practice—*Appellate Court—New case of fraud.*

An Appellate Court is not justified in setting up a case of fraud when such a case was not set up by the parties either in the pleadings or in the evidence before the First Court. **M** PERI RAMASAMI *v.* CHANDRA KOTTAYA, 47 M. L. J. 840; (1925) A. I. R. (M.) 261 **297**

——— *Consent order, when can be set aside.*

An order consented to by the Pleader of a party even if due to a mistake cannot be set aside except on proof that serious and substantial injustice would result to the party from letting the consent order stand. **M** VEPARI DOLAPPADU *v.* THOTTADI SURRANNA, 20 L. W. 900; (1925) A. I. R. (M.) 278 **408**

——— *Preliminary order—Appeal from final order, effect of.*

With respect to all Courts, more especially Courts of Record, such as the Original Side of the High Court, the order of the Court is the order that comes to be embodied in the formal order drawn up and issued by the Court, and when the first order of the Court is in the nature of a preliminary order, an appeal against the final order would be held to include any principles decided for the purpose of the preliminary order. **M** PYADA SATYARAJU *v.* GUNTUR COTTON, JUTE AND PAPER MILLS CO., 47 M. L. J. 710; 21 L. W. 136; (1925) A. I. R. (M.) 199 **333**

——— *Witnesses not served—Process-server, negligence of—Suit, whether can be dismissed.*

Practice—concld.

Where plaintiff's application for summoning witnesses was granted and he deposited the diet money as well as the process-fee, but the witnesses were not served on account of the negligence of the process-server and the plaintiff's suit was dismissed for want of proof:

Held, that the plaintiff could not be punished for the negligence of an officer of the Court. **L** MOTI RAM *v.* FIRM KISHORE LAL-RAM SARUP, 6 L. L. J. 418; (1925) A. I. R. (L.) 296 **321**

Precedents—*Subordinate Courts, duty of.*

A Court subordinate to a High Court is bound to follow the rulings of that High Court and is not entitled to rely upon the decisions of other High Courts and to decline to follow the decision of the High Court to which it is subordinate. **M** PERI RAMASAMI *v.* CHANDRA KOTTAYA, 47 M. L. J. 840; (1925) A. I. R. (M.) 261 **297**

———, *value of.*

A case decided years before upon another Statute cannot be any guide to the Court in interpreting the particular Statute before it. **C** KHIRODE KUMAR MUKERJI *v.* EMPEROR, 29 C. W. N. 54; 40 C. L. J. 555; (1925) A. I. R. (C.) 260; 26 Cr. L. J. 532 **372**

Pre-emption—*Rights of vendee, when vest in pre-emptor—Civil Procedure Code (Act V of 1908), O. XX, r. 14.*

A successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale, but from the date on which he enforces his rights, *i. e.* from the date on which he satisfies the conditions of the decree and brings it into operation. **L** NADIR ALI SHAH v. WALI, 5 L. 486; (1925) A. I. R. (L.) 202 **182**

Presidency Towns Insolvency Act (III of 1909), ss. 36, 56—*Fraudulent preference—Assignment to creditor before insolvency—Consideration and good faith—Burden of proof—Official Assignee, application by—Jurisdiction of Court—Examination of assignee under s. 36—Statement, admissibility of.*

Where a person makes an assignment of property at a time when he is unable to pay his debts when they become due, and within a few days of the assignment he is adjudicated insolvent, the assignment, as between the insolvent and the assignee, is fraudulent and void as against the Official Assignee.

If, after it has been established that an assignment is fraudulent and void as against the Official Assignee, the assignee desires to bring himself within the provisions of sub-s. (2) of s. 56 of the Presidency Towns Insolvency Act, the onus lies upon him to show that not only did he give valuable consideration for the assignment, but also that he acted in good faith.

A firm, *SM*, was, on the application of one of its creditors, adjudicated insolvent. About two weeks before the adjudication order, *SM* assigned to *RD* another of its creditors, certain outstanding debts due to the firm. Later, *RD* assigned these debts to *MR*. The adjudicating creditor of *SM* challenged the assignment by *SM* to *RD*, and the latter was called upon by the Official Assignee for inspection of the assignment to him. *RD* and *MR* were examined, under s. 36 of the Presidency Towns Insolvency Act, by the Registrar in Insolvency. Thereafter the Official Assignee applied to the Court to declare both assignments void as against him, and both assignments were set aside as fraudulent and void under s. 56 of the Presidency Towns Insolvency Act. On appeal by *MR*:

Held, that the Court had jurisdiction to deal with the application of the Official Assignee, and the depositions of *RD* and *MR* taken before the Registrar in Insolvency were admissible in evidence against the deponents for the purpose of showing the circumstances in which they took their assignments, and for the purpose of ascertaining all the facts which were material to that question. **C** MADHORAM RAGHUMULL v. OFFICIAL ASSIGNEE, 27 C. W. N. 611; (1923) A. I. R. (C.) 631 **984**

———— **s. 52.** *See* COMPANIES ACT, 1913, ss. 229, 230, 233 **626**

———— **ss. 52, 53**—*Civil Procedure Code (Act V of 1908), s. 36—Execution of decree—Order directing payment by instalments and execution of mortgage as security—Subsequent insolvency of judgment-debtor, effect of—Decree-holder, whether entitled to obtain mortgage.*

The Court passed an order under O. XX, r. 11 (2) of the C. P. C., directing that the decree against the judgment-debtor shall be payable by monthly instalments and that he shall give as security a mortgage on certain immoveable property. Subsequent to this order the judgment-debtor was adjudicated insolvent:

Held, (1) that the adjudication could not affect the position of the decree-holder who was entitled to obtain from the judgment-debtor the mortgage ordered prior to the adjudication;

(2) that the order that the mortgage be executed was one which might be executed as if it were a decre by reason of the provisions of s. 36 of the C. P. C. **R** ALLAN BROTHERS & Co. *v.* SHAIK JOOMAN SONS & Co., 2 R. 673; (1925) A. I. R. (R.) 189; 4 Bur. L. J. 32 **291**

———— **s. 102**—*Obtaining credit by trick—Debtor undischarged insolvent—Offence.*

Obtaining credit by a trick is within the purview of s. 102 of the Presidency Towns Insolvency Act, when the fact of the person obtaining it being an undischarged insolvent is not disclosed. **R** L. W. NASSE *v.* EMPEROR, 3 Bur. L. J. 329; (1925) A. I. R. (R.) 176; 26 Cr. L. J. 485 **229**

———— **s. 122.** *See* INSOLVENCY ACT, 1848, s. 3 **1025**

Presumption. *See* EASEMENT—RIGHT OF WAY **84**

———— *See* LIMITATION ACT, 1908, s. 26 **81**

———— Permanent tenancy. *See* LANDLORD AND TENANT—TENANCY **103**

Procedure—*Evidence in one case used in another—Objection by party—Irregularity.*

Where on the application of one of the parties to a suit, the Court used as evidence in the case the evidence in another case, though the application was opposed by the other party:

Held, that the procedure was opposed to law and vitiated the whole trial as irregular. **M** PERICI VENKOBACHARLU *v.* SANGI RADHABAYAMMA, 47 M. L. J. 640; (1925) A. I. R. (M.) 230 **912**

———— *Parties agreeing not to produce oral evidence—Court authorised to pronounce judgment after inspection of spot—Judgment, whether award—Appeal, whether lies.*

At the trial of a suit Counsel for the parties stated that they did not desire to adduce any oral evidence and they suggested that the Court should inspect the

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locality and should decide the case on the basis of the local inspection and on an examination of such documentary evidence as might be adduced by the parties on the day when the statement was recorded. The Court inspected the locality, examined the documentary evidence, heard the arguments for the parties and decided the case:

Held, that the parties did not intend to constitute the Trial Court their sole arbitrator of the case and that the judgment of that Court, therefore, did not amount to an award and was appealable. **A** RAGHUBIR SARAN DAS *v.* RAM DAS, L. R. 6 A. 122 Civ.; (1925) A. I. R. (A.) 348 **608**

——— *Prosecution, failure of, to produce witnesses —Presumption.*

Where the prosecution fails to examine witnesses who appear to have been present at the time of the occurrence, which is the subject of the trial, it may be presumed that if those witnesses had been examined they would not have supported the prosecution: but this presumption cannot render ineffective or outweigh unimpeachable evidence which has been produced in the case. **C** EMPEROR *v.* ALIMADDIN NASKAR **919**

——— *Suit against person in possession of assets—Assets, existence of, enquiry as to—Execution.*

Where a suit is brought against a person as being in possession of the assets of a deceased debtor, the question of possession of assets may either be investigated in the course of the suit or left for adjudication in the course of execution proceedings. **N** LAXMAN *v.* BABUSA **768**

Promissary-note, *suit on—Pro-note invalid—Plaintiff, whether can fall back on original cause of action—Procedure.*

The principle that in a case where a pro-note is executed for an antecedent debt, a suit on the pro-note failing, an action on the debt would lie is applicable only where the antecedent debt is anterior in point of time to the pro-note. Where no such prior and independent agreement is proved, the plaintiff's suit must fail. **M** PULUGURTA SOMARAJU *v.* MACHIRAJU, 20 L. W. 943; (1925) A. I. R. (M.) 351 **389**

Provincial Insolvency Act (III of 1907), ss 24, 44—*Provincial Insolvency Act (V of 1920), ss. 33 (3), 41, 42, 47, 64—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Proof of debt after conditional discharge, whether permissible—Debt barred after date of adjudication, whether can be proved —Secured creditor—Realisation of security—Balance of debt, whether can be proved in absence of personal decree.*

The discharge contemplated by s. 24 (3) of the Provincial Insolvency Act of 1907, which corresponds to s. 33 (3) of the Provincial Insolvency Act of 1920, is the final discharge and not a conditional discharge of the insolvent. The effect of a conditional discharge is not to terminate the insolvency proceedings.

A conditional discharge of the insolvent does not debar a creditor from proving his debt in insolvency.

A creditor is entitled to render proof of his debt at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties.

A debt which was alive and not barred at the date of adjudication can be proved at any time during the continuance of the insolvency proceedings.

A decree under O. XXXIV, r. 6 of the C. P. C.,

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does not create a debt but merely authorises the decree-holder to realise it by means of execution in the ordinary way. The absence of such a decree, therefore, does not in law debar a creditor from proving his debt in insolvency proceedings. All that is necessary for the purposes of insolvency proceedings is to prove the existence of the debt.

Under s. 47 of the Provincial Insolvency Act of 1920, a secured creditor who realises his security may prove for the balance due to him after deducting the net amount realised. The fact that he had got his name removed from the list of scheduled creditors and had proceeded to realise his security will not debar him of his statutory right to prove for the balance due to him in the insolvency proceedings. **Pat** BABU LAL SAHU *v.* KRISHNA PRASHAD, (1925) A. I. R. (Pat.) 438; 6 Pat. L. T. 410; 4 Pat. 128 **543**

Provincial Insolvency Act (V of 1920), s. 2 (1) (d)—*"Property," meaning of—Joint Hindu family —Business resulting in insolvency—Ancestral property, whether liable.*

Ancestral property of a joint Mitakshara family is "property" within the meaning of s. 2 (1) (*d*) of the Provincial Insolvency Act and is liable to be sold for the satisfaction of antecedent debts of the insolvents. **Pat** AMOLAK CHAND *v.* MANSUKH RAI MANGAN LAL, 3 Pat. 857; (1925) A. I. R. (Pat.) 127 **88**

——— **s. 5**—Interim *protection, grant of—Inherent power of Court.*

Under s. 5 of the Provincial Insolvency Act, the District Judge has inherent powers to grant *interim* protection to a person who has applied to be adjudicated an insolvent. **M** NALLAGATTI GOUNDAN *v.* RAMANA GOUNDAN, 47 M. L. J. 783; 20 L. W. 872; (1925) A. I. R. (M.) 170; (1925) M. W. N. 271 **677**

——— **s. 14**—*Creditor's petition, leave to withdraw—Discretion of Court.*

Under s. 14 of the Provincial Insolvency Act, no petition to adjudicate a person an insolvent can be withdrawn without the leave of the Court.

Where a petitioning creditor who has since settled his claim with the insolvent applies to the Court for permission to withdraw the petition, it is open to the Court to refuse leave and to pass an order of adjudication. **M** GADIGI MUDAPPA *v.* SEERNALI PARAMESWARA BHAT, 20 L. W. 880; (1925) A. I. R. (M.) 242 **303**

——— **ss. 27, 56**—*Hindu Law—Father, adjudication of, effect of—Son's share, whether vests in Receiver—Suit by son for partition, maintainability of—Sale by Receiver prior to vesting order, validity of—Ratification—Estoppel—Transfer of Property Act (IV of 1882), s. 43—Contract Act (IX of 1872), s. 200.*

On the adjudication of a Hindu father as insolvent, what vests in the Official Receiver is not only the share of the father but also the shares of his undivided sons in the family property which he could alienate to satisfy his own debts. This, however, does not prevent the sons from bringing a suit for partition of their shares on the ground that the father's debts are illegal or immoral and that the father could not convey their shares validly for such debts. Such a suit by the sons who are not in the position of creditors but claim independently of the insolvent, is not barred by the provisions of s. 28 of the Provincial Insolvency Act. In these respects, there is no difference between the Provincial and Presidency Towns Insolvency Acts.

In the absence of an order by the Court in Insolvency vesting the property of an insolvent in the

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Official Receiver, the property does not become vested in the latter and he cannot give a valid title to a vendee from him.

Where, however, subsequent to the alienation, the Court on being appraised of the fact does pass a vesting order, such an order is sufficient ratification of the Receiver's act so as to pass a good title to the alienee.

The alienee can also claim in such a case to have obtained a good title by reason of s. 43 of the Transfer of Property Act.

Where a person who acts ordinarily as an agent, *bona fide* thinking that he has a right to act for the principal, conveys the property of the principal, it is open to the principal to ratify such act and thereby give a good title to the vendee. If an agent acts without authority and thereby prejudices the rights of third persons, the ratification by the principal would not validate the act. But where the principal's property is alienated, and the only person that could be prejudiced is the principal himself, s. 200 of the Contract Act does not stand in the way of such an act being ratified by the principal. **M** GARAPATI NARASIMUDU *v.* BASAVA SANKARAM, 47 M. L. J. 719; 20 L. W. 946; (1925) A. I. R. (M.) 249 **439**

——— **ss. 33 (3), 41, 42, 47, 64.** *See* PROVINCIAL INSOLVENCY ACT, 1907, ss. 24, 44 **543**

——— **s. 51 (1)**—*"Date of admission of petition," meaning of—"Assets realised," what are—Execution creditor, rights of.*

The policy and the object of the Statute of Insolvency is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active.

The words "date of the admission of the petition" occurring in s. 51 (1) of the Provincial Insolvency Act qualify the word "assets realised" and not the word "sale", so that only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor.

When property is sold in execution of a decree, the sale-proceeds may be said to be "assets realised" within the meaning of s. 51 (1) of the Provincial Insolvency Act only when the balance of the purchase-money is paid and not when the 25 per cent. is deposited in Court. **M** RAMANATHAN CHETTIAR *v.* SUBRAMANIA CHETTIAR, 47 M. L. J. 759; 20 L. W. 872; (1925) A. I. R. (M.) 248 **216**

Provincial Small Cause Courts Act (IX of 1887), s. 23—*Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XLIII, r. 1* (a)—*Return of plaint by Small Cause Court for presentation to ordinary Civil Court—Return of plaint by Civil Court—Order, whether appealable—Revision—Question of title—Procedure in Civil Court.*

Where a plaint has been returned under s. 23 of the Provincial Small Cause Courts Act to be presented to another Court and it is presented to an ordinary Civil Court, an order passed by the latter Court directing the return of the plaint for presentation to the proper Court is not an order passed under O. VII, r. 10 of the C P. C. and is not, therefore, appealable under O. XLIII, r. 1 (*a*) of the Code. Such an order is consequently open to revision.

When a plaint is presented to a Civil Court under an order made under s. 23 of the Provincial Small Cause Courts Act, the case should be tried as framed, and the question of title should be gone into

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only incidentally in order to decide the merits of the case. The nature of the suit is not altered and it remains a suit of the nature triable by a Small Cause Court. **C** HARA MOHAN SAHA *v.* SUDHANSHU BHUSAN PAL **1002**

——— **s. 25.** *See* LETTERS PATENT (MAD.), CL. 36 **1016**

——— **s. 25.** *See* RAILWAYS ACT, 1890, s. 77 **474**

——— **s. 25**—*Finding of fact—Revision—High Court, power of.*

Where a finding of fact is recorded by a Small Cause Court with hesitation, the High Court is entitled to satisfy itself, under s. 25 of the Provincial Small Cause Courts Act, whether the decree passed by the Small Cause Court is according to law. **O** ZULFIQAR AHMAD *v.* ROBERT ELLIET, 10 O. & A. L. R. 1008; 1 O. W. N. 605 **423**

——— **s. 25**—*Revisian—High Court, when will interfere.*

Under s. 25 of the Provincial Small Cause Courts Act the High Court should only interfere to remedy injustice and when substantial justice has been done it will not interfere even though the Small Cause Court may technically have erred.

The High Court will not interfere in findings of fact when the Judge has decided them on evidence and there is evidence to support the finding. **R** VALAB DAS *v.* MAUNG BA THAN, 2 Bur. L. J. 154; 1 R. 372; (1924) A. I. R. (R.) 54 **362**

——— **Sch. II, Art. 31**—*Limitation Act (IX of 1908), Sch. I, Art. 89—Suit for accounts by successor-in-title of principal—Jurisdiction of Small Cause Court—Limitation.*

Plaintiffs' father purchased certain property and entrusted the management of it to defendant, to whom he advanced certain sums of money from time to time in order that the same might be lent to the tenants. After their father's death the plaintiffs called upon the defendant to render an account of the moneys received by him, and on his refusal to render an account brought a suit for accounts against him:

Held, (1) that the suit fell within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act and was excluded from the cognizance of a Small Cause Court;

(2) that the suit was governed by Art. 89 of Sch. I to the Limitation Act.

Article 89 of Sch. I to the Limitation Act is not confined in its application to suits by a principal himself, and extends also to suits by the successors-in-title of a principal. **A** MAHADEO PRASAD *v.* SOORAJ PRASAD, L. R. 6 A. 273 Civ. **704**

——— **Art. 41**—*Contract Act (IX of 1872), ss. 70, 72—Revenue paid by plaintiff for defendant by mistake—Suit to recover amount paid, nature of—Contribution, suit for—Jurisdiction of Small Cause Court.*

The word "contribution" as used in Art. 41 of Sch. II to the Provincial Small Cause Courts Act signifies a payment by each of the parties in respect of his share in any common liability.

Plaintiff filed a suit for recovery of a sum of money from defendant which he alleged had been paid by him by mistake on account of land revenue due from the defendant:

Held, that the suit was one to recover money under the provisions of s. 70 or s. 72 of the Contract Act and was not a suit for contribution within the meaning of Art. 41 of Sch. II to the Provincial Small Cause

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Courts Act and was not, therefore, excluded from the jurisdiction of a Small Cause Court. O MAULA BUX v. AHBARAN, 10 O. & A. L. R. 1056; L. R. 6 A. (O.) 9 **549**

——— **Sch. II, Art. 42**—*Civil Procedure Code (Act V of 1908), s. 102—Mortgage-deed executed by two persons of property belonging to one of them—Executants, whether co-mortgagors—Suit for contribution, nature of—Jurisdiction of Small Cause Court.*

Plaintiff and defendant joined in executing a document whereby certain property which belonged exclusively to the plaintiff was mortgaged and in the mortgage-deed the executants described themselves as mortgagors. Subsequently, the plaintiff paid off the mortgage-debt and brought a suit for contribution against the defendant:

Held, (1) that although the parties were described in the mortgage-deed as mortgagors the real mortgagor was only the plaintiff and that the defendant was not a mortgagor at all;

(2) that, therefore, this was not a suit for contribution by one of several joint mortgagors within the meaning of Art. 42 of Sch. II to the Small Cause Courts Act and was a suit of the nature cognizable by a Small Cause Court. A GAYA PANDE v. AMAR DEO PANDE, 22 A. L. J. 855; (1924) A. I. R. (A.) 787; L. R. 5 A. 673 Civ. **498**

Public highway—*Obstruction—Suit by private person, when maintainable—Special damage—Rule of equity, justice and good conscience.*

The case of public ways and highways is one of those cases which must be governed by the rule of equity, justice and good conscience.

No action can be maintained for what is a mere general obstruction of a highway affecting the whole public at large by one person without proof of special damage.

Land which was once in private ownership can only be converted into public use in respect of its surface by an act of dedication. A MUHAMMAD RAZA KHAN v. MUHAMMAD ASKARI KHAN, 22 A. L. J. 729; 46 A. 470; (1924) A. I. R. (A.) 599; L. R. 6 A. 67 Civ. **304**

Public way—*Lands within ambit of* zemindari—Zemindar, *declaratory suit by—Immemorial use by villagers as cattle-paths—Nature of right—Adverse possession—Villagers not joined as parties—Declaration, whether can be granted—Madras Land Encroachment Act (III of 1905), ss. 7, 14—Assessment, levy of, on occupants—Right of action—Preliminary notice—Limitation—Regulation XXV of 1802, s. 4*—Lakhiraj *lands, what are.*

Plaintiff, the *zemindar* of a village, sued the Government for a declaration of ownership and for recovery of possession and injunction in respect of certain *puntas* or lands used as paths for men and cattle and within the ambit of the village. The members of the village community using these paths were not made parties to the suit. It was found that the lands were used as *puntas* even at the time of the Permanent Settlement and continued to be used as such without disturbance by the plaintiff. The *sanad* granted to the plaintiff at the time of the Permanent Settlement was not filed and no act was proved indicating any possession of the lands by the plaintiff adverse to the villagers:

Held, that the plaintiff not having shown that he was or had become the absolute owner of the suit lands, the basis of the suit failed and the suit must be dismissed.

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Per *Spencer, Offg. C. J.*—(1) that the mere fact that assessment was levied by Government under the Madras Land Encroachment Act of 1905, against the occupants of the lands would not give a right of action to the plaintiff;

(2) that the period of limitation for a suit by a person aggrieved by proceedings under that Act was six months under s. 14 and that the suit having been brought more than a year thereafter was barred;

(3) that a preliminary notice under s. 7 of the Act to show cause why a person should not be made to pay prohibitory assessment under s. 5 of the Act did not give rise to a cause of action.

Per *Srinivasa Aiyangar, J.*—(1) that the plaint *punta* lands were not *lakhiraj* lands within the meaning of s. 4 of Regulation XXV of 1802;

(2) that these *puntas* having been dedicated to the public as highways, the Government at the time of the grant of the *sanad* to the *zemindar* held them in trust for the community, and it could not be assumed that in violation of such trust the Government granted them away to the plaintiff's predecessor; either the Government did not include these *puntas* in the grant because they were used only for general communal purposes, or else they made over the trust to the *zemindar* for the purpose of maintaining the trust in favour of the community, in which case the trustee could not by adverse possession have reduced the trust property to private ownership, and that in either case, the plaintiff must fail;

(3) that even if the plaintiff had acquired title to the lands by adverse possession, the body of villagers against whom the plaintiff's possession was claimed to be adverse not having been made parties to the suit, the plaintiff was not entitled to any declaration to that effect.

Per *Spencer, Offg. C. J.*—The right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another. M RAJAH OF PITHAPURAM v. SECRETARY OF STATE FOR INDIA, 47 M. L. J. 784; (1925) M. W. N. 271; (1925) A. I. R. (M.) 415 **345**

Punjab Alienation of Land Act (XIII of 1900), s. 21-A—*Alienation by agriculturist in favour of non-agriculturist—Suit by reversioners—Compromise, validity of—Revision of decree.*

The widow of an agriculturist sold her occupancy rights in certain land to some non-agriculturists. After her death her reversioners sued for possession of the land and the suit resulted in a compromise by which the plaintiffs were given half of the land, the other half being left with the vendees on their paying a certain sum of money. In consequence of the compromise the suit was dismissed. The Deputy Commissioner applied for revision of the decree under section 21-A of the Punjab Alienation of Land Act, as offending against the provisions of the Act:

Held, that even if the alienation by the widow was contrary to the provisions of the Punjab Alienation of Land Act, the decree dismissing the reversioner's suit did not, in any way, contravene those provisions. L RAM KALA v. HIRA, (1923) A. I. R. (L.) 218 **998**

Punjab Municipal Act (III of 1911), s. 3 (2)—*Wooden shed on wheels, whether "building."*

Punjab Municipal Act—concld.

A wooden shed mounted on wheels and intended to be a permanent fixture to the site is a "building" within the meaning of s. 3 (2) of the Punjab Municipal Act. The fact that its construction permits it to be moved from one part of that site to another does not render inapplicable to it the description "any hut or shed." L NANDU MAL v. MUNICIPAL COMMITTEE, SIMLA, 5 L. 513; (1925) A. I. R. (L.) 252; 26 Cr. L. J. 539 **379**

Punjab Pre-emption Act (I of 1913), s. 22 (4) *—Plaintiff, failure of, to make deposit within time fixed—Court, duty of—Omission to reject plaint—Illegality—Civil Procedure Code (Act V of 1908), s. 99.*

Where the plaintiff pre-emptor fails to deposit the 1/5th of the purchase-money within the time allowed by the Court for this purpose, the mere fact that the Court receives a security bond and places it on the record after the date fixed does not warrant the presumption that the Court altered its previous order or extended the time within the meaning of sub-s. (4) of s. 22 of the Pre-emption Act.

The provision in sub-s. (4) of s. 22, Pre-emption Act, about the rejection of the plaint is a mandatory one and the Trial Court's omission to pass an order in accordance therewith is an illegality such as cannot be covered by s. 99, C. P. C. L BAHADUR SHAH v. AHMAD SHAH, 5 L. 492; 6 L. L. J. 538; (1925) A. I. R. (L.) 209 **200**

Railways Act (IX of 1890), s. 72. *See* CONTRACT ACT, 1872, s. 73. **786**

——— **s. 72**—*Goods consigned to Railway Company for carriage—Risk Note Form "B"—Loss of goods—Damages, suit for—Burden of proof—Risk Note signed by person delivering goods, validity of.*

Where goods are delivered to a Railway Company for carriage and the Risk Note is signed by the person who actually delivers the goods to the Railway, the Risk-Note is binding on the consignor and the consignee.

Where goods are consigned to a Railway Company for carriage under Risk-Note Form "B" and are lost in transit the burden of proving that the loss was caused by the wilful negligence of the Railway Administration or the wilful negligence of or theft by its servants lies on the plaintiff. O BADRI NARAYAN v. AGENT, B. N. W. RAILWAY, 10 O. & A. L. R. 1463; 1. O. W. N. 760 **815**

——— **s. 72**—*Risk Note Form "B", goods consigned under—Suit for damages for loss of goods—Goods lost from wagon standing at platform—Presumption—Burden of proof.*

Where goods consigned to a Railway Company for carriage under Risk Note Form "B" are lost and the evidence shows that the loss must have occurred at a time when the waggon containing the goods was standing at the platform of a station, it must be held that the loss was due either to the wilful neglect of duty by the Company's servants or to theft by one of them. There is always considerable difficulty, almost amounting to impossibility, for a consignor to prove wilful neglect or theft by the Company's servants and the evidence given by the Company's servants in such a case must be viewed in favour of the consignor. O SHIV NARAYAN v. G. I. P. RY. CO., 10 O. & A. L. R. 1069; 27 O. C. 331; 1 O. W. N. 763 **338**

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——— **s. 72**—*Suit for damages for late delivery, whether competent—Risk-Note Form B—Deterioration and loss, meaning of—Railway Company, whether liable.*

Section 72 of the Railways Act does not bar a suit to recover damages caused by the late delivery of the goods consigned to a Railway Company. A fall in the market-value of the goods is not "deterioration," nor is delay in delivery "loss" within the meaning of the Risk-Note B, and the Railway Company is liable for the damage caused. L EAST INDIAN RAILWAY COMPANY v. DIANA MAL GULAB SINGH, 5 L. 523; (1925) A. I. R. (L.) 255 **404**

——— **ss. 72, 76**—*Goods consigned under Risk Note, Form "B"—Duty of Railway Company—Delay in delivery—Deviation from route—Deterioration—Burden of proof.*

When a contract is entered into the parties must be held to be bound by the ordinary meaning of the words used, where the words are not proved to be used in some special sense.

If goods consigned to a Railway Company for carriage have deteriorated by failure of the Company to deliver at the proper time, and that failure is due in its turn to failure of the Company to use ordinary prudence, the Company is, in the absence of a special contract, responsible for the deterioration.

Under s. 76 of the Railways Act it is sufficient for a plaintiff in a suit to recover damages for deterioration of goods delivered to a Railway Company for carriage, apart from any special contract, to prove the deterioration: the burden of proof is not on him to show how it was caused.

A carrier is bound to carry the goods by the ordinary route by which he professes to carry and is, therefore, liable for damages for delay caused by unnecessary deviation from that route.

Where goods are consigned under Risk Note Form "B" the Railway Company is protected by the terms of the contract contained in the note only so long as it carries the goods along the route which is expressly or impliedly indicated in the note, and in taking the goods off the ordinary route the Company goes outside the terms of the contract and cannot found a claim for exemption on the terms of the contract. A JANKI DAS-GOBIND RAM v. SECRETARY OF STATE FOR INDIA, 22 A. L. J. 1020; (1925) A. I. R. (A.) 10; L. R. 6 A. 72 Civ.; 47 A 234 **114**

——— **s. 77**—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Goods, non-delivery of—Suit for damages—Notice, whether necessary—Wilful neglect—Finding of fact—Revision.*

The fact that a plaintiff sues for damages on account of the "non-delivery" of goods consigned to a Railway Company does not absolve him from giving notice to the agent within six months.

When a suit for damages in respect of goods consigned to a Railway has been decreed on the ground of wilful neglect on the part of the Railway Company, the High Court is *prima facie* bound in revision by such a finding of fact, but if substantial justice has not been done, it can take into consideration the grounds of that finding in considering the question whether the Railway Company is entitled to the full benefit of the fact that notice was not served in time. A EAST INDIAN RAILWAY CO. v. FAZAL ELAHI, L. R. 6 A. 59 Civ.; (1925) A. I. R. (A.) 273; 47 A. 136 **474**

——— **s. 120 (b)**—*Using abusive language—Actual words—Prosecution, duty of.*

Railways Act—concld.

When an accused person is put on his trial for an offence under s. 120 (*b*) of the Railways Act, it is necessary to put the actual words used by the accused before the Court in order to enable it to determine whether the accused used abusive language within the meaning of the section. The evidence for the prosecution should also make it clear that the place of occurrence came within the definition of a Railway or part of a Railway. **L** BUDHA SINGH *v.* EMPEROR, 6 L. L. J. 469; (1925) A. I. R. (L.) 151; 26 Cr. L. J. 417 **33**

Rangoon Small Cause Court Act (VII of 1920), ss. 17, 23—*Civil Procedure Code (Act V of 1908), O. XXI, r. 36—Ejectment decree against tenant—Property in possession of sub-tenant—Symbolical possession.*

The provision in O. XXI, r. 36, C. P. C., is, under s. 23 (*a*) (*iii*) of the Rangoon Small Cause Court Act, applicable to a decree for ejectment obtained under that Act.

Therefore, in a decree for ejectment against a tenant obtained under the Rangoon Small Cause Court Act, only symbolical possession can be given when the premises are in occupation of a sub-tenant not bound by the decree. **R** ATCHIA *v.* JEEWA, 3 Bur. L. J. 263; (1925) A. I. R. (R.) 198 **501**

Registration Act (XVI of 1908), s. 17—*Compromise—Family arrangement—Registration.*

A petition of compromise filed before a Revenue Officer dealing with a mutation proceeding which intimates that the dispute between the parties has been settled in a particular manner, and which recognises and confirms an antecedent but disputed title operates as a family arrangement and does not require registration. **A** GANGA RAM *v.* LACHMAN SINGH, L. R. 5 A. 736 Civ.; (1925) A. I. R. (A.) 176 **633**

——— **s. 17**—*Oral sale—Separate receipt for part of consideration money—Endorsement on old sale-deed—Registration, whether necessary.*

Where a sale is effected orally and a receipt for a part of the consideration money is executed, and an endorsement is made on the back of an old sale-deed relating to the site in suit at the time when it is handed over to the vendee, the two put together cannot be styled as a sale-deed which requires registration. **L** JAI LAL *v.* SHEO CHAND, 6 L. L. J. 408; (1925) A. I. R. (L.) 123 **293**

——— **s. 17**—*Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Undertaking given by party to plant no more trees on land in dispute, whether requires registration—Declaration, suit for, that undertaking is ineffectual, maintainability of.*

A person cannot be permitted to give an undertaking to a Criminal Court to abstain from certain actions and then to go and file a civil suit for a declaration that the undertaking given by him is of no effect. Such a suit cannot be countenanced.

An undertaking given by a party to a proceeding under s. 145 of the Cr. P. C. to plant no more trees on the land in dispute, to remove any new trees that have been planted and to abstain in future from digging holes in the land is not a compromise and does not require registration. **A** RAM SARAN *v.* SHEO PRATAB SINGH **586**

——— **ss. 17, 49.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 58 **326**

——— **ss. 17, 49**—*Mortgage—Agreement by mortgagee to remit mortgage amount—Registration, whether necessary.*

A receipt executed by a mortgagee evidencing an agreement to remit a sum of money in excess of Rs. 100 out of the mortgage amount is inadmissible in evidence without registration. **M** VISHNU CHOTLA *v.* TALLAPRAGADA, 20 L. W. 801; (1925) A. I. R. (M.) 302 **392**

——— **s. 17 (1) (b)**—*Order by Inamdar to village officers—Recital as to nature of tenure—Order, whether compulsorily registrable.*

An order issued by an *inamdar* to the village officers directing them to treat certain lands, as held by the person mentioned therein on a permanent tenure on payment of a certain rent, does not create or declare any right but only affords evidence as to the true nature of the tenancy, and is admissible in evidence without registration. **B** RAMCHANDRA PANDURANG *v.* YELLAVA MADAR, 26 Bom. L. R. 1203; (1925) A. I. R. (B.) 194 **184**

——— **s. 17 (1) (f)**—*Partition—Deed of relinquishment filed in proceedings—Deed relating to other property—Registration, whether compulsory.*

A deed of relinquishment relating to immoveable property of the value of more than a hundred rupees is not absolved from registration simply because it was filed in certain partition proceedings when it appears that the property covered by it was kept wholly separate from the partition. **L** AMAR SINGH *v.* NUR MUHAMMAD KHAN, 6 L. L. J. 391; (1925) A. I. R. (L.) 125 **285**

——— **s. 17 (1) (b), (2) (xi)**—*Mortgage-deed, endorsement on, acknowledging receipt, whether requires registration—Receipt of mortgage-money, whether requires registration.*

An endorsement on a mortgage-deed acknowledging payment of the whole or part of the mortgage money, does not require registration, irrespective of the fact whether the endorsement purports to extinguish the mortgage or not. The limitation imposed by sub-cl. (*xi*) of cl. (2) of s. 17 (*b*) of the Registration Act, on an independent receipt that it should not purport to extinguish the mortgage in order to exempt it from registration, does not apply to an endorsement on a mortgage-deed.

A receipt granted by a mortgagee for money paid "for the discharge of the hypothecation deed" does not purport to extinguish the mortgage, within the meaning of sub-cl. (*xi*) of cl. (2) of s. 17 (*b*) of the Registration Act and is, therefore, exempt from registration. **M** GOPALASWAMY IYER *v.* KACHI KALYANA RANGAPPA, 20 L. W. 931; 48 M. L. J. 155; (1925) A. I. R. (M.) 348 **433**

——— **s. 77**—*Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Decree directing registration—Appeal—Stay of execution.*

Pending an appeal against a decree directing registration of a document under s. 77 of the Registration Act, the Appellate Court has power under the C. P. C., to stay execution of the decree.

Section 77 of the Registration Act refers to the final decision of a Civil Court and not to the decision of a Court whose judgment is likely to be reversed on appeal. **M** RAMASUBBA NAYAKAR *v.* DOARI RAJ, 47 M. L. J. 735; 20 L. W. 966; (1925) A. I. R. (M.) 401 **192**

Regulation XXV of 1802, s. 4—*Lakhiraj lands, what are.* *See* PUBLIC WAY **345**

Res judicata. *See* AGRA TENANCY ACT, 1901, s. 198 (2) **302**

——— *Mortgage—Redemption, suit for, beyond time—Acknowledgment document—Remand for decision as to authority of person making acknowledgment—Admissibility of document, question of, whether decided.*

In a suit for redemption of a mortgage the plaintiff relied upon a certain document as amounting to an acknowledgment of his right to redeem within the meaning of s. 19 of the Limitation Act. The High Court remanded the case for a decision on the question whether the person who acknowledged the mortgage was the *karnavan* of the defendant *tarwad* at the time the acknowledgment was made:

Held, that the High Court, by its order of remand, must be presumed to have decided that the document relied on by the plaintiff was admissible in evidence. **M** UDAMANTHALA NALUPURATATIL IBRAINE *v.* PARAMESWARA BAVANNAVAR **996**

——— *Rent-decree.*

A previous rent decree in the absence of the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realised from year to year. **C** ABDUL KARIM *v.* PROSANNA KUMAR **770**

Shamilat land - *Sale by co-sharer—Purchaser, rights of.*

A co-sharer in *shamilat* land is not competent to sell full proprietary rights in a specific plot out of the *shamilat* land, but a sale by him nevertheless holds good to the extent of conveying the rights which he can sell, including the right to retain possession till partition.

Where a co-sharer has been long in possession of a portion of the *shamilat* land no other co-sharer can oust him therefrom or even get joint possession with him, so long as a partition of the *shamilat* does not take place. A transferee from such a co-sharer has the same rights in the land as his transferor had. He is entitled to undisturbed possession of the land as long as the *shamilat* is not partitioned, and the other co-sharers have no right to prevent him from building on the land. **L** SAAD ULLAH *v.* IBRAHIM **553**

Specific performance—*Contract for sale of land—Time, whether of essence of contract—Condition, impossible, put forward by plaintiff, effect of.*

In cases of contracts for the sale of land, time as a rule is not of the essence of the contract, but it is open to the parties to make time of the essence of the contract. To have this effect, however, the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limit prescribed in a fashion which is unmistakeable.

In a contract for the sale of land a certain period was fixed for completion of the contract and a penalty was provided for non-performance. A day before the expiry of the period the purchaser, without tendering the purchase-money, put forward a demand which was not contained in the contract and which was impossible of fulfilment within the period prescribed. A further opportunity given by the vendor to the purchaser to complete the sale was not availed of by the latter. In a suit by the purchaser for specific performance of the contract:

Held, that the parties had attached importance to the completion of the contract within the period prescribed and that such completion having been made impossible by the plaintiff and that he having failed to complete the contract within the further opportunity allowed by the defendant, he was responsible for the default and was not entitled to any remedy. **M** SURYANARAYANAMURTHI *v.* SATYANARAYANAMURTHI, 20 L. W. 832; 48 M. L. J. 150; (1925) A. I. R. (M.) 211 **521**

Specific performance—concld.

Specific Relief Act (I of 1877), s. 9. *See* C. P. C., 1908, s. 11 **979**

——— **s. 22**—*Specific performance—Delay by vendor—Deposit, return of—Time of essence of contract—Notice—Reasonable time—Discretion of Court.*

Equity will not assist a vendor under a contract for the sale of immoveable property where there has been undue delay on his part and the vendee has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction to decree specific performance when the character of the property or other circumstances would render such exercise likely to result in injustice.

The dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow a vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by a notice given by the purchaser requiring the completion of the contract within a certain time, as unreasonable time.

Where in a contract for sale there has been no default on either side but the Court for some reason refuses to grant specific performance in the exercise of its discretion, the purchaser would be entitled to a return of the deposit. In order to enable the vendor to retain the deposit, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. **B** KARSANDAS PURSHOTTAMDAS *v.* GOPALDAS TRIKAMDAS, 25 Bom. L. R. 1144; (1924) A. I. R. (B.) 282 **491**

——— **s. 24**—*Oudh Rent Act (XXII of 1886), s. 127—Usufructuary mortgagee—Covenant for payment of creditors—Suit for ejectment of mortgagor—Equitable defence, whether available.*

In a suit for possession by a usufructuary mortgagee, who has undertaken to pay off certain creditors of the mortgagor with a part of the mortgage-money left with him, it is open to the mortgagor to set up the equitable defence that the mortgagee has not paid the creditors and has not performed his part of the same contract.

The mere fact that in such a case as the above, the mortgagee chooses to sue the mortgagor in ejectment under s. 127, Oudh Rent Act, instead of suing him for possession and damages in a Civil Court, is no reason for depriving the mortgagor of his equitable defence. Such defence is clearly supported by the second part of cl. (*b*) of s. 24 of the Specific Relief Act.

In order to obtain a decree under s. 127 of the Oudh Rent Act the plaintiff must show a title in ejectment as against the defendant. **O** AVANTIKA PRASAD *v.* GUR BUKSH, (1924) A. I. R. (O.) 425 **9**

——— **s. 26**—*Specific performance with variation.*

A contract can be specifically enforced with variation under certain circumstances only which are given in detail in the Specific Relief Act. **C** TARINI KUMAR DUTTA *v.* SRISH CHANDRA DAS **667**

Specific Relief Act—concld.

——— **s. 27 (b)**—*Contract of sale of immoveable property by one member of joint family—Subsequent settlement of all properties in favour of another member—Partition, whether amounts to transfer—Suit for specific performance—Sale of particular item—Right of alienee to share of specific property.*

Though the right of a member of a joint Hindu family to ask for partition of the family properties is by virtue of birth, a partition amounts to a transfer of the right of each member in favour of the other.

Where in a family arrangement between two brothers, one brother relinquishes all his rights in the family properties and settles them upon the other, there is a "transfer" in favour of the latter of all the rights of the former within the meaning of cl. *(b)* of s. 27 of the Specific Relief Act, so as to render him liable in a suit for specific performance at the instance of a person in whose favour the transferor had entered into a contract for sale prior to relinquishing his rights.

It is unnecessary in such a suit for the plaintiff to show that the partition arrangement is a fraudulent one. It will be enough if it is shown that the brother who got the properties under the arrangement took them with knowledge of the contract of sale entered into by his brother.

Where a junior member of a Hindu family agrees to sell any specific property belonging to the family, there is no invariable hard and fast rule of law that a decree cannot be passed against him for specific performance of the contract.

Whether it is an actual sale or a mere contract of sale, the question would depend upon the circumstances of each case. If the other members of the family are not likely to suffer by giving the vendee, or the person who has contracted to buy, a specific item, the Court should give him that item. **M** VENKATARAMAYYA *v.* RAGHAVALU, 21 L. W. 62; (1925) A. I. R. (M.) 492 **1054**

——— **s. 42.** *See* REGISTRATION ACT, 1908, s. 17 **586**

——— **s. 42**—*Declaratory suit by reversioner against alienation—Reversioner figure-head for alienor—Declaration, grant of.*

A decree declaring that the alienation in suit shall not affect the plaintiff's reversionary rights should not be passed in a case where the minor on whose behalf the suit is brought is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his own act. **L** AJAIB SINGH *v.* SHAM SINGH, 6 L. L. J. 389; (1925) A. I. R. (L.) 127 **284**

——— **s. 45.** *See* JURISDICTION OF HIGH COURT **14**

Stamp Act (II of 1899), Sch. I, Art. 1—*Balance struck and signed by debtor—Acknowledgment—Intention.*

The question whether a document comes under Art. 1 of Sch. I of the Stamp Act is one which depends in each case on the writer's intention.

If an acknowledgment is written with the intention of supplying evidence of debt it comes within Art. 1 of Sch. I to the Stamp Act. **L** ARJAN DAS *v.* RAM LABHAYA, 6 L. L. J. 393; (1925) A. I. R. (L.) 119 **290**

Succession Act (X of 1865), ss. 50. *See* OUDH ESTATES ACT, 1869, ss. 2, 11, 13, 19, 22 (7), (11) **509**

——— **ss. 50, 54**—*Will by* taluqdar—*Attestation by devisee—Evidence that devisee did not sign as attesting witness, whether admissible.*

Succession Act—concld.

It is open to a party to rebut the presumption arising from the face of a document that persons who purported to be attesting witnesses were really not such.

A Will executed by a *taluqdar* contained the following clause :—"I have executed this Will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this Will should be acted upon fully and they may not quarrel among themselves after my demise." The sons of the testator put their signatures to the Will, each signature being put under the word "witness:"

Held, that the testator obtained the signatures of his sons for some special purpose of his own and that this was sufficient indication of a want of intention of attestation by them and that they were entitled to lead evidence to show that they did not sign the Will as attesting witnesses.

According to Indian ideas of dignity it would be derogatory to the sons of a *taluqdar* to sign a document after men of small circumstances, whatever may be the object for which the signatures of the sons of the *taluqdar* may have been obtained. **O** SHIAM SUNDER SINGH *v.* JAGANNATH SINGH, 10 O. & A. L. R. 1261; 1 O. W. N. 881; 28 O. C. 91 **558**

——— **s. 118**—*Will, construction of—Gift, subject to condition subsequent—Condition, failure of, effect of.*

A testatrix devised the whole of her property to her son and daughter, and directed that should either of her children die unmarried his or her share would go to the survivor. Under a codicil a provision was added that should both the testatrix's children die unmarried, the property should go to one of her stepchildren. The son married and died leaving a widow who succeeded to his estate. Subsequently, the daughter died unmarried :

Held, (1) that the children of the testatrix took vested interests under the Will and the codicil subject to being divested in the event of the happening of certain conditions ;

(2) that the son having married and predeceased his sister the possibility of the estates taken by him and his sister becoming divested either under the Will or the codicil came to an end and the estate in question must be regarded as having vested absolutely in the daughter ;

(3) that, therefore, the heirs of the daughter were entitled to succeed to her estate in preference to the heirs of the testatrix.

A condition subsequent imposed upon a gift must be strictly construed. **L** MRS. CATHERINE MARY CHANDLER *v.* ADMINISTRATOR-GENERAL, PUNJAB **564**

Suits Valuation Act (VII of 1887), s. 11—*Overvaluation or under-valuation of suit, effect of—Change of forum—Jurisdiction, want of, whether cured—Prejudicial disposal of suit, meaning of.*

For the purposes of sub-s. *(b)* of s. 11 of the Suits Valuation Act, it must be decided on the circumstances of each case whether the change of *forum* owing to over-valuation or under-valuation has affected the disposal of the suit on its merits prejudicially or not. The disposal of a suit on its merits is prejudicially affected within the meaning of the sub-section when such disposal is made by a District Judge, instead of being made, as it ought to have been if the valuation were correct, by a Bench of two Judges of the Court of highest jurisdiction in a province. In such a case the lack of jurisdiction in the Court which has dis-

Suits Valuation Act—concld.

posed of the suit is not cured by the provisions of s. 11 of the Suits Valuation Act. **O** SHEORAJ SINGH *v.* PHULBASA KUER, 10 O. & A. L. R. 1314; 1 O. W. N. 900 **445**

Transfer of Property Act (IV of 1882), ss. 6 (h), 53—*Contract Act (IX of 1872), s. 23—Transfer of property in lieu of past illicit cohabitation, legality of—Void and unlawful consideration, distinction between—Fraudulent transfer.*

If, in order to compensate a woman for past illicit connection, the offending party gives her some property, the consideration for the transfer is not necessarily illegal.

Where a part of the consideration for a transfer is void but not unlawful, the transfer is not a nullity unless the balance of the consideration is also a void consideration.

Where, however, after excluding the void consideration the reduced consideration is grossly inadequate, the transfer may be presumed to have been made with intent to defraud, defeat or delay creditors within the meaning of s. 53 of the Transfer of Property Act. **A** MAHTAB-UN-NISSA *v.* RIFAQAT-ULLAH, L. R 6. A. 145 Civ. **459**

——— **s. 10**—*Compromise conferring full proprietary right—Restriction on power of alienation, whether valid.*

When full proprietary rights pass to a person under a deed of compromise, any restriction contained in the compromise on the power of alienation is a derogation from the full proprietary right conferred upon him and is consequently void. **L** PARTAP DAS *v.* NAND SINGH, 6 L. L. J. 419; (1924) A. I. R. (L.) 729 **323**

——— **s. 40.** *See* CONTRACT ACT, 1872, s. 37 **482**

——— **s. 41,** *principle of, applicability of.*

Section 41 of the Transfer of Property Act, provided its conditions are thoroughly satisfied, affords a protection to *bona fide* purchasers from ostensible owners and lays down an exception to what may be said to be the general rule that a person cannot convey a better title than he himself has in the property.

The section is based on the principle that if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done with his previous license.

If, however, any one of the essential elements mentioned in s. 41 of the Transfer of Property Act be wanting, the transferee is not entitled to the protection provided by that section **C** UMARAM GOGOI *v.* PURUK CHAND **540**

——— **s. 43.** *See* PROVINCIAL INSOLVENCY ACT, 1920, ss. 27, 56 **439**

——— **s. 52.** *See* C. P. C., 1908, s. 47, O. XXI, rr. 35, 98 **1004**

——— **s. 55**—*Contract Act (IX of 1872), s. 17—Seller, duty of—Restrictive covenant, non-disclosure of—Purchaser, whether can repudiate contract—Right of repudiation, when should be exercised.*

The seller is bound to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware and which the buyer could not with ordinary care discover.

An omission to make such a disclosure may be a fraud within the meaning of s. 17 (5) of the Contract Act and so render the contract voidable at the option of the purchaser, if his consent to the agreement has been caused by the fraud.

A restrictive covenant with regard to the property sold is a material defect in title which must be specifically brought to the notice of the buyer and its non-disclosure by the seller would entitle the buyer to rescind the contract.

The purchaser's right of repudiation must be exercised, if it is to be exercised at all, as soon as the defect in title is ascertained. **B** DOSIBAI *v.* DHANBAI, 26 Bom. L. R. 1071; (1925) A. I. R. (B.) 85; 49 B. 325 **597**

——— **s. 55**—*Material defect, whether includes encumbrance.*

The expression "material defect" in s. 55 of the Transfer of Property Act includes a defect of title and an encumbrance on the property.

The existence of an encumbrance undisclosed to the vendee which he could not have discovered by the exercise of reasonable care would make the sale voidable; where, however, the vendee is aware of the existence of an encumbrance, no duty is cast on the vendor to inform him of its existence. **M** GONDU RAMASUBBU IYER *v.* MUTHIAHKONE **999**

——— **s. 58**—*Registration Act (XVI of 1908), ss. 17, 49—Mortgage, usufructuary—Unregistered deed—Recital as to transfer of possession, admissibility of—Suit to recover possession, maintainability of—Suit to recover mortgage money.*

An unregistered deed of usufructuary mortgage contained a clause to the effect that the mortgagee in the event of his losing possession of the mortgaged property could require the mortgagor to re-pay the loan out of his assets other than the mortgaged property. The mortgage-deed contained a recital that possession of the property had been given to the mortgagee. Sometime afterwards the mortgagee brought a suit for possession of the land and in the alternative for recovery of the mortgage money:

Held, (1) that the mortgage-deed being unregistered the claim for possession must fail;

(2) that the usufructuary mortgage did not in itself imply a personal liability on the part of the mortgagor to re-pay the debt;

(3) that the recital in the mortgage-deed that possession had been transferred to the mortgagee was inadmissible in evidence to prove the transfer of possession under s. 49 of the Registration Act;

(4) that the personal liability of the mortgagor under the clause in the mortgage-deed arose only upon loss of possession by the mortgagee and that the mortgagee having failed to show that he ever got into possession, it could not be held that he had lost possession and that, therefore, he was not entitled to recover the mortgage money from the mortgagor under the clause. **O** JAFAR KHAN *v.* QADIRAN, 10 O. &. A. L. R. 1193 **326**

——— **s. 60**—*Mortgage—Purchase of portion of mortgaged property by one of several mortgagees, effect of—Redemption, piecemeal, whether can be allowed.*

It is only when all the mortgagees have joined in purchasing a portion of the property mortgaged to them that the integrity of the mortgage is broken up and the mortgagor or mortgagors become entitled to redeem the property piecemeal. Where one only of a number of mortgagees has acquired by purchase a part of the mortgaged property, the mortgage over that portion of the mortgaged property does not merge

Transfer of Property Act—contd.

in the sale. In such a case the purchaser mortgagee is in no different position from an outsider so far as the right conveyed by his purchase is concerned. The mortgage remains one and undivided and if redeemed at all can only be redeemed in its entirety. **O** JAGMOHAN SINGH *v.* HARBANS SINGH, 10 O. & A. L. R. 970; 27 O. C. 360; 1 O. W. N. 637 **621**

——— **s. 65 (a)**—*Sale in execution of mortgage-decree, effect of—Defect in mortgagor's title—Mortgagee purchaser, position of—Refund of purchase-money.*

In the case of a sale under a mortgage-decree, the purchaser acquires the interest of both the mortgagor and mortgagee, whilst in the case of a sale in execution of a money-decree, the purchaser obtains only the interest of the judgment-debtor, (*i. e.* mortgagor).

A mortgagee who purchases the mortgaged property at a Court sale but subsequently finds that the vendor had no title to a portion of the property sold is entitled to claim a proportionate refund of the purchase-money. **R** MA GUN *v.* MG. LU GALE, 3 Bur. L. J. 282; (1925) A. I. R. (R.) 130 **223**

——— **s. 68**—*Contract Act (IX of 1872), s. 24—Colonization of Government Lands (Punjab) Act (V of 1912), s. 19—Mortgage of tenancy rights—Void contract—Possession of mortgaged property given up by mortgagee—Suit to recover mortgage-money, whether maintainable.*

A mortgagee can invoke the help of s. 68 of the Transfer of Property Act only in cases where the mortgage is not void.

Section 68 of the Transfer of Property Act is applicable only to cases where the security is lost to the mortgagee otherwise than by his own fault. A suit to recover the mortgage money is not maintainable where the mortgaged property is lost owing to a default on the part of the usufructuary mortgagee himself.

Where a part of the consideration of a contract is unlawful, the whole contract must be regarded as void under s. 24 of the Contract Act.

A plaintiff is not entitled to claim a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is forbidden by law.

Defendant, who was the grantee of special tenancy rights in land belonging to Government, executed a usufructuary mortgage of his tenancy rights in favour of the plaintiff in contravention of the provisions of s. 19 of the Colonization of Government Lands (Punjab) Act and put the plaintiff in possession of the tenancy land. The mortgage was for a period of eight years, after the expiry of which the mortgagor was entitled to recover the land from the mortgagee free from the mortgage-debt. The mutation in respect of the transfer was rejected by the Revenue Authorities on the ground that the transfer was in contravention of the provisions of the Colonization of Government Lands (Punjab) Act, and, thereupon, the plaintiff voluntarily gave up possession of the land and brought a suit to recover the mortgage money from the defendant:

Held, (1) that the transfer being in contravention of s. 19 of the Colonization of Government Lands (Punjab) Act was void under s. 24 of the Contract Act, and the plaintiff was not entitled to recover the mortgage money on account of a breach of that contract;

(2) that the contract being void and the possession of the mortgaged property having been lost to the plaintiff not owing to any act or default of the defendant but having been given up by the plaintiff himself, s. 68 of the Transfer of Property Act was not applicable to the case. **L** HAMAD YAR KHAN *v.* SHANKAR DAS, (1923) A. I. R. (L.) 357 **802**

——— **s. 91.** *See* BENAMI TRANSACTION **855**

——— **s. 91.** *See* C. P. C., 1908, O. XXXIX, R. 1 **312**

——— **s. 108**—*Lessor and lessee—Lease granted by person having no title—Possession not secured—Rent, whether can be recovered.*

Where a person knowing that he has no title to certain property grants a lease of it to another, but in consequence of his want of title either fails to secure possession of the property to the lessee in the first instance or fails to secure him undisturbed possession, he fails to carry out the obligation imposed upon him by s. 108 of the Transfer of Property Act, and is not entitled to recover rent from the lessee. **A** MOTI LAL *v.* YAR MUHAMMAD, L. R, 6 A. 108 Civ.; (1925) A. I. R. (A.) 275; 47 A. 63 **756**

——— **s. 127**—*Gift on basis of ante-nuptial agreement, validity of—Possession transferred—Unregistered deed—Part-performance, doctrine of, applicability of.*

Plaintiff promised to make a gift of a house to his daughter as her dower at the time of her marriage and the latter's husband agreed to marry her on such a promise having been made by her father. After the marriage plaintiff transferred possession of the house to the daughter and subsequently executed an unregistered deed of gift in her favour. The daughter and her husband continued in possession of the house for several years and then sold it to certain other persons. In a suit by the plaintiff to recover the house against his daughter and the transferee from her:

Held, that the transfer having been made on the basis of an ante-nuptial agreement there was good and valid consideration for it, and that the donee having been put in the possession and having held such possession for a number of years was justified in resisting the claim of the plaintiff on the principle of the doctrine of part-performance of a contract, and that the plaintiff was estopped from urging that the transfer was invalid as not being evidenced by a registered deed. **C** PRAN MOHAN DAS *v.* HARI MOHAN DAS; 29 C. W. N. 889; 52 C. 425 **799**

Trespass—*Damages, assessment of—Principles applicable.*

In awarding damages for unlicensed trespass on land, a distinction must be made between a trespasser *bona fide* claiming a title and a wilful trespasser. Against a wilful trespasser, the damages awarded ought in no case to be less than the amount for which, having regard to all the circumstances, a prudent and reasonable landlord would have agreed to let the land for the purpose, or less than the amount which the trespasser would have had to pay as the result of reasonable negotiations for such use or occupation of the land. The amount so arrived at would be the minimum of damages awardable against him, but over and above that the *animus* with which the trespasser commits the wrong, its wilful character, for example, may be taken into consideration for the purpose of awarding higher damages.

A plaintiff, however, who stands by and virtually encourages the wrong is not entitled to damages on

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the same scale as one who has done his best to prevent the commission of the wrong. **M** RAMASAMI NAICKER *v.* MEENAKSHISUNDARAM CHETTIAR, 20 L. W. 836; 47 M. L. J. 922; (1925) A. I. R. (M.) 222 **268**

Trust—*Deed of arrangement—New trustees, appointment of—Trustees, duty of, to call for accounts—Liability of old trustee—Dismissal of trustee—Jurisdiction of Civil Courts.*

Where by a private arrangement between persons interested in the administration of a trust, new trustees are appointed to manage the trust properties, they are bound to take steps to acquaint themselves with the state of the trust properties and to get in the trust estate including any funds belonging to the institution. In order to discharge this duty which the law casts upon the trustees, they are entitled to call upon the old trustee to produce the accounts relating to the period prior to the appointment of the new trustees and the old trustee is not justified in ignoring this demand merely on the ground that the arrangement under which the new trustees were appointed did not expressly authorise them to call for the accounts for the period prior to their appointment.

Where under a deed of arrangement power is given to a certain number of trustees to dismiss a trustee and they proceed to exercise that power their action cannot be questioned by the Civil Courts. **L** KHUDA BAKHSH *v.* NUR MUHAMMAD, (1923) A. I. R (L.) 379 **807**

Trusts Act (II of 1882), ss. 77, 78. *See* GUARDIANS AND WARDS ACT, 1890, s. 32 **1047**

——— **s. 90**—*Joint* pattadars, *whether co-owners—Default in payment of land revenue—Revenue sale—Purchase, by one* pattadar, *effect of—Collector, order by—Notice, absence of, effect of.*

The mere fact that a *raiyatwari patta* stands in the name of two or more persons who own specific items in the property covered by it, does not make them co-owners within the meaning of s. 90 of the Trusts Act.

Section 90 of the Trusts Act applies only to the case of a co-owner who takes advantage of his position as co-sharer and does something in that capacity *qua* co-sharer to bring the properties to sale or gain an advantage in derogation of the rights of the other co-owners.

The mere fact of a purchase of joint property by one co-sharer in a Court sale not brought about by any act or illegal omission on his part is not sufficient to entitle the other co-sharers to the benefit of the sale.

The District Collector is the final authority entitled to set aside or confirm a revenue sale and not the Deputy Collector who has only delegated authority. In every case in which an order is made against a party, notice should be given to that party before such order is made, whether the order is made by a Revenue Authority or by a Judicial Authority. But where it appears that the party has not been prejudiced by his not being given notice, the order would not be invalid. **M** NAGASAMI IYER *v.* RAMASAMI IYER, 47 M. L. J. 755; (1925) A. I. R. (M.) 288 **212**

U. P. Court of Wards Act (III of 1899), ss. 9, 15, 34—*Contract Act (IX of 1872), s. 11—Ward of Court, contract entered into by, validity of—Portion only of property of ward under management, effect of.*

U. P. Court of Wards Act—concld.

A person whose property is under the superintendence of the Court of Wards labours under the disability enunciated in s. 34 of the U. P. Court of Wards Act, and is, therefore, incompetent to contract under the provisions of s. 11 of the Contract Act, and a contract entered into by such a person is void from its inception.

The whole of the moveable and immoveable property of a person, in regard to whose property a declaration has been made under s. 9 of the U. P. Court of Wards Act, must be deemed, under s. 15 of the Act, to be under the superintendence of the Court of Wards from the date of such declaration, and the mere fact that the Court of Wards purports to take some of the property under its management and not the rest of it, makes no difference to the applicability of the provisions of s. 15. **O** HARI KISHUN DASS *v.* MOHAMMAD SAFI JAN, 10 O. & A. L. R. 962; 1 O. W. N. 608 **409**

U. P. Municipalities Act (II of 1916), ss. 2 (23), 211—*"Street," what is—Blind lane with houses on either side, whether "street"—Notice under s. 211, when may be given.*

The jurisdiction of a Municipal Board to issue a notice under s. 211 of the U. P. Municipalities Act depends on whether or not the projection complained of overhangs a street. Where a projection does not overhang a street but overhangs a private piece of property, the Municipal Board has no jurisdiction to pass an order under s. 211, and if an order under that section is passed in such a case, it may be called into question in a Civil Court as being without jurisdiction.

A blind lane with houses on either side over which the residents of those houses have a right of passage is a street within the meaning of cl. (23) of s. 2 of the U. P. Municipalities Act. **A** BANARSI DAS *v.* MUNICIPAL BOARD OF AMROHA, L. R. 5 A. 818 Civ.; L. R. 6 A. 271 Civ.; (1925) A. I R. (A.) 234 **761**

——— **s. 178**—*Alteration in building, scope of—Raising wall above prescribed height—Penalties, when should be inflicted.*

The expression "an alteration in a building" in s. 178, U. P. Municipalities Act includes a part of such building.

To raise a wall above the prescribed height of the building is clearly within the mischief aimed at by s. 178, U. P. Municipalities Act.

Penalties must be provided and penalties sections must be used for bad cases where the individual has been contumacious and has palpably acted *mala fide.* But the penalty is only intended *in terrorem* and not to be used vindictively for technical offences. **A** NIHAL MUHAMMAD *v.* EMPEROR, 21 A. L. J. 774; (1924) A. I. R. (A.) 200; 26 Cr. L. J. 125 **41**

——— **s. 307**—*Disobedience of notice—Offence—Notice, validity of, proof of.*

For a conviction under s. 307 of the U. P. Municipalities Act it is necessary to prove that the notice disobeyed by the accused was issued under the provisions of the Act or under a rule or a bye-law. If a notice is not issued according to the provisions of the Act or under a rule or a bye-law a person to whom notice is issued may disobey it and yet not be liable to punishment.

From the mere fact that a person accused under s. 307 of the U. P. Municipalities Act admits that he received the notice and disobeyed it, it does not follow that he is guilty. It is open to him to plead

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that the notice was issued without authority and without reason. O RAM CHARAN *v.* IMPROVEMENT TRUST, LUCKNOW, 10 O. & A. L. R. 935; 1 O. W. N. 611; 26 Cr. L. J. 499 **243**

Vendor and purchaser—*Construction of document—Agreement to sell*—Fazandari, *meaning of—Lease held under Government, whether* Fazandari—*Re-entry, right of, existence of, effect of.*

The word *Fazandari* in its strict or proper meaning denotes an indefeasible right to hold land in perpetuity on payment of a small quit or ground rent; in its loose sense it means any kind of tenure agreed upon between the parties.

The term *Fazandari* cannot in its strict sense be applied to a lessee from Government, where a right of re-entry is reserved to the Government.

Defendant agreed to sell to the plaintiff a *Fazandari* estate which was described as "an estate equivalent to an estate in fee simple in possession free from incumbrances" subject to a small quit rent. It turned out that the estate was held by the superior holder under a lease from Government containing a covenant for perpetual renewal which reserved a right of re-entry to Government in certain contingencies:

Held, (1) that by the use of the term *Fazandari* in the agreement of sale the parties contemplated a *Fazandari* estate in the strict sense;

(2) that the estate held by the defendant was not a *Fazandari* estate in the strict sense of the word. B RAHIMTULLA *v.* HASANALI, 25 Bom. L. R. 1192; (1924) A. I. R (B.) 212 **1038**

Village shamilat—*Partition*—'Hasab rasad khewat,' *meaning of.*

The term '*khewat*' in the phrase '*hasab rasad khewat*' admits of two interpretations and may mean proprietary land or the land revenue assessed on that land.

The actual meaning of the term in any particular case depends upon the circumstances of that case. L DAYA *v.* BUDH RAM, 6 L. L. J 398; (1925) A. I. R. (L.) 127 **337**

Wagering contract—Kaccha adatia, *position of*—Teji mandi *transaction, nature of—Transaction, when wager—Intention to deal in differences only—Forward transactions.*

A *kaccha adatia* in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the *kaccha adatia* and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the *kaccha adatia* transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The *adatia* enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed.

There is no presumption as regards *teji mandi* transactions that they are wagering transactions.

Where the plaintiff is employed as a *kaccha adatia* by an up-country constituent, and where transactions are entered into by the *adatia* with third parties in Bombay, and where the intention of the third

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parties is not shown to be to deal in differences only, it is not enough for the defendant to prove an agreement between himself and his *adatia* that the *adatia* would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. B MUKUNDCHAND BALIA *v.* SOBHAGMAL-GIANMAL, 26 Bom. L. R. 1097; (1925) A. I. R. (B.) 79 **613**

Waiver. *See* LIMITATION ACT, 1908, SCH. I, ART. 182 **784**

Waiver.

Waiver must be an intentional act with knowledge and cannot be presumed. B DOSIBAI *v.* DHANBAI, 26 Bom. L. R. 1071; (1925) A. I. R. (B.) 85; 49 B. 325 **597**

Will—*Probate—Revocation—Disappearance of Will—Presumption.*

It is not always to be presumed from the disappearance of a Will that the testator had revoked it.

Where it appeared from the certified copy of a Will which could not be found that the Will had been executed in favour of the beneficiaries because they had been brought up by the testator, who was their great uncle; and the caveators were related to the testator in the same degree as the beneficiaries:

Held, that from the mere fact that the Will had disappeared, it could not be presumed that the testator had revoked it. L FEROZE DIN *v.* MULA SINGH **542**

——— *Probate—Sound disposing mind, what constitutes—Burden of proof.*

The onus of proof is upon an applicant for Probate to satisfy the conscience of the Court that the testator had a sound disposing mind at the time of making the Will.

If a testator has given instructions for his Will and it is prepared in accordance with those instructions, it will be valid though at the time of execution the testator merely recollects that he has given those instructions but believes that the Will which he is executing is in accordance with those instructions.

It would also be sufficient if it is proved that the testator had approved the Will although there might be no direct evidence as to his giving any instructions.

In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from all participation in that property. The protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration.

The question, therefore, which the Court is to decide in a case in which a testator has devised the whole of his property to one of his relatives, is not whether the testator knew that he was giving all his property to the devisee and excluding all his other relations from any share in it, [illegible] the time of execution of the Will capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of

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deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition though the justice or injustice might cast some light upon the question as to his capacity.

A testator who was a young man of about 21 years of age and had been suffering from diarrhœa and fever for two months before his death and was enfeebled both in body and in mind devised his entire property by Will, shortly before his death, in favour of his aunt by whom he was being nursed during his illness:

Held, that in the circumstances of this particular case, it was necessary for the propounder of the Will to prove that the terms of the Will had been clearly understood by the testator and had been approved by him; and that the mere fact that the testator could at the time of execution say that it was his Will or could answer some simple questions which were put to him did not show that he had a sound disposing mind at the time. C BRAJESWARI DASI *v.* RASIK CHANDRA GHOSE 581

WORDS AND PHRASES :—

Accused, meaning of. *See* CR. P. C., 1898, s. 342 236

Affecting the decision of the case, meaning of. *See* C. P. C., 1908, s. 105 100

Words and Phrases—concld.

Amount or value of subject-matter in dispute, meaning of. *See* COURT FEES ACT, 1870, SCH. I, ART. 1 257

Assets realised, what are. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 51 (1) 216

Between parties to the suit, meaning of. *See* C. P. C., 1908, s. 47 209

Date of admission of petition, meaning of. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 51 (1) 216

Make such other order as it thinks fit, scope of. *See* C. P. C., 1908, O XVII, R. 2 27

Owner, meaning of *See* BENGAL MUNICIPAL ACT, 1884, s. 340 533

Preparation, whether includes action of revising authority. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, R. 7 322

Proceedings, meaning of. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, R. 8 (*e*) 322

Serve on the manager an order in writing, meaning of. *See* FACTORIES ACT, 1911, s. 18 (2) 226

Street, what is. *See* U. P. MUNICIPALITIES ACT, 1916, s. 2 (23) 761

Sub-division, meaning of. *See* OUDH LAND REVENUE ACT, 1876, s. 40 468

Suit, whether includes execution proceeding. *See* C. P C., 1908, s. 24 746

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